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Another trustee issue for self-managed super funds

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You have just settled a sale of business transaction for Mac and Maddy and their accountant writes to you telling you that a large portion of the sale proceeds will be going into their self-managed superannuation fund ("SMSF").

He also tells you that for tax reasons, and to put some money away in a relatively safe environment for their children, they intend to deposit some of the money into the fund on behalf of their two children before the end of the financial year, and that you will need to add the children as trustees to ensure the fund complies with s.17A of the *Superannuation (Industry) Supervision Act* ("SIS Act").

As the SMSF owns real estate, you tell the accountant that it will be necessary to appoint a corporate trustee in order to avoid stamp duty when the property is transferred from trustees Mac and Maddy to the new trustees.

Speaking to Maddy to find out the full names of her children for the documents, you find out that one, Mia, is 19 years old and the other, Jess, is only 16 years old.

You tell Maddy that in order to comply with the superannuation legislation you will appoint Mia as a director of the new company trustee and that Jess will need to be appointed as a director when she turns 18. You tell her that as she and Mac are Jess's parents they can be directors on her behalf.

Maddy is happy with this and you prepare the documents and complete the transaction before the end of the financial year.

The sting

You get a call from the Mac and Maddy's accountant in November telling you that the fund has been audited by the Tax Office and is not, in its eyes, a SMSF as it does not comply with s.17A.

Section 17A(3) provide situations for other people to be trustees or directors of a corporate trustee in place of a member in certain circumstances. In particular, s.17A(3)(c) states that a SMSF does not fail the tests in section 17A by reason only that "if a member of the fund is under a legal disability because of age and does not have a legal personal representative - the parent or guardian of the member is a trustee of the fund in place of the member".

The problem is that the Tax Office take the view that section 17A(3)(c) only works if the parent or guardian is a human trustee on behalf of the child and not a director of the corporate trustee. The Explanatory Memorandum supports this view.

The accountant tells you that he believes the Tax Office will not take any action if steps are taken to appoint Mac and Maddy as Jess's legal personal representatives, so that you can take advantage of section 17A(3)(b)(i), or you appoint human trustees.

You remind the accountant of the stamp duty cost of appointing human trustees and start reading up on how to make Mac and Maddy Jess's legal personal representatives, remembering that Jess is too young to give an enduring power of attorney.

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