

Avoid cookie-cutter estate plans

by Jason Spits and Matthew Burgess

Trustees should be warned from using estate plans that deal with SMSFs under a will as they are unlikely to be suitable in most cases.

Advisers and auditors should be warning clients to avoid using lawyers that do not specialise in or understand estate planning as it relates to an SMSF, with many defaulting to a standard approach that is unsuitable, according to a legal practitioner.

View Legal director Matthew Burgess said any estate planning involving an SMSF trustee had to be holistic and extend past the same documentation created for non-SMSF clients.

"SMSFs are the biggest example in terms of highlighting that so many people, and we feel that non-specialist and heritage lawyers are a big part of this problem, automatically assume estate planning is just doing a will and having an enduring power attorney," Burgess said in a presentation hosted by The Auditors Institute today.

"We find, just in terms of the dollars, that is not true at all as many people will not have their most substantial asset being the family home, but it will be their superannuation entitlements and a disproportionate amount of that wealth can be tucked away inside that SMSF environment.

"What we're finding in development and cases we've seen over the last 12 months is that people underestimate the reach of their estate plan, particularly when it comes to superannuation," he added, noting the place of super in an estate was tested again last year in the case of *Ghosh v Ghosh & Ors* [2024] VSC 259.

"The key part of that case was just re-asking the question of whether the will can regulate somebody's super. The answer was a very hard and a very firm no."

He said he was not entirely certain why legal practitioners kept advising clients that superannuation must be passed on through the estate, but noted long-standing work practices may be the cause.

"There is a lack of proper specialisation across each of the key disciplines [related to superannuation and estate planning], but I reckon there has built up over time an assumption that back in the day it was seen as a useful thing and people have used that with a cookie-cutter approach just turned out across the board.

"It's a really high-risk strategy and one that hasn't had a lot of thought applied to it.

"There's an opportunity perhaps for auditors that if you're seeing that approach to estate planning being just churned out across an entire client base, stop and ask the question: 'Why is it so?' The answer may be a little bit unsettling