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You know there are people who sit in courtrooms all day, just to hear the interesting stories. I think I might do that when I retire!

In this edition of Newsflash, we have some more interesting tax cases – these ones relating to superannuation. In particular, the *Aussiegolfa* case is a must read for anyone with property in a SMSF.

Superannuation and Bankruptcy – Morris Case, and the Gapes Case

Here are a couple of recent cases that will interest readers concerned about their heir being bankrupt at the time of receiving an inheritance, where their share of the estate assets would go straight to the bankruptcy trustee.

Basically, if a beneficiary of your estate is bankrupt at the time of your death the executor will be personally liable if they don't hand over the bankrupt's share of the estate to the bankruptcy trustee to be distributed amongst the creditors. There is no way around this for your executor, this problem can only be fixed before you die.

The money a bankrupt has in superannuation is usually safe from the bankruptcy trustee, so what about the money the deceased had in superannuation, that is going to be paid to the bankrupt heir? Let's look at the Morris case:

Ms Morris had a very busy few years. In July 2011, she gave birth to a daughter. In January 2013, she had a son. In May 2013, her husband died, and in August 2013, she became a bankrupt. The Morris case 2016 FCA 846 is all about the bankruptcy trustee trying to get his hands on her late husband's superannuation which was paid to her as a death benefit. Fortunately, the bankruptcy trustee did not succeed; but only because it appears that the court found Ms Morris held the insurance proceeds as trustee for herself and her children. If it was instead found that she just held them for herself, or if her husband had left a binding death nomination in her favour, the circumstances may well have been different.

This is a concerning example of how you can get caught out, just when you think you have a one-size-fits-all solution in the shape of a (normally highly recommended) binding nomination. Considering how soon after his children were born that Ms Morris' husband died, if he did have a binding nomination in place it may well have been 100% in his wife's favour. She must be very glad he didn't have one.

Now while you are gazing into your crystal ball deciding whether to binding nominate or not, consider the situation in *Gapes (Bankrupt) [2017] FCA 787*. In this case, the deceased left her superannuation to be paid into her estate and distributed amongst her beneficiaries, one of whom was bankrupt. The bankruptcy trustee got that one; it had lost any protection of being a superannuation payment once it reached the deceased's estate.

Private Use of SMSF Property - Aussiegolfa

A sub-trust owning the property still didn't allow a SMSF to rent an apartment to the daughter of one of the members of the fund. Reference *Aussiegolfa Pty Ltd (Trustee) v Commissioner of Taxation* [2017] FCA1525.

The funds held in a SMSF must be used for the sole purpose of providing for a member's retirement, or a member's family, in the event of their death. If an SMSF invests in a property that is going to be used by a member or their associates, then it will be considered an in-house asset; and a SMSF can only hold 5% of its assets in house. It is the **whole value of the asset** that is taken into account, not the amount of use. This means if you own a holiday apartment in your SMSF, just staying there **once** will turn it into an in-house asset, and you are gone. The SMSF will be forced to get rid of the property anyway, because it has another purpose other than providing for a member's retirement i.e. providing for a member's holiday.

In the Aussiegolfa case, the SMSF owned units in a trust that owned the apartment the daughter lived in, with other students. Nevertheless, the court found that the in-house asset rules applied, and the investment breached the sole purpose test. Note that it would have been different if it was a widely held trust.

Even before this case went to court, the taxpayer was on the back foot because the ATO has wide powers to deem an asset to be in-house regardless. The costs of getting it wrong are huge; this is **not** an area to push your luck.

Best Askbantacs Question – Getting Money Into A SMSF To Buy A Development Property

Lots of good ideas in this one if you find yourself wanting to buy a property in your SMSF, but if the contribution caps are getting in the way and you can't lend the money to your SMSF because you intend to change the nature of the asset that will be given as security.

<http://taxquestions.com.au/getting-more-money-into-your-smsf-to-buy-a-property/>

If you would like to ask a question of askbantacs go to <http://taxquestions.com.au/>

This Editions Webinar – SMSFs

https://www.youtube.com/watch?time_continue=295&v=6sZzfPTgCew

This Edition's Blog – SMSF Introduction

<http://bantacs.com.au/Jblog/smsfintro/#more-138>

Further Reading on SMSFs

http://www.bantacs.com.au/booklets/SMSFs_Booklet.pdf

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