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Newsletter

Tips and Traps - Super and Family Law

specialising in superannuation valuations for family law purposes since 2003

Abstract – Welcome to the New Year. What better way to start than for practitioners to refresh their skill levels on superannuation and family law. This edition of my newsletter has something for everyone from experienced practitioners to new starters in this very complex field. Of necessity, brevity is required but I am happy to expand on any point. Just click here to send a question. There is also a superannuation tip specifically directed to the new regime from 1 July 2007.

1. **Is it superannuation**? A good starting point! In most circumstances, superannuation is fairly obvious. You sight a member statement. Practitioners should be aware of the following:

   a. Temporary income streams such as pre-assessment payments pending invalidity claims are not splittable.
   b. Small accounts are not splittable. Small is less than $5000.
   c. Reversionary payments to children are not splittable.
   d. Overseas superannuation is not splittable but can be valued and counted as a financial resource.
   e. Compensation type income streams such as Vets Affairs pensions are not splittable. Again, they can be valued as a financial resource.

2. **How do I know if there is superannuation**? There are about 28 million superannuation accounts for about 10 million workers. Most people do not consolidate their superannuation accounts but rather start a fresh every time they change jobs. Practitioners should match the superannuation accounts with the person's employment history to ensure that all superannuation is accounted. For most, where there is employment, there should be a corresponding superannuation account.

3. **When is a family law valuation (FLV) required?** About 80% of superannuation accounts are accumulation accounts and these do not require a FLV. The account balance is the FLV. Self Managed Superannuation Funds (SMSF) do not have a valuation regime and most utilise the last financial statements. However, practitioners should be aware that SMSFs do not have to use market values to obtain audited statements so you should consider obtaining a current valuation of the assets.

4. **How do I recognise a defined benefit fund?** Look for a multiple - lump sum multiple or a pension

multiple and superannuation salary. These are absent in accumulation accounts. Defined benefit funds will require a FLV. A defined benefit scheme can be a lump sum, a pension or a combination of both.

5. **Why is the value of a member statement of a defined benefit fund greater than the FLV?** This is a common question and goes to the heart of valuations. Most defined benefit lump sum schemes assume retirement of age 65. A defined benefit that has accrued before age 65 represents what has accrued to date but it is not payable until the person retires. By then, it would have lost purchasing power and suffered an opportunity loss in terms of investment income. The time value of money is taken into account by a series of discount factors. At age 65, there is no discount. At age 64, there is a very small discount. At age 40, some 25 years before access, the discount factor is more than 50%. The FLV is in fact a net present value. On the other hand, the member statement shows what has accrued as at a point in time. One is looking backwards – the member statement on what has been accrued. The FLV is looking forward as to what the value at the appropriate date would represent if the member retired at age 65.

6. **Why are defined benefit pension schemes FLV higher than the statement?** The FLV of pension schemes generally give a higher value than the member statement reflecting the relative generosity of pension schemes.

7. **What is the impact of not getting a FLV?** The most common mistake made by practitioners is using the member statement to value the superannuation. This would generally work against the member but the reverse could be true for some pension schemes. Claims could be made against PI so be aware of this issue.

8. **What are scheme specific factors?** Most superannuation schemes are valued using the factors in the *Family Law (Superannuation) Regulations 2001*. Those regulations also allow schemes to use alternative factors, collectively referred to as scheme specific factors (SSFs). Those schemes using SSFs and those pending approval are listed on the Family Court web site. Notice of pending SSFs is on the Superannuation Information Form. Practitioners should particularly be aware of those schemes that are pending approval, as the previous valuations are void once SSFs are approved. An example is the NSW State Superannuation Scheme where SSFs should be approved sometime in the next 6 months. When the NSW Police Scheme introduced SSF, the FLV in one of my cases went from $180,000 to $980,000 under the SSF.

