



Superannuation splitting under the family law

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Under Australian family law, superannuation is treated as an asset. You should consider the balance of your and your former partner's superannuation when negotiating and formalising a property settlement.

In most cases, the Federal Circuit and Family Court of Australia looks at superannuation separately from the parties' other assets and debts. This is called a "two-pool" approach. In this article, we are assuming that a two-pool approach is being used.

In this article, we will discuss:

- How superannuation entitlements can be distributed in a property settlement;
- How to calculate a superannuation split;
- Superannuation entitlements as a negotiating tool; and
- How to formalise and effect a superannuation split.

How are superannuation entitlements likely to be distributed in a property settlement?

Case law provides some guidance about how superannuation entitlements are distributed in a property settlement.

When considering whether a super split is appropriate, it is important to consider whether the day-to-day contributions of one party contributed to the growth of the other party's superannuation.

For example, if one party ceases work to be the primary carer of the children, they are indirectly contributing to the growth of the other party's superannuation. By staying home to care for the children they enabled the other party to work and accumulate superannuation.

The length of the relationship will often determine the appropriateness of a superannuation split. This approach is applicable in Victoria. You should seek advice from a family law specialist in your State.

For example:

Long-term relationship (10+ years)

In long-term relationships, **an equalisation of the whole of the parties' superannuation** (see more on this below) is likely to be considered appropriate.

Short-term relationships (5 years or less)

In short-term relationships, a superannuation split may not be appropriate. If no super split occurs, each party would simply retain their own superannuation entitlements.

Medium-term relationships (between 5 years and 10 years)

In medium-term relationships, **an equalisation of the superannuation accumulated by the parties during the relationship** (see below) may be appropriate.

The Federal Circuit and Family Court of Australia can determine whether there should be a distribution of the parties' superannuation entitlements. In addition to the length of the parties' relationship, the Court will consider:

- whether the parties have children or dependants;
- each party's respective superannuation balance at the start of the relationship (i.e. their initial contribution of super);
- the age and health of the parties and their ability to accumulate superannuation in the future;
- the nature of the parties' financial relationship (i.e. did they intermingle their finances); and
- whether it is just and equitable for there to be a superannuation splitting order.

These matters can be nuanced, and so appropriateness of a superannuation split will differ on a case-by-case basis. You should seek legal advice about your entitlement to a super split, regardless of the length of your relationship.

What kind of superannuation interests can be split?

Most superannuation interests can be split under the family law. This includes:

- an accumulation interest (usually held with an industry/retail fund);
- self-managed-superannuation-funds (SMSFs);
- defined benefit superannuation interests (sometimes held by government or emergency services employees); and
- some superannuation pensions.

What superannuation interests cannot be split?

Not all superannuation interests or payments made to a member of a super fund can be split under the Family Law Act. Examples include:

1. A super interest with a withdrawal value of less than \$10,000;
2. A lifetime or fixed term pension or annuity where the amount of annual benefit payable to the member is less than \$4,000;
3. A payment already made to the super fund member for early release on compassionate grounds or severe financial hardship;
4. An income protection benefit being paid from an external Income Protection cover for a period of less than two years;
5. A payment made to the super fund member:
 1. during any period in which their health is being assessed for the purpose of determining their eligibility for payment on the ground that the super fund member is totally and permanently incapacitated; or
 2. because the super fund member's salary or other remuneration, or hours of employment, have been reduced because of ill health;
6. A superannuation agreement, flag lifting agreement or splitting order already applies to the superannuation interest.

There may be other types of super interests or payments that are not splittable. If you are unsure, you or your lawyer can check with your superannuation fund.

How do you calculate a superannuation split in a property settlement?

A common misconception when parties agree to divide their superannuation is that the party with less superannuation is entitled to half of the other party's superannuation.

This is not correct.

Step 1 - Obtain a current value for each party's superannuation entitlements

There are different types of superannuation interests. The most common is an accumulation interest. These types of superannuation interests do not need to be valued, as parties can rely on the balance as detailed in the superannuation statement.

However, other types of superannuation interests, such as a defined benefit interest, have a more complex valuation formula. The balance, as detailed in the superannuation statement, may not be an accurate reflection for family law purposes, and we generally recommend engaging an actuary to value such an interest.

Self-managed superannuation interests may also need to be valued. The type of valuation and the fund value will be dependent on the type of assets owned by the fund. For example, if the fund owns real estate, you will need to obtain a property valuation. In addition to this there may be other assets of the fund such as shares or cash.

Step 2 – Calculate the superannuation split

In Victoria, there are generally two approaches to calculating the superannuation split.

An equalisation of the whole of the parties' superannuation

Add together the total of both parties' superannuation entitlements and divide this by two. This is the sum that each party should receive/retain.

