



SUPER - IT PAYS TO TAKE AN INTEREST

SELF MANAGED SUPERANNUATION FUNDS - TRUSTEE DUTIES IN RELATION TO A MARRIAGE BREAKDOWN

The Family Law Legislation Amendment (Superannuation) Act 2001 was introduced to provide the division of superannuation interest upon marriage breakdown. These changes took effect on 28 December 2002. Many of the changes are contained in the Family Law Act 1975 and corresponding Regulations (referred to as Family Law provisions). The Australian Taxation office (ATO) does not administer the Family Law provisions. Therefore, any questions concerning these provisions should be directed to your legal advisor or the Family Law Court.

Who is affected by the legislation?

The amendments apply to all marriages including those that were dissolved before 28 December 2002. However, the amendments **do not** apply to marriages where a property settlement has already been approved and concluded under a court approved agreement or a court order. If you are unsure whether the legislation applies to your circumstances, you may need to seek legal advice.

These provisions do not apply to defacto relationships.

What are the changes?

In the event of marriage breakdown a superannuation agreement may be made or the Court may make an order specifying the manner in which superannuation interests are to be divided. It will be possible to split the superannuation interests at the time of marriage breakdown **'interest split'** or the split may occur when a payment is made usually upon retirement **'payment split'**.

For more information on interest splits and payment splits and the taxation implications of either option, please refer to the fact sheets called *Taxation impacts of marriage breakdown for superannuation providers and RBLs treatment of benefits paid as the result of marriage breakdown*.

What is the process required under the Family Law Act 1975?

Both parties would obtain information from the trustee on the value of the interest. The Family Law provisions require the trustee to provide the spouse or any person who intends to enter into a superannuation agreement with the member, information about a superannuation interest. This information is specified in Regulation 67 of the Family Law (Superannuation) Regulations 2001 (FLS Regs) in relation to the superannuation interest of a member of a self managed superannuation fund.

The Family Law regulations also stipulate how the benefit interests are to be valued. If you have any queries concerning either or both of these aspects, it is recommended that you seek legal advice.

After obtaining information about the superannuation interest, both parties would then prepare a 'Superannuation Agreement' and lodge this documents with the trustee, together with proof of marriage breakdown or separation. The superannuation agreement will specify how future payments are to be split.

Parties may also agree to 'flag' a benefit. This prevents the trustee from paying out the benefit to the member spouse without first asking the parties how they wish to split the benefit. This would be used where the parties are close to retirement and would rather wait and see what the exact benefit will be before determining how to split it.



What if the parties are unable to agree on the splitting of superannuation payments?

The Family court may become involved if the parties are unable to agree between themselves on how to split their benefit. The court has the ability to determine how a benefit is to be split and may order the trustee to split the benefit or flag the benefit.

What if the court order/agreement does not conform to the rules of the trust deed?

Superannuation interests **must** be divided on the separation of parties to a marriage despite any contrary intentions otherwise provided for in legislation or a superannuation fund's trust deed.

What superannuation interests can be split?

Superannuation interest that may be split are outlined in the Family Law provisions. Examples of superannuation interest that are splittable include:

- Payment to the spouse;
- Amounts rolled-over by the member spouse to another superannuation fund;
- A payment to the legal personal representative of the spouse after the death of the spouse;
- A payment to the legal personal representative of a reversionary beneficiary after the death of the reversionary beneficiary.

What payments cannot be split?

Some payments are not splittable and are detailed in the Family Law provisions. Examples of superannuation interest that are unsplitable include:

- Superannuation interests that have a value of less than \$5,000;
- Payments made to a member spouse on compassionate grounds;
- Payments made to a member spouse due to severe financial hardship;
- Payments made to a member spouse due to incapacitation.

How will future payments be split under the superannuation agreement or court order?

The superannuation agreement will specify how future payments are to be split. The superannuation agreement may specify a base amount or apply a percentage to all payments. If the base amount option is chosen, the trustee notionally allocates this amount to the non-member spouse. This notional amount is then adjusted by an amount of interest for each accrual period until payment. When the benefit is eventually paid to the member spouse the trustee must first pay the non-member spouse their adjusted share and the member spouse receives the residual.

