
Property & Financial Matters Family Dispute Resolution

Superannuation (Married Couples and Domestic Partners)

Introduction

The Family Law Act 1975 has been amended to bring superannuation of de facto couples into the superannuation splitting regime. These laws, which commenced on 1st March, 2009, apply to de facto relationships that have broken down after this date.

Superannuation interests that each partner have will be able to be split (noting that married couples have been able to split superannuation entitlements since 2002).

De facto couples who separated before the new laws commenced are able to choose, after obtaining independent legal advice, whether the superannuation splitting laws should apply to them.

When couples separate and are wanting to arrive at a final property settlement, they are often unsure as to how to deal with the issues of superannuation.

The legal position is clear that the existence of superannuation funds must be taken into account in dividing the assets of separating couples.

The reasons why superannuation is a relevant factor in the determination of a property settlement are because:

- it may be the most valuable asset the couple will ever have;
- money paid in by the employee could be viewed as money that could have been spent on the family; and
- it provides a contributor to a superannuation fund, financial security beyond retirement.

So, while there is no doubt that the issue of superannuation should be part of any discussion about property division, the uncertainty arises when one asks the question as to how superannuation is dealt with in law, when a couple separate.

What Information Is Required?

When discussing how superannuation is to be treated in a property settlement, it is important to find out:

1. The type of fund - Is it an accumulated benefits fund, a defined benefits fund, a self-managed fund, a partially vested accumulation scheme, a small superannuation accounts fund, a percentage only fund.

- a) An accumulated benefits fund can best be described as:
“Those where the benefit is directly related to the level of contributions and the investment performance of the fund.”
- b) A defined benefits fund can be described as:
“A fund which provides members with a specified level of benefit either as a lump sum, or pension or a combination of both, based upon years of service with an employer and salary levels prior to retirement as well as contributions and investment earnings.”
- c) A self-managed fund, is often referred to as the ‘mum and dads’ or “partners” funds,
- d) A partially vested accumulation scheme – these may occur in some executive schemes or may be described as a loyalty scheme.
- e) A small superannuation accounts fund – these will be unusual but easily identifiable as they are held in a reserve with the Australian Tax Office.
- f) A percentage only fund – to qualify for this category the interest must be prescribed in the Family Law Superannuation Regulations and there is only one interest in this category at present – Commonwealth judicial pensions.

2. The terms of the fund - is the benefit capable of being transferred?

- a) The amount of the benefit payable at retirement age and at other nominated ages, net of any tax amounts which are preserved.
- b) Whether the benefit will be paid in a lump sum, or as a pension, or a combination of both.
- c) The number of years during the marriage or de facto relationship that contributions have been made and the extent to which the fund has increased during that time.
- d) The value of the superannuation interest – under present legislation it is the gross value of the superannuation interest. However if parties intend to split superannuation interests or agree to a flagging order, then the gross value of the superannuation interest should be calculated in accordance with Family Law (Superannuation) Regulations 2001.

How Is Superannuation Treated In A Property Settlement?

There is no set method which is used to determine how the existence of superannuation affects the division of other assets.

The Court, or the couple trying to reach agreement about property settlement may take several approaches in dealing with superannuation.

Whichever method is used, either singularly or in combination, is dependent on a decision as to what is most likely to achieve a fair division of assets, in the circumstances of each particular case.

Under the present superannuation laws, the Family Court of Australia and the Federal Circuit Court of Australia have the ability to make orders which directly impact on superannuation entitlements of both married couples and couples in a de facto relationship and also bind third parties.

Superannuation may be dealt with as part of a property settlement either by way of agreement between the parties or court order.

The new laws enable the court to make orders changing the interests of parties in superannuation in the same way the court can change interests in other assets.

What follows is a brief outline of some of the approaches available when dealing with superannuation interests.

a) *By an offset of superannuation against other assets*

The fact that one spouse or de facto partner has superannuation and the other does not can be taken into account in a property settlement in a very broad general way. A decision may be made as to a notional interest that one spouse or de facto partner has in the other's superannuation, with an offset in the division of other property e.g. one party may receive a greater share of the home or a greater payout from the spouse or de facto partner who retains their superannuation entitlement.

b) *A splitting order or agreement*

Parties may agree to, or the Court may order a division of superannuation via a splitting order or splitting agreement. Any order made by the court or any agreement reached by parties is one made subject to the 'just and equitable' requirements of the Family Law Act.

Once ordered or agreed to, the split will provide the non-member spouse or de facto partner with superannuation entitlements, with a corresponding reduction in benefits payable to the member spouse or other de facto partner.

The terms of splitting orders will depend on the type of order being sought, but an order cannot be made in relation to an interest with a value of less than \$5,000.00.

c) *A flagging order or agreement*

A flagging order or agreement is similar to an injunction and operates to prevent the trustee of a fund from making payments from that fund and requires the trustee to notify both parties of any conditions of release.

Flags will be of most use where the value of a superannuation interest is unknown, but likely to become payable and therefore known soon – for example where a member's retirement is imminent. When appropriate the flag may be 'lifted' either by further order or a 'flag lifting' agreement to allow the matter to be finalised and if appropriate, the superannuation split made.

Obtaining Information From The Trustee

There are three categories of persons who are eligible to obtain information about a superannuation interest. The eligible persons are:

- the member of the superannuation fund;
- the spouse of the member or de facto partner of the member; and
- the person who intends to enter into an agreement with the member. This category includes fiancées.

Superannuation Information Kit

The Family Court has prepared a Superannuation Information Kit which can be used by a person to obtain information from the Trustee of an eligible superannuation plan or the Retirement Savings Account (RSA) provider about a superannuation interest of a member of the plan.

If it is likely that your negotiations in family dispute resolution will revolve around a split of superannuation interests or an agreement to bind the trustee in some way, then it will be necessary to complete the relevant forms in the kit and send them to the Trustee or the RSA provider together with the appropriate fee.

The Trustee or RSA provider will then complete the relevant parts of the Superannuation Information Form and return them to the person requesting the information. The superannuation information form provided by the Trustees or RSA provider should enable parties to calculate the gross value of the superannuation interest.

Superannuation Agreements Reached In Family Dispute Resolution

If, at the completion of your negotiations in family dispute resolution, an agreement is reached in relation to your assets and superannuation interests and your agreement in some way binds the trustees of a superannuation fund i.e. an agreement to split superannuation interests or a flag agreement, then if you are intending to make an application to the court for a consent order, you must attach the relevant part of the Superannuation Information Form completed by the Trustee or RSA provider, to your application, together with confirmation in writing that this fund has no issue with the agreement that has been drafted and agrees to be bound by that agreement.

If an agreement is reached whereby parties retain their own superannuation interests or there is an agreement to offset a superannuation interest against other assets, then there is no requirement to obtain a completed Superannuation Information Form, so long as parties can identify the relevant superannuation interests and state their agreed value.

Taxation

Tax on superannuation is certain and will have to be paid at some point. The Court will be loathe to ignore the tax consequences of a split and will almost certainly take the tax into account.

Confused?

If after having read this you are confused, then you are in good company. Superannuation is still one of the more complicated and unpredictable areas of family law.

As such, couples wanting to negotiate a property settlement involving superannuation should each obtain independent legal advice about what figures should be used in the calculations and the relevant approach to take.

The information contained in this handout is general information only. It is supplied on the understanding that the Family Relationship Centre is not providing legal advice on a particular matter, or at all. The handout contains information that is intended to assist those attending Property & Financial Matters Family Dispute Resolution.

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We strongly recommend the obtaining of specific independent legal advice.