

TOOLBOX

Super trustees breathe a sigh of relief

The super splitting law is not as complicated as first thought, **NABIL WAHHAB** says.

On May 30, 2003, the full court of the Family Court handed down a decision in the case of Hickey, stating that formal valuation of superannuation interests is not mandatory in every family law matter.

The issue before the court was whether, in proceedings where parties agree on the value of the superannuation interests and each of them will retain their respective superannuation, such an order is a splitting order.

In Hickey, the parties agreed the wife had an accumulation interest in the growth phase of approximately \$25,000 and the husband had an accumulation interest in the growth phase of approximately \$10,600. Both parties were less than 55 years of age.

The trustees of the respective superannuation funds were independent. Neither party satisfied any condition of release and neither sought information from the Superannuation Trustees (the Form 6), nor had they obtained a valuation of the superannuation interests. They simply agreed!

The parties in Hickey filed terms of settlement in the Family Court in relation to property settlement and as part of that order sought the following declaration:

"That, except as otherwise provided in these orders, the husband and wife each be declared the sole legal and beneficial owners of all items of property or resource including money, motor vehicles, insurance, equities, superannuation entitlements and personal effects currently in the possession or control of each of them respectively."

This declaration was the only reference in the terms of settlement in relation to superannuation. One of the questions the court had to answer was whether such a dec-

laration was capable of being made by the court and if so, whether the declaration was a splitting order. Put another way, the court had to ask itself whether the parties can organise their own affairs and enjoy the benefits of the new super splitting law.

Under the new law, a court cannot make a super splitting order that is expressed to bind the trustees of the eligible superannuation interests, unless the trustee has been accorded procedural fairness. A trustee must be given notice as a pre-condition to being bound by the order.

Usually this obligation is satisfied by the party seeking a splitting order serving a copy of the family law application or the order that a party will ultimately seek in the Family Court on the trustee, some time prior to the commencement of the hearing. In the case of Hickey, the parties had not informed the trustees of the declaration, they simply agreed between themselves.

The object of the new law is to allow certain payments in respect of superannuation to be allocated between the parties to a marriage, either by agreement or by court order. Under the new law, superannuation is treated as property for the purposes of family law proceedings and is capable of being split.

Accordingly, the court may make an order allocating a defined amount to a spouse (base amount), make an order allocating a defined percentage to a spouse or make an order applicable to percentage only interests.

When making such an order, the court exercises its powers under Section 79 of the Family Law Act, which deals with alteration of property interests. Any super splitting order made must



Couples can still make their own decisions about splitting super.

be just and equitable. There is no mandatory obligation on the court to make an order in relation to superannuation, however, if it does, that split must be in accordance with the new law.

This is not to say that Parliament intended to make the splitting of superannuation optional after the commencement of the new law on December 28, 2002, however, it did intend to make super splitting and flagging orders optional in property proceedings in the court's consideration of the appropriate order.

The effect of the new law is to give the court the discretion to make splitting or flagging orders in appropriate circumstances, but not to compel the court to make such an order in every case. This also gives the court the flexibility to decide on the mix of division of property and super between parties.

The court decided in Hickey that an order whereby an adjustment is made to the other property having regard to the value of the superannuation interest is not an order "in relation to a superannuation interest".

The effect of the decision in Hickey is to restore common sense to a debate that has been brewing for two years. The court's decision means that in most cases people

do not have to obtain a valuation of a superannuation interest, they can simply agree – that should be easy in the vast majority of cases, especially where the interest is an accumulation interest in the growth phase.

In most cases, the value of the interests appears on the member's statement and (if??) it is submitted, a valuation is not required, although we have to wait a little longer to receive guidance from the full court on this issue.

If there is any splitting or flagging order sought, whether in relation to accumulation interest or defined benefit interest, the trustee will need to be accorded procedural fairness and provided with the opportunity to be heard in relation to the order sought. The trustee must therefore be given a copy of the orders sought within a reasonable time prior to the date of the hearing.

Certainly there are some superannuation interests where parties will need information about the interest and the valuation is required, but this is more likely to be the case with defined benefit or hybrid interests.

Nabil Wahhab is an accredited specialist in family law. He is an associate with Sydney law firm, The Argyle Partnership, Lawyers.

Tip of the week: To PDF or not to PDF

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PDFs aren't all that great

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Tip supplied by Debbie Mayo-Smith of Successful Internet Strategies – www.successis.co.nz

Q&A...

Question: I am an employer and I understand that I am required to make superannuation guarantee contributions for my employees on a quarterly basis. When I make contributions for a particular quarter, am I permitted to make additional contributions that apply to future periods?

Answer: Yes, contributions can be made towards a future quarter providing the contributions are not made in respect of

IntegraTec's JASON MENZIES answers your questions in depth.

a period more than 12 months from the beginning of the quarter in which the contribution was made.

For example, if a contribution is made on July 15, 2003, (that is, in the September quarter 2003), and the contribution relates to a future period, the contribution can count towards the next three quarters up until the quarter ended June 30, 2004.

Contributions cannot, however, be counted twice, that is, once a contribution is counted in a particular quarter it cannot be counted towards future quarters.

Another point to note is that contribu-

tions cannot count towards previous quarters after the cut-off date for the quarter. For example, the cut-off date for the quarter ended September 30, 2003, is October 28, 2003. Any contributions made after October 28, 2003, cannot be counted towards an employer's superannuation guarantee liability for the September quarter 2003 or any previous quarter.

Where an employer has not made their superannuation guarantee contribution by the cut-off date, they are required to make a payment of the superannuation guarantee charge to the Australian Taxation Office.

Reference: S23 (7) S23(8) of the Superannuation Guarantee Administration Act 1992.

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Got a question? E-mail: questions@integratec.com.au