If the percentage method is chosen the trustee applies this percentage to the benefit when required to work out the non-member spouse's benefit where payment is required. Details concerning how payments are to be split are contained in the Family Law Regulations.



When does a payment split operate?

The Family Law Act 1975 provides that the operative time for a payment split will be the beginning of the fourth working day after the day on which a copy of the agreement is served on the trustee. However, for SMSFs (Self Managed Super Funds) it is expected that the payment split will be operative immediately. The trustee must receive evidence of the fact that the parties have separated.

When does a payment flag operate?

For SMSFs, the operative time for a payment flag is as soon as it is served on the trustee.

Is the non-member spouse considered to be a member of the fund?

Yes, the Superannuation Industry (Supervision) Regulations 1994 (SISR) include a modified meaning of member. This definition applies from the operative time of payment split and applies in relation to the SIS provisions dealing with the prohibition of lending to members, the in-house asset rules and the definition of SMSF.

However, where a superannuation fund ceases to be a SMSF due to the admission of the non-member spouse as a new member, the fund has six months in which to organise their affairs before it ceases to be a SMSF.

Are the acquisition rules under section 66 of the Superannuation Industry (Supervision) Act 1993 (SISA) contravened when an asset is transferred from one SMSF to another SMSF as the result of a payment split?

In most circumstances an asset (notwithstanding certain exceptions) transferred from one SMSF to another SMSF would constitute the acquisition of an asset from a related party and hence result in a contravention of section 66 of SISA.

However, Treasury have confirmed that it is the policy intention to ensure that assets may be transferred from a member's SMSF to an SMSF of their former spouse without contravening section 66 of SISA when the asset transfer is due to the member spouse's superannuation interest being subject to a payment split.

The Tax Office is currently considering the appropriate process necessary to give effect to this policy intention.

In the interim any request to have such an acquisition exempted should be forwarded in writing.

When may an SMSF accept contributions where benefits have been subject to a payment split?

A regulated superannuation fund may accept contributions in respect of a member who is under the age of 65 where the contributions are in satisfaction of an entitlement under a payment split.



What information should be provided by the trustee when a payment becomes subject to a payment split?

The fund must notify the member spouse and the non-member spouse in writing that the interest is subject to a payment split. This notice is referred to as a payment split notice and must be provided:

- i. within 28 days of a payment split under a superannuation agreement or flag lifting agreement; or
- ii. If a splitting order, by the **later** of the end of 28 days after the operative time for the payment split and the end of 28 days after the trustee receives a copy of the order.

In addition, when the trustee gives the payment split notice certain information must also be forwarded to the non-member spouse including:

- contact details of the fund;
- whether the governing rules of the fund will allow the non-member spouse to be a member of the fund;
- circumstances under which the entitlement is payable to the non-member spouse;
- the value of the ETP components;
- Where the non-member spouse is able to become a member of the fund, all relevant details to understand the management and financial condition of the fund.

Regulation 2.36C of SISR specifies the requirements in full.

What options are available for a non-member spouse in relation to superannuation interests?

Division 7A.2 SISR provides options for certain superannuation interests.

Where an interest in a regulated superannuation fund is subject to a payment split and:

- the interest is an accumulation interest that is in the growth phase; or
- an allocated pension is being paid in respect of this interest;

The non-member spouse may request the trustee to:

- i. create a new interest for the non-member spouse; or
- ii. Roll-over or transfer the amount to which the non-member spouse is entitled to another regulated superannuation fund or approved deposit fund (ADF).

This request must be in writing, signed by the non-member spouse and given to the trustee within 28 days after the trustee provided a payment split notice to the non-member spouse. The request must state the date on which the request was given to the trustee. It is possible that the trustee may allow a longer period of time for the non-member spouse to submit their request.

