The treatment of superannuation in a property settlement between separating couples has previously been a problem area because of the special qualities of superannuation interests. Because of strict rules in relation to superannuation interests, it has sometimes been difficult to arrive at a settlement which is fair to both parties. Since 2002, if your property settlement is dealt with under the Family Law Act, superannuation as well as other assets can be divided as part of your property settlement. Because most people have superannuation this will have a significant effect on most peoples' property settlement.

Before 2002 superannuation was treated differently to property in family law property settlements. This was because superannuation normally cannot be collected until the member retires form the workforce.

The law now provides that superannuation is to be treated as though it were property of the parties. The court can make orders 'splitting' or 'flagging' superannuation interests. A splitting order splits the superannuation interest so that some of it is given to the other spouse. A flagging order prevents the superannuation fund paying out any money when the member retires until the court has decided how the money should be paid. These orders must be obeyed by the superannuation funds.

Getting information

A member of a superannuation fund or the spouse of a member can apply to a superannuation fund for information about the member's interest in the fund. The fund is required to give this information provided that all the legal requirements of the request are met. The law states what information must be supplied by the fund. This information enables the member's interest in the fund to be valued and assist the parties and the court to decide how the superannuation interest should be dealt with in a property settlement.

Valuing superannuation interests

The law provides a formula for the valuation of a superannuation interest. There are many different types of superannuation interests and there is a special formula for each type. Some funds, particularly large government funds, have their own valuation formulas approved. The one exception is selfmanaged superannuation funds for which there is no set formula. A formal valuation by a qualified expert may be needed for these types of fund.

Entitlement to Superannuation Interest

The law provides that each parties superannuation interest is to be taken into account when examining how much superannuation each party is entitled to retain. The same basic "4-step" process described in our Plain English Guide to Property Settlement is applied to superannuation. Additionally factors suchas when the parties began contributing to the fund are taken into account as well.

Carrying out the orders

Once orders affecting a superannuation interest are made then a copy of the orders must be given to the superannuation fund. How the orders operate varies from case to case depending on what the particular orders say, and the type of superannuation interest. Most splitting orders will result in the creation of a new superannuation interest for the person who is not a member of the fund.

Tax and financial planning issues

Orders relating to superannuation interest can have very important consequences. It is essential that your lawyer understand the potential tax and financial planning implications and knows where to get expert advice about these issues. In some cases splitting orders can be used to the financial advantage of both parties, for example by minimising tax liabilities.

How can Mills Oakley help you?

At Mills Oakley we have a number of family lawyers and Accredited Specialists in Family Law who practise exclusively in the area of family law. As well as our practical experience in all aspects of family law, other specialist lawyers in the firm are able to contribute their expertise in areas such as commercial, taxation and property law where such issues need to be considered in dealing with your case.

We aim to provide the service that is right for you, whether that be simply advising you as to your rights and obligations, assisting you in negotiating a resolution of issues in dispute or representing you in contested proceedings in the Family Court. Where appropriate we will work with your other advisers, such as your accountant, so as to achieve a good understanding of all aspects of your case and provide you with the best possible representation.

MILLS OAKLEY

Contact us

Susan Warda
Partner | Sydney

T: +61 2 8289 5804
E: swarda@millsoakley.com.au

Martina Thornton-Storgato
Partner | Sydney

T: +61 2 8415 7601
E: mstorgato@millsoakley.com.au

Tracey Middleton
Special Counsel | Sydney

T: +61 2 8035 7995
E: tmiddleton@millsoakley.com.au

John Mazzotta
Partner | Melbourne

T: +61 3 9605 0871
E: jmazzotta@millsoakley.com.au

Sally Baker
Partner | Melbourne

T: +61 3 9605 0946
E: sbaker@millsoakley.com.au

Anastasia Christou
Special Counsel | Perth

T: +61 8 6167 9886
E: achristou@millsoakley.com.au

Rachael Murray
Partner | Brisbane

T: +61 7 3228 0419
E: rmurray@millsoakley.com.au

Sophia Pippos
Special Counsel | Brisbane

T: +61 7 3228 0436
E: spippos@millsoakley.com.au

Jeremy Culshaw
Consultant | Adelaide

T: +61 411 689
E: jculshaw@millsoakley.com.au

Carly Mirza-Price
Partner | Sydney

T: +61 2 8289 5877
E: cmirza-price@millsoakley.com.au

Beth Jarman
Special Counsel | Sydney

T: +61 2 8035 7835
E: bjarman@millsoakley.com.au

Susannah Quinn
Special Counsel | Sydney

T: +61 2 8289 5859
E: squinn@millsoakley.com.au

Damian Harriss
Partner | Melbourne

T: +61 3 9605 0978
E: dharriss@millsoakley.com.au

Kym Kerr
Partner | Perth

T: +61 8 6167 9804
E: kkerr@millsoakley.com.au

Alexandra Moles
Partner | Brisbane

T: +61 7 3228 0424
E: amoles@millsoakley.com.au

Emily Wood
Special Counsel | Brisbane

T: +61 7 3010 8003
E: ewood@millsoakley.com.au

Kate Bishop
Partner | Adelaide

T: +61 8 8330 2912
E: kbishop@millsoakley.com.au