9. **What is a Non-Separate Interest?** This is only relevant to defined benefit schemes as most accumulation schemes are forced to establish separate interests. A separate interest is where the superannuation account that is split is transferred to the other party. A non-separate interest (NSI) cannot be split until a payment occurs. Telstra,

and Aussie Post are examples of NSI schemes. Wives who are older than their husband are particularly disadvantaged by NSI. For example, if there is a 5 year age difference and the husband chooses not to retire until age 65, the wife would have to wait until she is 70 before receiving any superannuation. Furthermore, if the superannuation was a pension scheme, and the husband died at 66 without any reversionary beneficiaries, the wife would not receive any further superannuation from the splitting order. In other words, the timing and the quantum of superannuation for the NMS from a NSI are very uncertain. Practitioners should only split NSIs when there are no other options.

10. Match the circumstances. The Full Court case of Coughlan and Coughlan suggested that where the circumstance of the member did not match the assumptions implicit in the valuations, then these should be argued as a 75(2) factor. An example would be where the life expectancy of the member is different from the average. Another would be where the 65 year retirement age is not appropriate because the member's stated intention is to retire earlier.

11. Match the Superannuation to the Period of Marriage. This is probably the aspect most underrated by practitioners. It offers substantial scope for material adjustment to the FLV. The amount to be excluded consists of the superannuation brought into the marriage, and the post separation superannuation. What remains is the amount of superannuation referable to the marriage period. The process of establishing the facts is now described:

a. *Post separation contributions*. The NMS should receive the interest on the base amount from the date of separation until the present time. This is a neutral outcome as the member retains all post separation contributions whilst the wife receives all the interest that she would have received if it had been possible to split the superannuation as at the date of separation. A FLV at date of separation is required. Click here to obtain a copy of the precedent case supporting this approach.
b. Pre-marriage contributions. These are more difficult to quantify because it is not always possible to obtain inputs to do the FLV. In some circumstances, it is possible to recreate the superannuation account. Having obtained the FLV, it is necessary to adjust for price and the time value of money to that prevailing at date of separation.
c. Inappropriateness of using West and Green formula. The Full court case of M & M ruled out the use of this formula. For a discussion, read my last newsletter by clicking here.

12. Consider taxation. If the member is retaining their superannuation in exchange for other assets such as the family home, taxation should be addressed as a matter of equity, particularly if the superannuation is from an unfunded source (mostly Government schemes). The family home contains no taxation whilst superannuation does have embedded taxation. After 1 July 2007 for those over 60, an unfunded scheme still pays 15% tax on any lump sum whilst any pension receives a 10% rebate. For funded schemes, taxation is no longer a live issue.

13. **Orders.** Practitioners should check the web site of the particular superannuation scheme to see if the Trustees have published pro-forma orders on their web site. Some trustees will accept post-dated orders. Be aware that any post-dated orders will see an interest component added for the NMS. Some trustees will not accept type b orders or a percentage split. Practitioners should be aware that these may disadvantage the member as the split will include all post separation contributions. Common errors in orders include misspelling the name of the Trustee and the superannuation scheme.

14. **Self Managed Superannuation Fund (SMSF).** These require special consideration and will be the subject of my next newsletter. Please click here if there is anything else you would like to see addressed in this newsletter.

The New Superannuation Environment - Tips

As most of you would know, the superannuation is set for radical change from 1 July 2007. Some 500 pages of legislation were introduced into the Parliament on Thursday 8 Dec 2006. Simplification and tax free benefits to those over 60 from taxed funds are the main provisions. The Senate is expected to pass the Bill in March giving the industry just 3 months before its date of effect. Huge inflows of money into superannuation are expected.

Tip of the Month – control of superannuation tax concessions has passed from the benefit side (where it was once heavily taxed if the benefits were large) to the contributions side. The new regime restricts the amount of contributions going into superannuation. However, for a short time, the restrictions have been relaxed. Now is the time for making large contributions to superannuation for once the phase in period ends, the maximum contribution will be limited to $50,000 pa if claiming a tax deduction and $150,000 otherwise. Both these figures will be indexed.

Feedback

Please email me any feedback or topics you would like covered in future newsletters.

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