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How to choose between family trust and SMSF

Family trusts and self-managed super funds (SMSFs) have a lot to offer Australians as wealth transfer and management tools.

Family trusts and SMSFs carry their own benefits and disadvantages in providing a way to transfer and manage your family's wealth. By weighing up the points of difference, you can choose the most appropriate option for you.

One of the major benefits of using a SMSF is the opportunity to minimise your tax bill. Investment income is taxed at 15 per cent cap during the accumulation phase; during the pension phase, there is no investment property tax. While family trusts do not share all the same tax benefits, they are simpler to manage as they adhere to fewer regulations and are not audited. A family trust will also offer greater flexibility in managing your investment portfolio, i.e., holding assets used for personal use such as a holiday house, while SMSFs provide flexibility in managing your retirement nest egg.

You cannot access your SMSF until you retire or meet a condition of release, so if you are in the early stages of wealth accumulation, a family trust may be better suited to your needs. When used correctly, a family trust can be an effective way to add to your super. They allow higher-earning family members to distribute income to lower-earning family members to even out the tax burden among the family and protect assets for current and future generations.

A family trust also offers a better avenue for intergenerational wealth transfer than a SMSF. Unlike a SMSF, in a family trust, the trustee does not own the assets; the trust does. So when the trustee passes away, the assets remain in the trust. This helps to protect assets from falling into the wrong hands when the trustee dies. However, a SMSF also allows super proceeds to be excluded from an estate where there is an effective death binding nomination. In this way, you can nominate who you would like your death benefits to be paid to.

If you find the benefits of both options appealing, it is important to note that operating a family trust and a SMSF at the same time is an effective option for many individuals. For example, an individual may make payments to their SMSF (reaping the tax rewards available), until they reach their contribution caps. At this point, they can choose to send their remaining funds to their family trust. In this way, you may have greater flexibility in managing your retirement savings while creating an easier way to manage and pass on your assets to your family's future generations.

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Your super and divorce

Going through a divorce is an extremely traumatic experience; among the emotional challenges are the financial issues, particularly when you consider what will happen to your superannuation?

Super might be the last thing on your mind during a divorce, but it is important to realise complex rules apply and merely walking away with your super untouched is not always possible. Your ex-spouse is likely entitled to receive a portion of your superannuation interests, and vice-versa.

Superannuation is treated as property under the *Family Law Act 1975* and as such is to be divided equitably and fairly amongst a divorcing couple. However, unlike other property assets - your super is held in a trust, and different super splitting rules are available unless you are a defacto couple located in Western Australia.

The super splitting laws offer three options you and your ex-spouse can take to make a superannuation agreement. This agreement forms part of your 'binding financial agreement' and outlines what will happen with the superannuation interests involved. You can form the agreement before, during or after the relationship is ended. If you do not have an agreement in place, you can obtain a court order. Regardless, the details involved in super splitting laws are quite tricky to comprehend and to make the best decision independent legal and financial advice for each party must be sought for the agreement to be legally binding. The options available for dealing with your super include:

Interest or payment split

A common approach is to have a portion of your super benefits immediately split and paid to your ex-spouse. This portion is paid in one of three ways. Providing you have met a condition of release, the agreed portion can be withdrawn from your super in the form of a payment. Otherwise, the creation of a new interest for the non-member is permitted, or payment is transferred to their super fund.

Payment flagging

You can choose to flag the interest in your super until a particular event occurs down the track (i.e., retirement). This may be a good option if the value of the interest cannot be determined, and in this way, you and your ex-spouse can wait until the event occurs to determine how you will split the interest involved. By flagging your super, payment cannot be paid until a flag-lifting agreement is signed.

No split or flag

This option requires taking into account the value of the superannuation benefits involved but leaving them untouched while other property is divided fairly and equitably between the divorcing couple. For instance, your super benefits remain untouched while your ex-spouse receives a larger share of the remaining property assets. No split or flag is also the only option available for de facto couples in Western Australia.

What if you have a SMSF?

Super splitting laws become more complicated when it involves a self-managed superannuation fund (SMSF). During your divorce, you will still be required to continue your duties as trustee, including acting in the best interests of all members even if your ex-partner is also a trustee, i.e., not excluding them from the decision-making process. Independent legal and financial advice for each party must be sought to find the best approach.

Acquiring assets legally in a SMSF

Strict investment rules govern how trustees can acquire assets through self-managed super funds (SMSF) from related parties.

When it comes to acquiring an asset from a related party, a trustee must ensure it is an 'arm's length transaction', in other words, the asset is purchased at market value. This means ensuring it is also:

- a listed security (i.e., shares listed on an approved stock exchange)
- an in-house asset (provided the market value of the fund's in-house assets does not exceed five per cent of the total market value of the fund's assets)
- business real property (i.e., land or buildings used exclusively for business purposes)
- an asset specifically excluded from being an in-house asset

These rules not only apply when purchasing an asset but also when selling, loaning and leasing an asset to a related party. A clear example of a SMSF failing to transact at arm's length is an SMSF that gives a loan to a related party who pays this loan back over a period without being charged interest. Another instance could involve investing in a related unit trust that does not pay distributions back to the fund.

In a situation where an asset is acquired for an amount lower than market value or for no cost, such as an 'in specie contribution' then the difference between the amount the fund has paid and the asset's market value must be recorded as a contribution.

ATO issues SBSCH reminder

The Australian Tax Office (ATO) is reminding employers using Small Business Superannuation Clearing House (SBSCH) to check their employee details are accurate when making payment.

Submitting incorrect employee details can risk their super fund rejecting your payment and returning the amount to the ATO. Once the ATO receives your payment, they will contact you and require you to update the information within seven days. Providing the details are updated, the ATO will re-send your payment to the employee's super fund. If you fail to update these details, the ATO will return the amount to you instead.

Ensure your payment is successful by checking the following details are correct:

- Unique Superannuation Identifier (USI) (a super fund product for APRA-regulated funds)
- Super fund member account number
- ABN, bank account and electronic service address for self-managed super funds (SMSFs)
- It includes no symbols, such as '&' in the fund name

SBSCH is a free service you can use to make your Super Guarantee (SG) contributions in one electronic payment providing your business has an annual aggregated turnover of less than $10 million or has no more than 19 employees. Once you make your payment to SBSCH, the payment will be distributed to each super fund accordingly.

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