



PLATINUM



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Vengeful Spouse Strips Cash from SMSF - Now What?

QUESTION : I have a client who is currently going through a divorce. She's from old family money and married (I think) unwisely. Her soon-to-be (cheating, 35 year old) ex-husband decided it would be a good idea to withdraw \$150,000 from their SMSF's bank account. Both my client and her ex-husband are trustees of the SMSF. My client confronted her ex-husband and he told her "Well, you'll have to repay the money because I've already spent it." My client has the capacity to inject the funds, but she doesn't see why she should have to do so.

Is this a breach of the early release rules by my client who did nothing wrong? How does it affect the SMSF?

Accountant, Cottesloe WA.

ANSWER : Unfortunately it is not all that unusual for people going through a divorce to empty joint bank accounts – just to spite the other person (and to fund post-marital extravagances Ed.). Usually when that happens, the innocent party receives some sort of adjustment in their favour – when dividing up the marital assets. Needless to say, anyone emptying bank accounts and blowing the money is not looked upon favourably by the Family Court when making financial orders.

But, what we have here is a different kettle of fish. Not only has one spouse raided a joint bank account (so to speak), they have actually stolen money from a superannuation fund. The money is not their money. Even though you may be one of the trustees and members of the fund – the money is not yours until you meet certain pre-conditions. The *Superannuation (Industry Supervision) Regulations 1994 (SIS Regs)* provide the rules that must be followed to access the funds in your SMSF. These are set out in column 2 of Schedule 1 SIS Regs (**Schedule 1**).

The most common consideration is the member's [preservation age](#). Generally, if you have not reached your preservation age, you cannot access any of the money in your SMSF. There are exceptions to that rule, however, for the present case we'll take it as a threshold test to be met.

What are the early release rules?

The term 'early release rules' gets bandied about these days. However, the term does not appear in any of the legislation. So where do you find out what the rules are?

The first place to look is in Schedule 1. Schedule 1 is read with the sole purpose test under s 62(1) SIS Act. As a trustee of a SMSF, you have a duty to ensure the SMSF satisfies the sole purpose test at all times. Therefore, looking for ways to access funds from your SMSF before retirement or attaining your preservation age is likely to cause you to breach the sole purpose test – which is, in its basic form, to provide for the retirement income of the SMSF's members.

If a trustee of a SMSF authorises the release of superannuation benefits to a member before the pre-conditions in Schedule 1 are met – that trustee has breached s 62(1) SIS Act.

What's the big deal? It's going to be your money anyway, right?

It is easy to understand why some SMSF trustees think that way. However, as a trustee of a SMSF, you have just as much right to use the SMSF's funds for your own benefit as the fund managers of the large retail superannuation funds. There is a clear distinction between the roles of SMSF trustees and SMSF members. The trustees have a legally enforceable duty imposed on them to apply the SIS Act and tax laws correctly to ensure that the members' funds are protected and preserved for funding their retirement.

The members of the SMSF really have no role to play in the administration of the fund – in their capacity as a member – they merely are account holders in a retirement investment vehicle. This is much the same as a member of a retail fund.

If a trustee of a SMSF permits an early release of superannuation benefits to a member, they can face some [very heavy penalties](#) and are at the mercy of the ATO.

Our beloved Platinum Members get the inside scoop on the dangers of breaching SIS Act.

You can always just pay it back and no one will know, right?

Wrong. The problem with that line of thought is that your SMSF is required to be audited on an annual basis. Therefore, it is inevitable that the auditor will spot a large withdrawal and then a corresponding deposit in the SMSF's bank account and ask some questions.

The problem is, it's not just the illegal taking of money that is in issue. A trustee of a SMSF has a positive obligation to report adverse events to the ATO within a reasonable time of becoming aware of the event. Even the 'innocent' trustee who didn't take the money is subject to civil and criminal penalties for failing to notify the ATO of the breach within a reasonable time. Therefore, if the 'innocent' trustee just decides to put the money back in the accounts and sweep the whole thing under the rug, they can be just as culpable as the person who drained the bank account in the first place. Further, the ATO is likely to take a dim view of the 'innocent' trustee's actions and could disqualify them from being a SMSF trustee.

What other problems are there for either party?

The party that has illegally accessed their superannuation benefits is required to report the money that they stole from the SMSF in their income tax return for the year that the theft occurred. The money becomes part of their assessable income and is taxed at the taxpayer's marginal rate of tax plus the Medicare Levy.

Also, if either party is disqualified from being a SMSF trustee by the ATO, it may cause problems for the SMSF where both parties have pooled their resources to buy assets in the fund. To remove the member benefits of the disqualified person from the SMSF, it may be the case that the SMSF needs to liquidate the fund assets. This is so that the member benefits are rolled over into a retail fund. Even worse, if the disqualified trustee remains in the SMSF despite their disqualification, it may cause the whole of the SMSF to be non-complying and therefore lose its concessional tax status.

How do you go about fixing these problems?

The key issue in resolving the problems is to not utilise the 'Ostrich method' of problem solving. Putting your head in the sand only causes more problems, especially if one or more of the trustees didn't do anything wrong in the first place. Remember, even the innocent trustees have a duty to report adverse events to the ATO, regardless of who is at fault.

If the offending SMSF trustee doesn't have the resources to pay back the money, but the innocent trustee does – it may be worth considering a loan from the innocent trustee to the offending trustee to facilitate repaying the stolen money to the SMSF. In circumstances where there are Family Court proceedings on foot, you should seek legal advice from your family lawyer as to how such arrangements could affect those proceedings.