If the trustee does not receive a request from the non-member spouse within 28 days concerning what action is to be taken, the trustee may:

- i. create a new interest; or
- ii. Roll-over or transfer the transferable benefits to another regulated superannuation fund/ADF or eligible roll-over fund.

However, before the trustee can roll-over or transfer the entitlement to an eligible roll-over fund, the trustee must give further written notice to the non-member spouse requesting them to nominate a fund within 28 days from the date of the notice.



The notice must specify the name and contact details of the eligible roll-over fund to which the entitlement will be transferred if a nomination is not received. If the non-member spouse responds, the trustee simply rolls-over or transfers the entitlement to the nominated fund.

However, if the non-member spouse does not stipulate a fund, the trustee can roll-over the entitlement into the eligible roll-over fund.

Request for a new interest

Where a trustee needs to create a new interest for the non-member spouse, the method by which value of the new interest will be calculated will depend upon whether the payment split is a base amount or percentage payment split. The specific requirements are detailed in regulation 7A.11 SISR.

The trustee must reduce the member spouse's interest by the value of the benefits that the non-member spouse has in the new interest.

The trustee must ensure the amounts are taken proportionately from the unrestricted non-preserved benefits or preserved benefits of the member spouse when creating the new interest.

A new interest is created either on the day the trustee receives the request or where the non-member spouse did not make a request (new account created on trustee's initiative), on the twenty-ninth day after the day when the payment split notice was given by the trustee to the non-member spouse. The trustee must notify the non-member spouse within 28 days of creating the new interest. For more information please see a copy of the fact sheet *Taxation impacts of marriage breakdown for superannuation providers (NAT 7827)*.

Rolling-over or transferring transferable benefits

Where a trustee rolls-over or transfers the member spouse's benefits, amounts must be taken proportionally from the unrestricted non-preserved benefits, restricted non-preserved benefits and preserved benefits of the member spouse.

Where a non-member spouse specifically requests the benefits to be rolled-over or nominates in writing that the benefits be rolled-over, the trustee must roll-over or transfer the benefits within 90 days of receiving the request or nomination.

Where the trustee does not receive a request or nomination concerning the roll-over or transfer of the benefits, the trustee may roll-over within 90 days after the 28 days period that the non-member spouse was given in order to nominate a fund.

The trustee must notify the non-member spouse of the roll-over or transfer within 28 days of the roll-over or transfer taking place.

Request for a lump sum payment

A non-member spouse may request a lump sum payment provided they have satisfied a relevant condition of release at the operative time for the payment split. A relevant condition of release for the non-member spouse is defined as meaning retirement, death, permanent incapacity or attaining age 65.

The request by a non-member spouse for a lump sum payment must be made before the end of 28 days after the trustee has given the payment split notice (or longer if trustee allows) to the non-member spouse.

In paying a lump sum, the trustee must ensure the amounts are taken proportionately from the unrestricted non-preserved benefits, restricted non-preserved benefits or preserved benefits of the member spouse.



The value of the member spouse's benefits must be reduced by the amount paid to the non-member spouse.

The value of the member spouse's benefits must be reduced by the amount paid to the non-member spouse.

The trustee must pay the lump sum within 90 days after receiving a request for payment or a longer period allowed by the Regulator.

What if the governing rules of the SMSF do not allow a new interest to be created?

In these circumstances the trustee should request that the non-member spouse nominate another superannuation fund to enable a roll-over. If the non-member spouse fails to provide information of a suitable superannuation fund, the trustee may roll-over to an eligible roll-over fund.

What if the superannuation interest is not an accumulation interest in growth phase or an allocated pension being paid?

This may occur where the member spouse is a member, has a defined benefit interest and the member spouse is entitled to a payment because they have met a condition of release. Where the non-member spouse is entitled to a payment because they have met a condition of release.

Where the non-member spouse does **not** satisfy a relevant condition of release (explained above) at the time of the splittable payment, the trustee may:

- i. allocate an amount to an interest that the trustee creates for the non-member spouse; or
- ii. Roll-over or transfer the amount to which the non-member is entitled to a regulated superannuation or an RSA to be held for the benefit of the non-member spouse.