Example:

- Party 1 superannuation = \$50,000
- Party 2 superannuation = \$150,000
- Total Super = \$200,000
- Divide by two = each party should receive \$100,000

The person with the higher superannuation balance will need to transfer the difference to the person with the lower superannuation balance.

In the above example, Party 2 would need to transfer \$50,000 to Party 1 so that they each receive \$100,000.

An equalisation of the superannuation accumulated by the parties during the relationship

Calculate the superannuation accumulated by both parties during the relationship. To do this each party will need to identify the balance of their superannuation at the commencement of the relationship and deduct this from their current balance.

Example:

- If Party 1 had \$25,000 in superannuation entitlements at the commencement of the relationship and their current balance is \$50,000, the total superannuation accumulated during the relationship is \$25,000.
- If Party 2 had \$100,000 in superannuation entitlements at the commencement of the relationship and, their current balance is \$150,000, the total superannuation accumulated during the relationship is \$50,000.
- Add together the total superannuation entitlements accumulated by both parties during the relationship and divide this by two. This is the sum that each party should receive.

Calculation:

- Party 1 superannuation accumulated during the relationship = \$25,000
- Party 2 superannuation accumulated during the relationship = \$50,000
- Total super accumulated during the relationship = \$75,000
- Divide by two = each party should receive \$37,500.

The person who accumulated the higher amount of super during the relationship will need to transfer the difference to the other person.

In the above example, Party 2 would need to transfer \$12,500 to Party 1, so that they each receive/retain \$37,500 out of the combined total of \$75,000 of super accumulated by the parties during the relationship.

It is important to note that superannuation will be transferred from one party's superannuation account to the other party's superannuation account. It is not a cash payment. It will not therefore be accessible to the receiving party until retirement or until they are able to access their superannuation entitlements for some other reason (for example, if they meet the financial hardship rules of the relevant super fund).

Superannuation as a negotiating tool

While there is the general position at law, parties can use their superannuation entitlements as a negotiating tool to achieve a property settlement that suits both parties' needs.

Examples include:

- The party with the lower income earning capacity may benefit from more cash and less superannuation, particularly if they are considering purchasing a new home. In this scenario, they may opt to receive less superannuation than they would ordinarily be entitled to, in lieu of more cash. A "discount" would usually be applied to the cash sum that they are to receive, as they benefit from the cash straight away (as opposed to waiting to access super at retirement).

- The party that is closer to retirement or who has a defined benefit fund, may wish to keep their superannuation entitlements intact. In this scenario, they may opt to give the other party a higher cash payment to preserve their superannuation entitlements.

In either scenario, both parties would need to agree to deviate from the general position at law. If you are considering forgoing a superannuation split in exchange for cash, it's important to seek advice about the long-term financial consequences of doing so. If you are unsure of the best way to proceed in your matter, obtain accounting and financial advice, alongside legal advice.

We've agreed to a superannuation split, what next?

Once the parties have agreed to a superannuation split, they will need to:

Step 1 - Decide how to formalise their property settlement and, consequently their superannuation split.

There are two ways to make your property settlement legal and binding:

1. an Application for Consent Orders; or
2. a Financial Agreement.

For more information about this, please refer to our article ["Consent Orders or Financial Agreements"](#).

A superannuation fund cannot legally effect a superannuation split between ex-partners unless they are served with a court order or Financial Agreement providing for that.

Step 2 - Seek the superannuation fund's approval of the superannuation splitting orders/agreement.

Regardless of the way in which you formalise your property settlement agreement, a draft copy of the superannuation splitting orders/agreement will need to be sent to the relevant superannuation fund (being the superannuation fund that the split will come from) for the fund's approval. This is known as giving the super fund "procedural fairness".

Superannuation funds can take up to 28 days to respond to any request for procedural fairness. This timeframe should be borne in mind when considering how long a property settlement will take to formalise.

Step 3 - Provide a certified copy of the Consent Order or the Financial Agreement and a Regulation 144 Notice to the relevant superannuation fund to effect the superannuation split.

After the property settlement agreement has been formalised, a certified copy of the sealed Consent Orders or the fully executed Financial Agreement will need to be provided to the relevant superannuation fund.

The fund will also require the party who is receiving the super split to complete a “Regulation 144 Notice.” This Notice provides the fund with their personal details and details of where they would like the superannuation split amount to be transferred. On receipt of these documents, the relevant superannuation fund can take up to 28 days to process the superannuation split.

Get advice from a family lawyer

If you would like further information in relation to the distribution of superannuation entitlements under the family law or property settlement agreements generally, please contact Emera Family Law to schedule an initial consultation with one of our experienced lawyers.

This blog is of a general nature and should not be relied upon as legal advice. If you require further information, advice or assistance for your specific circumstances, please contact us.