

Power of attorney critical in incapacity

by Todd Wills and Matthew Burgess

Nominating an enduring power of attorney prior to the possibility of incapacity is vital for SMSF trustees.

Appointing an enduring power of attorney (EPOA) before a potential incapacity event is crucial for SMSF trustees as the process of obtaining authorisation afterwards may entail additional administrative costs and processes.

When asked about this situation during an Institute of Financial Professionals Australia webinar today, View Legal director Matthew Burgess noted the process for planning around the incapacity of an SMSF member becomes much more challenging in the absence of a nominated EPOA.

“It’s not a good outcome. What happens is there are tribunals in each and every state where a government agency has the right to appoint who they believe is the most appropriate person to have the same powers as the attorney,” Burgess said.

To illustrate his point, he recounted a recent incident from his practice where the absence of an EPOA for an incapacitated member led to the need for an additional administrative process to maintain compliance with existing laws.

“We had this [situation] with an SMSF in the last quarter. We had a situation where someone had lost capacity and they were signing some documentation for one of the fund managers and the fund manager looked at the signature and said: ‘This signature seems terrible, can you please prove the capacity of the co-director?’” he said.

“And the co-director had to come back and say ‘the trustee doesn’t have capacity’ and on top of that they didn’t have an enduring power of attorney.

“I think it took almost 12 weeks, but the director with capacity had to go off and get appointed under the guardianship tribunal as the valid authority, the administrator of his wife who had lost capacity, and then was allowed to go through the process where we countersign [the documentation].

“So you sign once in your own directorship and once as the incapacitated director.”

For these reasons, he advised fund members the appointment of an EPOA during the member’s lifetime will provide greater certainty than the situation of needing to appoint an administrator after a member has already lost legal capacity.

“One of the things on your checklist [when planning for the incapacity of a member] should be checking do we have an EPOA in place because if we don’t, it can be a real journey to go and get that fixed up,” he said.