If the trustee allocates rolls-over or transfers the benefit, the trustee must have received from the non-member spouse consent in writing to the allocation, roll-over or transfer of benefits. If not, the trustee must have reasonable grounds to believe that the trustee of the receiving fund has received written consent to the roll-over, allocation or transfer.

If the non-member spouse's entitlement under the payment split is to be paid as a lump sum, the trustee must allocate, roll-over or transfer the lump sum within 90 days after the splittable payment becomes payable.

If the member spouse is being paid a pension, the trustee must allocate, roll-over or transfer the amounts to which the non-member spouse is entitled in accordance with the frequency stipulated in the governing rules of the fund or if no such stipulation exists, at least annually.

If the member spouse is being paid a pension on or before the operative time for the payment split, the trustee of the fund must pay to the non-member spouse when the splittable payment is payable, the amount to which the non-member spouse is entitled.

Once the non-member spouse satisfies a relevant condition of release at the time of the splittable payment, the trustee of the fund must:

- i. pay the amount the non-member spouse is entitled to; or
- ii. where the benefit is not a pension and the non-member spouse so requests:
 - a. allocate the amount to an interest the trustee created for the non-member spouse; or
 - b. Roll-over or transfer the amount to another regulated superannuation fund nominated by the non-member spouse.



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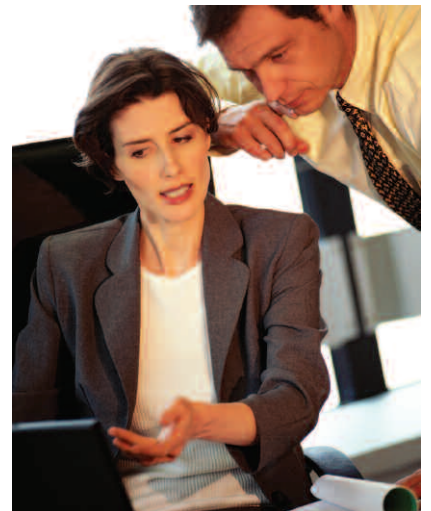
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The solicitors in our family law section are Warren Tegg, Kate Murphy and Joanne Bennett



Warren Tegg

Warren was admitted to practice as a Solicitor of the Supreme Court of Queensland and the High Court of Australia in 1979. He ran his own legal practice specialising in Family Law and Business Advice from 1980 until 2001 before merging with Bennett Carroll. Warren has been helping people with their Family Law problems since the inception of the Family Law Act in 1976.

Warren is Department Head with the Family Law division of Bennett Carroll. He brings to the department a wealth of experience that includes some five years running his own call centre for people with Family Law problems, as well as acting as a sessional mediator with Relationships Australia Queensland from 1989 to 1994. He is also the General Manager of the Master Guidance Company, which is a counselling service owned by Bennett Carroll.

Warren has served on a number of Queensland Law Society committees during his career and is currently a member the Small Practice Management division where he has been called upon to speak at State conferences on legal practice.



Kate Murphy

Originally from Northern NSW, Kate studied at Queensland University of Technology graduating in 2005 with a Bachelor of Laws and a Bachelor of Business. She has a strong interest in Family Law, which extends to international law relating to marriage and children.

Kate was admitted to the Supreme Court of Queensland in 2006 and the High Court of Australia in 2007. Kate has over 4 years extensive experience in Family Law, as well as engaging in Criminal and Commercial Law. Kate has also had the benefit of being trained with Pauline Tesler, with a strong focus on negotiation.

Kate is a member of the Queensland young lawyers association.

Joanne Bennett

Joanne graduated from Deakin University before completing her Professional Legal Training at Bond University in 2003 and was admitted in December that year.

Joanne is an experienced family lawyer and can offer professional assistance and guidance in all types of family law matters including those involving children and financial issues, de facto relationships, pre-nuptials and parental orders.

Joanne also has extensive Commercial Law experience in vital areas such as property, company structures, franchise agreements, joint venture agreements and leases.

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