

## The Weekend Australian

Edition 1 - All-round CountrySAT 08 FEB 2003, Page 038

### Now super joins the Great Divide

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Once sacrosanct, super is now up for grabs in the Family Court, thanks to new laws. But it's not always the best move, **Jacquie** Hayes reports

NEW legislation that treats superannuation as property when couples divorce and allows it to be split has been tested in the courts.

In what's believed to be the first case since the legislation came into effect on December 28, the Family Court last week arrived at a settlement deemed to be "just and equitable" for both parties -- although it wasn't what either had initially hoped for.

Before the law's passage, super proceeds were quarantined from creditors, including spouses seeking a property settlement in the event of marriage breakdown.

It was considered a financial resource, and not taken into account when dividing other property.

If there was only one superannuated partner, that person was often left with their super, while the spouse ended up with a greater share of more accessible assets such as the family home, but no retirement savings.

But now some experts warn that the new law might not be the best avenue for everyone.

"There's a danger that people will split superannuation just because they now can," says Jennifer Brookhouse, technical manager at financial planning firm RetireInvest.

"The new legislation doesn't make it compulsory to split the superannuation benefit. In some cases, it could actually disadvantage one or both parties."

Splitting super can create immediate financial difficulties, perhaps requiring the marital home to be sold so the remaining assets can be divided equitably.

This could leave both parties without enough spare cash with which to buy a new home.

"Even where the marital home remains with one party, if the other person requires immediate funds to set up another household, receiving or retaining a preserved superannuation benefit as a major part of their settlement may not be an attractive option," she says.

The issue will have greatest relevance for couples where one partner is the main or only breadwinner.

It will also resonate for women who've given up their careers to care for children, and either not worked or only worked part-time for many years.

"Post-divorce, women often return to full-time work, but this may be too late to generate any meaningful level of superannuation savings," she says.

"Receiving a share of their partner's super may be an important step in ensuring an adequate retirement income."

The case that was wound up last week is one in point.

**Nabil Wahhab**, a family law specialist with **The Argyle Partnership Lawyers**, says his client, the husband, was prepared to split his super benefit with his wife.

"The interesting thing about this case is the husband said the wife should share his accumulated super, whereas the wife wanted the cash -- that is, the bulk of the proceeds from the sale of the home," **Wahhab** says. If the judge had decided in her favour, the husband would have been super-rich but asset-poor.

This would have made it difficult for him to set up a house for himself and his children, who would spend 40 per cent of their time with him under the terms of the custody agreement.

"The evidence was that both parties wanted to purchase something for themselves and their children," **Wahhab** says.

"If my client couldn't have any cash, it would have made it difficult for him to go out and get a loan."

The better arrangement, in the judge's view, was that the wife should get some super and cash.

"The judge said if she didn't give the wife super, it's highly unlikely she'd ever obtain superannuation," **Wahhab** says.

"She plans to work again, but she doesn't have super, and is close to her mid-40s. The judge felt it would be better for her to have some."

The judge finally awarded the wife 20 per cent of her husband's super, and ordered that she be compensated with a greater share (66.5 per cent) of the assets from the sale of the house. She'll also get a further sum of money, in respect of other assets the parties owned.

**Wahhab** says the case will be a trend-setter in the Family Court.

"A judge has discretion in relation to the percentage of super they give to a spouse, and then compensate that spouse with other assets that are realisable to give them their entitlement," he says.

"In effect, what the judge did in this case (was decide) it wouldn't be just and equitable to give her half in super because she wouldn't be able to provide for herself and the children. So she gave her less in super and more in assets."

Brookhouse says separating couples with existing super benefits should beware of how receiving super can affect their financial arrangements.

If additional funds push that person's super balance over their reasonable benefit limit (the total amount on which they can get tax concessions), the excess benefit could be taxed at 48.5 per cent if subsequently taken as cash.

But those eligible for social security could benefit from taking super as part of their property settlement, she says.

For a start, funds held in superannuation are exempt from means-testing if the owner is below pension age.

“Receiving super as part of a property settlement may allow people to maintain their entitlements or make them eligible to receive social security benefits,.” Brookhouse says