

SMSFs & Family Law Super Splitting

dbalawyers.com.au/smsf-compliance/smsfs-family-law-super-splitting

21/01/2020



Introduction

A superannuation interest is considered 'property' for the purposes of the *Family Law Act 1975* (Cth) ('FLA'). Thus, it may be split in a similar manner as the parties' other assets in response to a relationship breakdown.

Indeed, the superannuation splitting laws extend to all de facto relationships in all states and territories, except for Western Australia where superannuation for de facto couples currently is not a separate splittable asset and instead receives treatment as a financial resource.

This article provides an overview of some of the key aspects to be taken into consideration when undertaking a super split in a self managed superannuation fund.

What is a splitting order?

A superannuation split may occur under either a splitting order or a superannuation agreement, which forms part of a financial agreement ('Splitting Order').

Where an SMSF trustee receives a Splitting Order certain obligations apply. Broadly, the SMSF trustee is bound to apply the terms of the Splitting Order whenever a splittable payment (ie, a spouse's superannuation interest) becomes payable.

Who are the parties?

The superannuation splitting laws refer to the relevant parties as the member and non-member spouse.

The member spouse is the member whose superannuation interest is being split. Typically, the member spouse will be the member remaining in the SMSF. In contrast, the member obtaining the benefit is referred to as the non-member spouse. Often the non-member spouse is the departing member exiting the fund once the payment split is carried out.

Note that if there is a split of each member's interest in the same SMSF, both parties may be a member spouse in respect of their own interest and non-member spouse in respect of their former partner's interest.

What is a splittable payment?

A splittable payment includes the following:

- a payment to a spouse;
- a payment to another person; or
- a payment to the legal personal representative ('LPR') of the spouse, after the death of the spouse.

While splittable payments typically occur on the retirement, rollover or death of a member, a Splitting Order places an additional obligation on an SMSF trustee to split the member's benefit between the member and non-member spouse, pursuant to the particular terms of the Splitting Order.

Splitting a superannuation interest

Indeed, the SMSF trustee must observe the operating standards contained in Part 7A of the *Superannuation Industry (Supervision) Regulations 1994* (Cth) ('SISR') when they receive a Splitting Order. The Splitting Order will set out the terms of the superannuation split. Broadly, the amount of a Splitting Order may be determined by either a 'base amount' or 'percentage' method.

Under a base amount split, a Splitting Order will specify a particular amount or formula for determining the amount payable. In contrast, under a percentage interest split, the amount payable is determined by reference to a percentage payable to the non-member spouse.

Naturally, the most appropriate splitting method will depend on a number of factors. Thus, each party should ensure they obtain expert advice from their family lawyer and adviser before deciding on what method best suits their particular circumstances.

Once the superannuation interest becomes subject to a payment split, the non-member spouse may generally request one of the following options in respect of the interest:

- create a new interest in the same fund -- this option may be precluded under the SMSF deed;
- transfer the benefits to another complying rollover fund; or
- receive the amount as a lump sum payment if the amount constitutes unrestricted non-preserved benefits.

Once the non-member spouse has made an election in relation to how the superannuation interest should be dealt with, the SMSF trustee broadly has an obligation to give effect to that choice.

Implementing Splitting Orders

While the FLA empowers the court to make orders in relation to the superannuation interests of the parties, what SMSF trustees and advisers often do not realise is that Splitting Orders do not enliven the relevant splitting provisions in the SISR, nor do they bind the SMSF trustee as a third party to the relationship.

Accordingly, additional documents are required to implement a legally effective superannuation split.

DBA Lawyers' suite of Family Law SuperSplitting documents provides practical guidance to SMSF trustees and advisers in relation to the steps required by the SISR to implement a legally effective split.

These documents cover both married couples and couples terminating a de facto relationship including same sex relationships.

SuperSplitting in an SMSF context typically results in a restructure of an SMSF. Naturally, each member that is undergoing a separation should consider their wills, powers of attorney, binding death benefit nominations, shareholdings/directorships in companies, who are nominated as appointors to any discretionary trusts, etc, that invariably must be changed after a separation and/or divorce.

Other matters

Numerous other issues should be considered before implementing a Splitting Order. In particular, among other things, the following should be considered:

- transfer balance account issues;
- tax consequences including capital gains tax ('CGT') liabilities and whether any CGT rollover relief should be claimed; and
- stamp duty.

Conclusion

There are a range of issues involved with a super split. A super split must be properly documented and strategically managed to be legally effective. We offer a document suite and advice that focuses on SMSF aspects.

Note that the above commentary is a general summary only and is not intended to be relied on as advice.

Related articles

<https://www.dbalawyers.com.au/smsf-compliance/family-law-supersplitting-kit-smsfs/>

* * *

Note: DBA Lawyers hold SMSF CPD training at venues all around. For more details or to register, visit www.dbanetwork.com.au or call 03 9092 9400.

For more information regarding how DBA Lawyers can assist in your SMSF practice, visit www.dbalawyers.com.au.

Daniel Butler, Director

DBA LAWYERS

20 January 2020

Download date: 29/01/2020 Copyright © DBA Lawyers Pty Ltd.

Any information provided on this website (including any blog posts) are mere summaries and general information provided for educational purposes only. This is no substitute for expert advice. Anyone seeking to rely on this content should obtain expert advice to confirm particular issues especially as the law is subject to ongoing changes and substantial penalties can be imposed.

As a law firm DBA Lawyers Pty Ltd is not licensed to give financial product advice under the *Corporations Act 2001* (Cth).