

## Litigation over estate benefits set to 'escalate'

*By Keith Ford, SMSF Adviser and Matthew Burgess, Director, View Legal*

Holistic estate plans are becoming increasingly critical as litigation involving SMSFs and member benefits on death or incapacity becomes more common, a leading legal expert has said.

Matthew Burgess, director of View Legal, said the intergenerational wealth transfer of the Baby Boomer generation is driving a key issue for SMSF advisers.

"The combination of these factors has apparently in recent years seen increased estate litigation generally; and ever-increasing cases involving SMSFs," he said.

"In this context, it seems highly probable that litigation around SMSF member benefits on death or incapacity will continue to escalate, and the level of adviser (and member) understanding of how critical holistic and integrated estate planning is will be of increasing importance."

Burgess provided an example of the kind of contentious dealings that are becoming more common, outlining a "factual matrix" that was shared with View Legal in which an SMSF member died intestate (without a valid will) where the only other member of the SMSF is the deceased's estranged brother who has refused to pay the member benefit to the deceased's widow.

The surviving brother alleged that even if the deceased brother were to have had a will, it "would not legally allow him to make a claim on his superannuation as his superannuation member account balance was not his personal property in that any account balance(s) is/are legally owned by the SMSF. The Fund has discretionary power in dealing with deceased member balances. As such the claim by (the widow) 'to facilitate the payment of the deceased's entitlement' will not be undertaken as part of a claim under the deceased's estate as there are no entitlements to claim".

According to Burgess, this situation highlights the need to "invest in a holistic estate plan that seamlessly integrates management of superannuation entitlements with personal estate planning objectives". The first area that needs to be examined is trustee duties, as trustees of an SMSF must act in accordance with their duties at law and under the superannuation legislation.

"In particular, in making a determination, a super fund trustee needs to demonstrate that their decision is fair and reasonable. Any court review of a trustee decision need not analyse the trustee's processes or reasoning," Burgess said.

"Therefore, in the factual matrix set out above, arguably the surviving brother would be acting appropriately in carefully considering who to pay the death benefit to, whether it be dependants or his deceased brother's legal personal representative (LPR). Further, where a member dies intestate, it may well be the case that paying to the member's LPR is inappropriate, as apparently indicated by the brother in the situation here.

"This said, unless the surviving brother can prove he was somehow in an interdependent relationship or was otherwise a dependant (both of which would be assumed to be unlikely) the range of potential

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recipients will be limited to the widow and any children of the deceased. Thus, query the mischief ultimately achieved by the surviving brother in noting that superannuation is not an estate asset.”

Superannuation is not an estate asset

Referring to the decision in *Stock (as Executor of the Will of Mandie, Deceased) v N.M. Superannuation Proprietary Limited* [2015] FCA 612, Burgess reminded that superannuation death benefits are not an estate asset.

“Briefly, in a situation where an LPR challenged the trustee of the superannuation fund's intended distribution on the basis of comments in the member's will, the court in *Stock* confirmed that superannuation is not an asset of an estate and a superannuation fund trustee is not bound to follow the directions of a will.”

“In particular, even if superannuation is specifically mentioned in a will, this does not make it an asset subject to the terms of the will. While a trustee may review a deceased member's will, it is not the role of a super fund trustee to attempt to resolve issues relating to their estate.

“Rather, a trustee must independently determine the distribution of a death benefit, unless there is a valid binding death benefit nomination (BDBN) in force.”

Burgess added that the risk of these contentious situations arising is something that is “becoming increasingly well documented”, particularly in larger funds with four, five, or six members.

“Indeed, from a specialist adviser perspective, the risks of a falling out are one of the few (and perhaps only) reasons for considering a BDBN, in the context that the inflexibility created by BDBNs is generally actively avoided by specialist holistic estate planning advisers.”

Also noting the high-profile example of the decision in *Notaras v Notaras* [2012] NSWSC 947, Burgess said complications can arise where trustees are at loggerheads, even where there is not a death benefit in dispute.

This case saw one of the brothers (Brinos) make withdrawals from the SMSF, of which around \$60,000 were alleged to be in excess of his entitlement. The other brother (Basil) was unaware of the withdrawals and thus had not provided consent.

The court ultimately ordered that Brinos be removed as trustee of the SMSF due to his failure to act jointly and replaced him with a corporate trustee (Bazport) of which Basil was the sole director and shareholder, leaving the SMSF with both an individual and corporate trustee.

“The Court confirmed Basil would (as a result of the decision) need approval from the Tax Office for its failure to comply with the superannuation law requirement of all members of an SMSF also being trustees,” Burgess added.

Despite the (assumed likely) position that the surviving brother in the factual matrix provided to View will need to pay the death benefit to the “ultimate benefit of the deceased member's family”, Burgess said the case reinforces the so branded 'golden rule' – “that is whomever controls the gold (or SMSF) makes the rules”.

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“Given the surviving brother's views set out above about the legal position (which at best could be said to be 'convoluted'), it seems clear that the key factor in play pending payment of the benefit currently is the surviving brother's sole control of the SMSF, with no duties imposed by a valid BDBN (in other words, the golden rule).”

“The angst and delays – and professional fees – triggered by the surviving brother (and his adviser) are ongoing. Arguably all of which would be avoided with investment in even a rudimentary holistic estate plan.”