

WHAT HAPPENS TO SUPER IN A PROPERTY SETTLEMENT?

30 August 2019

Background

Despite the law changing 17 years ago to make superannuation 'property', a common question we get is whether superannuation has to be included? Let's do a quick refresh of what happens with superannuation in a property settlement.

The law in relation to superannuation and family law changed dramatically in 2002 with the introduction of the Family Law Legislation Amendment (Superannuation) Act. Prior to December 2002, the options for dealing with superannuation in a property settlement were very limited.

Following the amendments, superannuation is now treated as 'property' and is able to be 'split' by agreement or court order.

Treatment of Superannuation

Whether or not a superannuation interest will, in fact, be split and in what proportions will depend upon the circumstances of the case. Potentially, the superannuation policy can be "split" in any percentage (it does not have to be 50/50). A split does not mean a payout of the policy, rather it is a "rollover" of an interest. A fund of less than \$5,000 cannot be split.

Relevant factors for considering if a split should occur, include:

- Whether there are children.
- If, by splitting the superannuation, the primary carer of the children will be able to keep the family home.
- The needs of the parties for cash and saleable assets.
- The value of all the property and the proportion of the property pool that is made up of superannuation.
- The type of super.
- The ages of the parties.
- The length of time before the parties can access their super.
- Any tax implications.

Types of Superannuation

There are three main 'types' of superannuation funds:

- Accumulation fund – a superannuation fund that provides benefits to members based on contributions and earnings, less fees (e.g. like a bank account balance).
- Defined benefit fund – a superannuation fund in an eligible superannuation plan which provides benefits to members according to a formula set out in the trust deed. The formula usually takes into account the member's length of service and final average salary.
- Hybrid funds – a superannuation fund that is a combination of a defined benefit fund with an accumulation component.

Defined benefit interests are becoming less common and therefore most parties will be dealing with accumulation interests.

Other terms that parties should be familiar with when looking at superannuation include:

- Growth phase –where no benefit has been paid in relation to the interest and no action has been taken by the member under the rules of the fund to cash in the benefit.
- Payment phase – is defined as an interest that is not in the growth phase.

How do you get information about superannuation?

Each spouse can request information from the respective superannuation Trustee for either their policy or their spouse's policy. This is done by sending to the Trustee a Declaration and Superannuation Information Form. The Trustee of the fund is entitled to charge a reasonable fee for providing the information. The Trustee is not allowed to give out the address of the member, or notify the member that an information request has been received from a non-member (the other spouse).

The Trustee is required to provide a statement to the requesting spouse outlining:

- The value of the superannuation interest as at certain dates.
- Any withdrawals made between those dates.
- Details of any payment flags (i.e. notifications) or previous splits.
- Any fees that it will charge for payment splits and flags.
- The member's eligible service period and date that their membership in the fund commenced.
- Preservation and components of the interest.
- Vesting terms and scales.
- Details regarding reversionary beneficiary entitlements if the benefit is in the pension phase.
- Valuing a superannuation interest.

Superannuation interests that are going to be split must be valued in accordance with the Family Law (Superannuation) Regulations.

The majority of superannuation interests are accumulation interests in the growth phase and therefore, valuations will be straightforward. In these situations, a recent 'member statement' and/or a completed 'Superannuation Information Form' will be sufficient.

However, some funds require a further valuation by an expert in superannuation splitting and it is important that anyone considering a superannuation split obtain specialist Family Law advice immediately.

Benefits of super splitting

The changes to the law in relation to superannuation in family law property settlements has provided parties with more flexibility in the way that property settlements are structured.

This is particularly the case where parties may be a long way off retirement but have significant superannuation interests, the option of splitting superannuation can provide a more just and equitable outcome for both parties.