Superannuation in family law matters

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What are the different funds?

The type of funds vary.

The main types of superannuation funds include:

a. Accumulation funds;
b. Self-managed funds;
c. Defined benefit funds.

Accumulation funds are the most common funds we deal with in property settlements. Essentially, it involves your employer making contributions to your superannuation in addition to you salary. The superannuation benefit ‘accumulates’ over the years and as your salary increases.

Self-managed funds are usually more complex than an accumulation fund. Self-managed funds in family law matters usually involve a structure whereby the parties, either individually or through a corporate entity, are the Trustees of the fund. In other words, the fund is controlled by the spouse parties. Self-managed funds usually encompass bank accounts, shares and investment properties of the parties. It is important that we are able to work closely with your accountant when looking at the intricacies of your self-managed fund.

Defined benefit schemes are common for some professions. Cases which involve a defined benefit fund include matters where the client was or is working in the Police Force, the Military or a government organisation like the ATO. In a defined benefit scheme, the recipient of the fund is usually entitled to a pension. That pension may affect the assessment of entitlements in a property matter. Other matters which are important to consider in the assessment of the property matter include the age of the parties, whether the defined benefit fund is commutable and whether the fund is in payment phase or non-payment phase.

Is my superannuation or my partner’s superannuation included?

Contrary to public belief, superannuation is taken into account in a property settlement.

The Court has power to make Orders with respect to parties’ superannuation interest. For example; the Court can make an Order that as part of the property settlement, you receive a portion of your ex partner’s superannuation.

There are complex requirements whereby the fund will need to be notified of any agreement reached by you and your ex-partner.

Now that it is included… What Orders can the Court make about superannuation?

What, if any, Orders are made is discretionary. Each case is different.

There are essentially two different Orders the Court may make about superannuation when deciding your property matter.

The first is what we call ‘splitting the super’. In a superannuation split, either a base dollar amount or a percentage amount in the fund is transferred from one party to the other. Upon the transfer being effected pursuant to the property agreement, the recipient of the transfer will have an amount deposited into their own superannuation fund. That party can than access the funds at a particular age.

The other Order is called a ‘flagging Order’. A flagging Order or agreement is a binding injunction on the trustee of the superannuation fund from making any further payments from the fund. That is, it is an Order which prohibits the ‘controller’ of a superannuation fund to distribute funds in that superannuation account. Once such Order is made, it can only be lifted by way of further Order or agreement. As you may imagine, such Order is helpful in a situation where one party is close to retirement age and will have access to funds and the other party seeks that those funds be preserved at least until their property settlement is finalised.

What protocols must be followed to ensure the superannuation interests can be dealt with?

Before the Court is able to accept a property settlement where there is an Order concerning superannuation being ‘split’, the Court must be satisfied that the Trustee of the fund in question has had the opportunity to review and comment on the proposed Orders sought. This is known as procedural fairness.

The objective of this process is to ensure the fund in question is able to enforce the Order that is to be made. It needs to comply their regulations and protocols.

For example; in some case where there is a defined benefit scheme, the fund may refuse to accept a percentage base split of the fund and seek a dollar based amount split. This is common for these funds because of the complex nature of the fund.

Commonly, before we enter into negotiations on your behalf, it is imperative the value of the fund is verified properly. This may include viewing a superannuation statement or performing a formal valuation of the fund.

It is wise to obtain financial advice about your property settlement and how best to structure your settlement.

So what is the most important aspect for me to take away?

Property settlement not only includes finalising arrangements but it also includes deciding how best to structure your settlement. When filing documents with the Court or attending mediation, the structure you wish to achieve can be put forward. For instance; that you retain 60% of the house and that you receive 50% of superannuation entitlements.

Unfortunately, if a Judge makes a decision, the structure may be different to what you envisage. The reason is that the Court will consider how best to divide the pool of assets (including superannuation) based on factors such as the length of the relationship. Therefore, seek advice from our specialist family lawyers about property settlement including how the Court is likely to deal with your superannuation.