

SMSF members becoming targets for children seeking bigger inheritances

Lawyers warn estate disputes are rising as the value of self-managed super funds tops \$820 billion.

Duncan Hughes *Reporter*



Jun 5, 2022 - 6.16pm

Self-managed super fund trustees are increasingly becoming targets of legal claims from estranged children who claim they have been unfairly excluded from an inheritance, say lawyers.

The latest landmark case involves about \$4 million being paid to the biological family of a deceased member's \$18 million estate that was originally directed to a second wife through a self-managed super fund. The second wife had to pay about \$400,000 in legal fees.



Lawyers warn estate disputes are rising as the value of self-managed super funds tops \$820 billion across 600,000 funds and more than 1 million members. **Wayne Taylor**

“This is potentially groundbreaking,” says Anna Hacker, national manager, estate planning at Australian Unity. “The traditional strategy of putting assets in super to keep them at arm’s length from potential litigants needs to be reviewed.”

Though the NSW Supreme Court case was decided on legal issues unique to that jurisdiction, it could apply to SMSFs in other states and territories, particularly if any of the fund’s assets are based in NSW, lawyers say.

Matthew Burgess, a director of View Legal, a specialist estate planning company, says: “Anyone who assumes it only applies to NSW is playing a very dangerous game.”

Lawyers warn that estate disputes are rising as the value of self-managed super funds tops \$820 billion across 600,000 funds and more than 1 million members, according to Australian Taxation Office analysis. The average in each fund is about \$1.3 million.

Roughly one in 20 Australian families are either blended or stepfamilies, according to the Australian Institute of Family Studies. These include families with two or more children, at least one of whom is the natural or adopted child

[\[https://www.afr.com/wealth/personal-finance/legal-decision-a-game-changer-for-blended-family-inheritance-claims-20200312-p5499q\]](https://www.afr.com/wealth/personal-finance/legal-decision-a-game-changer-for-blended-family-inheritance-claims-20200312-p5499q) of both partners and at least one other child who is the step-child of one of them.

Legal landscape in flux

Burgess says estate disputes involving large inheritances are “spawning an entire industry” of “no win, no fee” lawyers who prominently advertise their services, particularly online and on roadside billboards.

Hacker says family disputes about wills and estates have jumped about 80 per cent [\[https://www.afr.com/wealth/personal-finance/big-increase-in-inheritance-feuds-among-blended-families-20191212-p53jbs\]](https://www.afr.com/wealth/personal-finance/big-increase-in-inheritance-feuds-among-blended-families-20191212-p53jbs) in the past decade as the number of “blended families” rose sharply.

Andrew Meiliunas, state litigation leader for Maurice Blackburn Lawyers, says family disputes involving second and subsequent marriages constitute a “large portion” of its wills and estates work.

Lawyers claim the number of couples considering divorce has skyrocketed after the COVID-19 lockdowns.

Meiliunas warns that new laws mean SMSF trustees need to monitor both their funds and legal changes to ensure that omissions and ambiguities don't result in expensive, protracted and stressful litigation.

“The legal landscape continues to change, which means experienced financial advisers and lawyers must continue to be involved in monitoring assets and trust arrangements,” he said.

The recent NSW Supreme Court decision awarded three of William Benz's six adult children about \$4 million from his SMSF despite it having been bequeathed to his second wife, Erlita.

Benz had also made a binding death nomination (a legal document binding scheme trustees to pay the benefit to a nominated beneficiary) leaving Erlita his superannuation.

He had made a separate will, but there was nothing left in the residuary estate to satisfy bequests to the children.

Justice Julie Ward ruled there was an expectation in the family that the children would share in his estate because of the terms of the will and the father's history of helping his children.

“None of them are destitute, but their common submission is that their needs can be assessed by reference not only to the 'bread and butter of life' but also to a 'little of the cheese or jam that a wise and just parent would appreciate should be provided if circumstances permit,’” she ruled.

Andrew, the son, was awarded \$900,000 to pay off his mortgage and renovations. Daughter Catherine was awarded \$900,000 for renovations and “to save an amount for contingencies”. Another daughter, Anna, received about \$1.9 million to purchase a two-bedroom apartment close to her son's school and “save an amount for contingencies”.

Need for timely reviews

Burgess says: “The ruling here is analogous to bankruptcy legislation in that will makers who take steps to remove assets from their personal name within three years of the date of their death leave those assets exposed to be 'clawed back' into the estate for the purposes of family provision.”

Another key aspect of estate planning is under review by the High Court, the nation's most senior jurisdiction, involving a blended family, an SMSF and the validity of a binding death nomination.

The only daughter of a deceased father is bringing an action claiming the binding death nomination awarding his estate to a partner was invalid because it had been signed more than three years before his death. The law requires these nominations to be reviewed every three years to remain valid.

A High Court ruling overturning the current decision could increase pressure on fund members to regularly review their estate planning, say lawyers.

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“Bigger estates are vulnerable to claims, even if the claimants are well-off,” Hacker says of disputes that can arise between a surviving spouse and children, between children, or grandparents against some combination of surviving spouse and children.

She says the Benz case highlights the need for financial advisers and lawyers advising on a will involving an SMSF to consider the wider estate planning issues before using death benefit nominations.

This includes checking the SMSF trust deed regularly and updating changes in personal circumstances (or those of the family or beneficiaries), she says.

Ensure your will is current and reviewed if there are any changes in personal circumstances, such as divorce, she adds.

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