Benefits of Consulting with a Marriage Lawyer

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When a marriage or de facto relationship breaks down, it can be a stressful time. Part of this process may involve the separation of assets, which may include the family home, business interests, investments, savings and superannuation. If a mutual agreement cannot be reached, the Court can determine the settlement. Obtaining the right financial and legal advice from a marriage lawyer at the early stages of this process can help a party to navigate their way through the Family Law system and make decisions about their assets and superannuation that provides a better outcome.

Superannuation Splitting as part of a property settlement

Superannuation is an asset that can usually be divided as part of a property settlement. Sometimes it is not possible to split superannuation. For example:

1. When the interest is of little or no value, when it would not be cost effective to do so (see The Commonwealth Attorney-General's guide "Splitting Laws – Frequently Asked Questions");
2. In the recent case of *Goudarzi & Bagheri* (No. 2) the Court considered the exclusion of the husband's retirement pension from the property pool. It is noted that the wife received in excess of $1.4 million by way of an adjustment on account of the husband's pension.

Superannuation agreements

Following a divorce or other relationship breakdown, parties are able to make a "superannuation agreement" about how any superannuation benefit of either party will be split. There are rules about what this agreement needs to say and hence why you should consult a marriage lawyer. An agreement can also be made before or during a marriage or de facto relationship, detailing how any superannuation will be split if there is a marriage or relationship breakdown.

If a superannuation agreement meets certain legal requirements, the agreement is binding and the trustee of a superannuation fund is required to implement the agreement. A Court cannot make an order about a superannuation interest that is dealt with in a superannuation agreement.

Court orders

If there is no agreement between the parties about how to deal with superannuation, then the Court can be asked to make a property settlement order that specifies how superannuation is to be split. If this order is properly constructed, the Court order is binding on the trustee of a superannuation fund, who has to comply with it.

Some complicating factors

There is some complexity relating to the division of superannuation benefits. For example:

1. There are different types of superannuation benefits (for example, accumulation and defined benefit funds, allocated pensions, complying pensions and annuities). They each have different rules.
2. An important part of considering property settlement terms and the split of any superannuation benefit involves requesting information from a superannuation fund about the benefit (this request can be made by a spouse) and ensuring that the benefit is valued in accordance with the Family Law (Superannuation) Regulations.
3. Consideration should be given to how superannuation interest can be split. For example, a split may occur in the form of a specific dollar amount (base amount) or as a percentage of the balance of the party's superannuation fund. This can make a significant difference to the settlement outcome.
4. The parties should consider the eligibility criteria to access superannuation benefits.
5. For a splitting order to be binding on the Trustee of a Superannuation fund, certain requirements must be followed including the provision of procedural fairness to the Trustee.
6. The splitting of superannuation carries its own tax implications. For example, financial advice should be obtained in relation to a payment made under a family law split being a capital gains tax (CGT) exempt event. When dealing with splitting certain tax concessions like roll-over relief can apply. Some funds will even have untaxed elements or other schemes not subject to tax. Advice may also identify wealth management strategies (for example, spouses going through separation may wish to consider the structure of their superannuation asset holdings to be in a position to optimise the $1.6 million transfer balance cap).
7. There are time limitations that may apply. For married couples, applications for property adjustment must be made within 12 months of a divorce becoming final. For de-facto relationships, applications for property adjustment must be made within 2 years of the breakdown of a de facto relationship.

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The law in relation to superannuation provides parties with more flexibility in the way that property settlements are structured. A spouse may consider the option of splitting superannuation to ensure that there is a more equitable outcome for both parties.

Knowing what you may be entitled to is important in ensuring that any asset distribution (which can include superannuation benefits) is fair. This is why it is recommended to speak to a marriage lawyer if you are considering a property settlement. A marriage lawyer from our specialist family law team will work closely with qualified accountants and financial planners to give you the guidance needed. Speak to one of them today!

Contact us on 1800 300 170 or email us at familylaw@matthewsfolbigg.com.au

Disclaimer

Family law situations can be complex and sometimes they can involve serious issues. Information outlined is proposed to provide general guidance only. Due to the seriousness of legal matters as well as the uniqueness of your individual situation, professional advice should be sought. For advice, please contact one of our Marriage Lawyers.