SUPERCENTRAL

Super splitting is more than agreement between the parties

When the Family Court orders are finalised, the parties might think that it's all over, but when it comes to super-splitting there's considerably more to do.

With one in three marriages in Australia likely to end in divorce, the splitting of interests in a Self-Managed Super Fund has raised a number of questions. Under the Family Law Act, superannuation (whether an SMSF or a public offer fund) is treated as a form of property. As a consequence, couples seeking property orders from the Family Court are required to give a full and frank disclosure of all their superannuation interests.

Once both parties have presented the court with a disclosure of their SMSF interests, a valuation will be conducted. This includes a valuation of all assets held in the name of the fund trustee.

As assets in an SMSF are often diverse, there is no standard approach to valuation. Usually, an independent (chosen by the parties) or court appointed expert valuer will conduct a review of the fund.

Once a valuation of the fund has been completed, the court is likely to make a superannuation splitting order. The splitting order will depend on the type of superannuation interest and whether it is in the growth phase or the payment phase.

Common examples include:

1. an order for a member to roll-over their interests into another fund (which also means the member leaving the SMSF);
2. an order for a member to pay a percentage or dollar amount of their pension to the other member; or
3. an order that one of the members give their superannuation interest in the fund to the other member.

Some superannuation interests cannot be split. These include but are not limited to:

1. contributions you make with a personal injury election;
2. transfers from foreign funds;
3. government co-contributions; and
4. super interest that is subject to another unrelated payment split (previous divorce).

Generally, Family Court orders regarding superannuation are often not precise on the method for enacting superannuation splitting. In any case, any split of SMSF contributions must always be compliant with the applicable superannuation and tax laws.

There are a number of common misconceptions about how to split superannuation.

One such is the belief that super splitting converts the fund into a cash asset. Unless members have reached retirement or preservation age, any interest within the fund must not be paid out to a member (or any other individual).

Another is that the parties can agree on what should happen to the super and simply sign resolutions giving effect to that agreement.

These notions are incorrect and dangerous.

The conversion of a member's entitlements under a super split can only be undertaken pursuant to the provisions of Part 7A.2 of the Superannuation Industry (Supervision) Regulations 1994 which are lengthy and can be difficult to comprehend.

Splitting couples should therefore always seek independent legal advice on how to give effect to super splitting orders and on the options for reinvesting their respective interests into another fund whilst ensuring that any action taken remains compliant within the law.

A failure to comply with these regulations will likely cause material adverse tax consequences for the members and the fund.

It is also imperative to remember that contribution splitting in accordance with a Family Court Order has no effect in reducing the amount counted towards the annual concessional contributions cap. Contributions which fall outside the ATO's contributions cap may result in extra tax.

So, if you've been served with a Family Court Super Splitting Order, it is prudent for you and your ex-spouse or partner to obtain independent legal advice to protect yourself from any adverse tax consequences or risk of non-compliance with superannuation law.

For more information on any aspect covered in this article, please call SUPERCentral on 02 8296 6266 or email info@supercentral.com.au.