

The most important case ever in SMSF succession planning ... and what it really means

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Disclaimer: DBA Lawyers advised the plaintiffs during the course of litigation. We only mention facts made publicly available in the judgement.

The recent decision of *Wooster v Morris* [2013] VSC 594 is the most important decision ever regarding SMSF succession planning.

All SMSF practitioners must be aware of its facts and its vital lessons.

However, we fear that the key message might be getting lost in the industry. Namely, what matters — what really matters — is the identity of who is holding the 'purse strings' upon death or loss of capacity.



Facts

Mr Morris ('the deceased') had two adult daughters from a previous marriage (Mrs Wooster and Mrs Smoel, that is, the plaintiffs). He also had a second wife, Mrs Morris.

The deceased and Mrs Morris were the members and trustees of an SMSF.

In March 2008, the deceased made a binding death benefit nomination. The BDBN was in favour of the plaintiffs in respect of all of his interest in the SMSF.

The deceased died in February 2010. His interest in the SMSF was \$924,509.

Probate of the deceased's will was granted to the plaintiffs (ie, the plaintiffs were the deceased's executors).

After the deceased's death, the surviving trustee (ie, Mrs Morris, the step mother of the plaintiffs) was left running the SMSF. Mrs Morris had a son from a previous relationship and Mrs Morris appointed him as her co-trustee.

Later on, the trusteeship of the SMSF was changed to a company called Upper Swan Nominees Pty Ltd. Mrs Morris was the sole director and shareholder of Upper Swan.

For reasons not mentioned in the judgement, the trustee decided that the BDBN was not binding. Instead, Mrs Morris, as sole director of the trustee, decided to pay none of the deceased's death benefits to the plaintiffs but instead she decided to pay all the death benefits to herself.

The plaintiffs issued court proceedings seeking declarations that — among other things — the BDBN was valid and binding.

The parties agreed that this question be answered by a 'special referee', rather than the court.

The special referee found in favour of the plaintiffs, holding that the BDBN was valid and binding and that the plaintiffs were entitled to be paid \$924,509 plus interest.

However, the trustee's legal fees in defending the claim were 'substantial' and had 'been paid only from the accounts in the name of the deceased'. For example, the court mentioned that the draft financial accounts for 2013 record legal fees of \$302,699 and accounting fees of \$43,560.

The trustee and Mrs Morris (ie, the defendants) argued that the plaintiffs should be paid only out of the deceased's interest in the SMSF.

Question for the Court

The court considered a number of questions. One question was what was available to be paid to the plaintiffs: was it limited to only what the deceased had in the SMSF, or could the plaintiffs also access money that Mrs Morris had in the SMSF plus her personal money?

The court held that:

As a consequence of the decisions of Mrs Morris, if the defendants claimed an indemnity from the [SMSF], they would bear only a small portion of the financial consequences of the litigation, despite being entirely unsuccessful. Rather, the loss would be borne almost entirely by the plaintiffs in the depletion of their interest in the [SMSF].

The court declared, among other things:

- all moneys held by the SMSF (including Mrs Morris' member accounts) were available to meet the payments; and
- the trustee and Mrs Morris personally were jointly and severally liable to pay all outstanding money.

Lessons for practitioners

Wooster v Morris contains many vital lessons that all SMSF practitioners must be aware of.

Lesson 1 — LPR does not automatically become a trustee

Wooster v Morris clearly dispels the myth that when a person dies their executors (legal personal representatives) automatically become a trustee in the deceased's place. Here, the plaintiffs were the deceased's executors but they did not become trustees.

Rather, the identity of trustee upon death is determined by the trust deed of the SMSF. In DBA Lawyers' opinion there are very few deeds that appropriately distribute the power to appoint a trustee upon death or loss of capacity.

Lesson 2 — BDBNs are only a partial solution at best

There is a misconception that SMSF succession planning is completely handled by making a BDBN. *Wooster v Morris* clearly dispels this myth as well. In *Wooster v Morris* the deceased had made a valid BDBN but the plaintiffs still had to spend over three and half years in legal battles to obtain their money.

Accordingly, an adviser can not simply tell a client to make a BDBN and expect that succession planning is handled. This leads into the most important lesson from the case.

Lesson 3 — what really matters is the identity of who is holding the 'purse strings'

Wooster v Morris clearly demonstrates that far more important than any BDBN is the identity of who is holding the 'purse strings' upon a member's death or loss of capacity. As stated above, this depends to a very large degree on what the trust deed of the SMSF provides. There is huge variation in this regard. Although DBA Lawyers carefully draft their deeds to ensure sensible outcomes, many practitioners find that other SMSF trust deeds have poorly drafted provisions that invariably result in the 'minority' surviving member(s) wielding an unfair amount of power upon death.

Find out more with The Complete Guide to SMSFs and Planning for Loss of Capacity and Death

DBA Lawyers offers a detailed, step by step publication designed to ensure complete and thorough SMSF succession planning, ranging from ensuring the right people are running the SMSF, to ensuring maximum tax efficiency, and much more.

DBA Lawyers is currently updating *The Complete Guide* to cover *Wooster v Morris* and many other changes. The updated version will be available by 31 January 2014 and will cover:

- the most detailed commentary ever written on how to ensure that the right people are running the SMSF at the right time;
- the latest on reversionary pensions in light of TR 2013/5 and SMSFD 2013/2;
- the latest on anti-detriment strategies;
- when the holder of an enduring power of attorney can exercise the donor's shareholder rights ... and when they can not; and
- much, much more.

For more information on *The Complete Guide*, see www.dbalawyers.com.au/complete-guide

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