

Marriage break-up: avoiding a super split with your client

The right advice on super splitting may well save your client from financial ruin, writes **NABIL WAHHAB**.

Super splitting on marriage breakdown was thought to be easy. A process of valuing a superannuation entitlement and dividing it in two. This is the easy part. The difficult part is when clients do not receive, or are not advised, to obtain financial and tax advice.

The risk of not being advised about the financial and tax consequences of a super split on marriage breakdown may spell financial ruin to your client's retirement plans in the long-term and perhaps significant tax liabilities in the short-term.

Imagine one of your clients is going through a divorce. She and her husband have between them \$500,000 in a self-managed super fund. Let us assume that her account has a balance of \$300,000 and her husband a balance of \$200,000.

She advises you that she has agreed to split her super interest with her former husband on a 50/50 basis, but they have not valued the superannuation interest nor obtained any financial planning, taxation or even practical advice about the mix of assets that would be rolled out if a superannuation splitting order is made by the Family Court.

Do you have any duty to your client to give advice in relation to her proposal? Have you thought

hearing the judge was advised that the husband had \$130,445 in his superannuation account and the wife had \$103,032. No other information was provided to the court as to the fund.

The court did not have any breakdown of the cash, investments and assets that comprised the superannuation fund and individual members' entitlements to each component. Nor was it aware of the taxation implications that would follow, including any capital gains tax or any stamp duty that may become payable.

The court was not even informed whether the super fund was fully compliant, particularly in regards to the lodgement of taxation returns and other required documents for the current financial year in which the proposed roll-over was to occur. These issues were not answered by the parties or their lawyers when they appeared before the judge.

The orders sought by the parties gave the husband an unfettered discretion to select his preferred assets and investments for his long-term benefit. The court was, therefore, left in the dark as to whether there were any particular taxation consequences or other investment criteria applicable to the various assets within the superannuation fund.

The court was also unaware of



Advice is an essential part of a super split.

assets should be rolled out. A spouse may (once the orders are made) decide that the other spouse should receive the publicly listed shares or that they receive, say, a block of land owned by the fund. If the block of land is rolled out, there will be stamp duty payable by the spouse exiting the fund.

While these problem areas are not new, the new super splitting law has brought a number of issues to light. The number of do-it-yourself (DIY) funds has increased significantly and in years to come there will be problems for separating spouses, as well as spouses wishing to exit the DIY super fund for any other



purported to do in *Wrigley's* was effect an interest split rather than a payment split. This was outside the court's jurisdiction.

Particularly in DIY super funds, it is crucial that parties incorporate in the settlement the class of assets that will be rolled-out, or provide a formula to give effect to their intentions. If no such agreement is reached, one spouse may have sole discretion to determine the other spouse's asset mix entitlement.

Such an unfettered discretion can have disastrous effects on your client's future financial planning and estate planning for retirement or incur significant stamp duties and other expenses.

The effect of the judge's decision in *Wrigley's* was a saving grace for the parties – or at least one of them. The parties now have an opportunity to obtain a valuation of the super interest, consider the taxation issues, obtain financial advice and work out a formula to determine the asset mix on roll-out of the interest.

Lawyers, advisers and accountants have a common goal – namely, to protect their clients on separation. There is a great need for these professionals to collaborate, so that if a super splitting or roll-out order is sought, advisers can investigate and advise their client as to the asset mix, taxation, stamp duty and financial planning issues, including the impact of super splitting orders on your client's retirement plans.

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wife received her 50 per cent in cash (as the husband had determined) and he retained investments in properties or shares which increase in value over time, it is possible that the wife could have an action for negligence against the lawyer, adviser or accountant for failing to advise her on the most appropriate asset mix for the roll-out or splitting.

The other aspect of the *Wrigley's* case was that the parties sought an order to the effect that the wife receive the equivalent of 50 per cent of the total interest in the super fund. This is equivalent to a super splitting order. However, the parties did not obtain any valuation of the superannuation interest. It is for this reason as well that the judge rejected the proposed orders as he was not satisfied of the value of the super fund.

Super splitting law is not about interest split but payment split. The court needs to know the value of the fund (less any surcharge debt and any previous super split) before splitting. What the parties

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about whether or not the Family Court has the power to make an order of the kind that your client has mentioned? Have you spoken to your client's family lawyer to discuss her proposal?

Most of these questions were dealt with recently by the Family Court. In the *Marriage of Wrigley*, the court was asked by the parties to endorse Consent Orders. In the orders, the parties agreed that the husband would roll out the equivalent of 50 per cent of his self-managed super fund to his former wife.

The super interest was not valued, although on the day of the

whether the husband would retain assets or investments that could bestow him with a better income stream or have improved growth prospects than the ones he would transfer to his former wife. Because of the issues raised above, the judge refused to make the order for super splitting.

Most super fund trust deeds are not specific as to the mix of assets that each member will receive on rolling out of their interests. It is therefore left to the trustees to undertake the task. If the husband and wife are joint trustees, there is usually conflict as to which

reason unless proper planning and advice is received.

Lawyers, accountants and financial advisers owe a duty to their clients to investigate, or at least advise, on the issues highlighted here. If the adviser or accountant knows of an impending court case, and the client's proposals, the adviser or accountant has a positive obligation to discuss the proposal for rolling-out or splitting with the clients and point out the tax and financial implications of the split or roll-out.

If the splitting orders were made by the judge in *Wrigley's*, and the