
Superannuation

In December 2002, the law regarding superannuation and family law changed dramatically. Superannuation is treated as property, and separating married couples may split or flag superannuation by agreement or court order.

Payment Split

Superannuation interests of parties to a marriage can be dealt with directly by a court dealing with the adjustment of their property interests after separation. A superannuation interest can be split through either:

- an order of the Family Court or Federal Magistrates Court
- a superannuation agreement

There are two main types of funds:

- *Accumulation funds* are the most common. They provide benefits to members based on contributions and earnings, less fees
- *Defined benefit funds* provide benefits to their members according to a formula set out in the trust deed. This formula usually takes into account the member's length of service and final average salary

Notice to Superannuation Funds

A superannuation agreement or court order only binds the trustee of a superannuation fund if the trustee has been given procedural fairness. This means that the trustee must have reasonable notice of the proposed orders.

Whether to Split?

Whether superannuation will be split and in what proportions will depend upon the circumstances of the case. Relevant factors include:

- whether there are children
- if splitting the superannuation means the primary carer can keep the home
- the needs of the parties for cash and saleable assets
- the value of all the property and the proportion of the property pool which is superannuation
- the type of fund
- the ages of the parties
- the length of time before the parties reach a condition of release
- tax implications

Valuing a superannuation interest

The court must value a superannuation interest which is being split. The valuation must be in accordance with the *Family Law Act*. An interest not being split can be valued another way, although it is unusual to use a different approach.

For self managed superannuation funds, the contents of the fund must be valued eg. shares, real property.

The majority of superannuation interests are accumulation interests in the growth phase. Valuations will, therefore, usually be straightforward. A recent member's statement and/or a Superannuation Information Form completed by the trustee of the fund is usually sufficient to obtain the valuation.

An expert in superannuation may need to be engaged to value a defined benefit fund in accordance with a specific formula.

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Superannuation agreements

A "superannuation agreement" is a financial agreement that deals only with superannuation. As with financial agreements dealing with non-superannuation assets, a superannuation agreement must meet certain formal requirements to be binding. There are some additional requirements for superannuation agreements.

The grounds upon which financial agreements can be set aside are set out below.

Payment flags

A payment flag can be imposed on a superannuation interest by a superannuation agreement or a court order. A payment flag prevents the trustee of the superannuation fund from making any payments or transfers in relation to that interest.

Parties may want to defer making an agreement as to how to split superannuation. This may be because the member is nearing a condition of release. An interest in a defined benefit fund may appreciate sharply in value if the member reaches a threshold factor (ie age 55).

Setting aside agreements

Superannuation agreements can be set aside on the grounds relevant to financial agreements plus two further grounds specific to superannuation agreements. The full list is:

- the agreement was obtained by fraud
- at least one of the parties entered into the agreement for the purpose of defeating the interests of a creditor
- the agreement is void, voidable or unenforceable

- it is impracticable for the agreement (or part of it) to be carried out due to circumstances which arose after the agreement was made
- a party with responsibility for the care, welfare and development of a child will suffer hardship
- the agreement is unconscionable
- there is no reasonable likelihood of a superannuation flag set by an agreement being terminated by agreement
- one of the superannuation interests covered is an unsplitable interest

Tax issues

There may be tax advantages to one or both of the parties splitting superannuation. Specialist tax and/or financial planning advice may be required.