



## Newsletter

# **Superannuation and Same Sex Couples plus NSW Schemes**

specialising in superannuation valuations for family law purposes since 2003

**Abstract:** - This newsletter will be of interest to those family law practitioners that:

- Have clients that are in a same sex relationship, or
- Have clients with a superannuation interest in a defined benefit NSW Government scheme. These schemes have recently created separate interests

Attached to this Newsletter is my schedule of fees for 2009.

### ***The Same-Sex Relationships (Equal Treatment in Commonwealth Laws-Superannuation) Act 2008***

The following will be of interest to family law practitioners dealing with same sex couples.

The above Act ends discriminatory treatment of same sex couples (SSC) by amending 11 Commonwealth Acts effective from 1 Mar 2009.

The general approach is to ensure that a surviving partner of a 'couple relationship' is entitled to benefits and to define members of a 'couple relationship' so that it includes SSC along with married couples and de facto relationships.

The Act also includes a new definition of children who are the 'product of the relationship', - designed to encompass children who are the result of a SSC deciding to have children by artificial conception using donated gametes for one or both of the genetic parents.

The Act amends the definition of spouse, dependent and child to enable members of a SSC

and their children to be included in the definition of a 'dependent' for taxation of superannuation death benefit purposes.

### **Interdependent Relationships**

In 2004, *Superannuation Industry (Supervision) Act 1993* (SIS Act) was amended to include interdependent relationships, which, in many cases, covered same sex couples (SSC).

As a result of this amendment, SSC gained death benefit dependent status but the application was patchy. This was because SIS did not mandate the change and required Funds to amend their trust deed. Superannuation schemes that were legislatively based (judges, military, public servants) were also excluded.

A classic example of an interdependent relationship is the elderly sisters. They can nominate each other as beneficiaries.

So why change? Not all SSC would fit interdependency definition and it would be discrimina-



tory if SSC were not treated in a similar manner to heterosexual couples.

One of the main consequences of the change is that the surviving partner of a SSC can now receive the deceased person's lump sum or pension benefits. This puts them on an equal footing to heterosexual couples. Other advantages are payment of benefits to children and that the superannuation payments are now tax free.

### **A Note of Caution**

The above superannuation benefits only apply whilst SSC fulfill the definition of a de facto relationship. Once separated, no superannuation death benefits will flow directly to the surviving partner. In some cases, where the superannuation is in the form of a pension, the superannuation may be lost forever. The family law practitioner needs to be able to inform the client of the superannuation consequence of separation and risk of death.

## **NSW Scheme Specific Factors**

On 19 Dec 2008, the much awaited operative date for *The Superannuation Legislation Amendment (Family Law) Act 2003 No 77* was finally gazetted. This now allows separate interests to be created for the following NSW Government Schemes:

- State Authorities Non-Contributory Superannuation Act 1987 (SANC). This scheme is a defined benefit for the 3% productivity payment.
- State Authorities Superannuation Act 1987 (SASS). This scheme is a split benefit scheme and was closed in Dec 1992.
- Superannuation Act 1916 (SSS). This scheme was closed in 1987. Most members are now pensioners.
- Police Regulations (Superannuation) Act 1906.

From 19 Dec 2008, all orders served on the Trustees and those that were in the pipeline awaiting processing, will have the non-member entitlement paid as a lump sum in their own name. At long last, the clean break between the parties has arrived.

### **Why is This Important?**

For defined benefit schemes without a separate interest, payment of superannuation monies only occurs whenever a splittable payment is made. This means that the non-member has to wait until the member retires, dies or is invalidated out before any payment is received. If, for example, the wife is say 5 years older than the husband, and he chooses to retire at 65, the wife would not receive any split super until she is 70.

The member can also be disadvantaged. For example, the SASS is a split benefit scheme comprising an accumulation component and defined benefit element. The non-member enjoys a rate growth on his or her share determined by AWOTE (a wage index) plus 2.5%. It hovers around the 7% mark. Yet members, in recent times, has had up to 50% loss on their accumulation accounts. Remember, the member gets to keep whatever is left after paying for the non-member. So the larger the interest paid to the non-member, the less the member keeps. If super was split 50/50, some accounts will now have materially different outcomes thanks to the global financial crisis and the way the non-member receives interest.

### **Past Cases**

The Trustees have until June 2009 to begin paying lump sums to non-member spouses. It could take some time to process the 6 years of non-member interests that were established between Dec 2002 and Dec 2008.

How will this be done? It depends on the type of order.



### **Orders that Featured a Base Amount and are in the Growth Phase**

A typical example might be where an order specifies that the husband will pay \$100,000 to the wife. The member would still be contributing or have a preserved interest. The trustees will determine what the wife's current entitlement is by adding AWOTE plus 2.5% for the period from date of orders to the current date. This amount will be rolled out as a lump sum to the non-member. If he or she has fulfilled a condition of release (eg. reached preservation age), then the entitlement could be paid out as cash.

For the member, the amount paid out will reduce the member's superannuation balance as at the date of payment to the non-member. Thereafter, the member accrues his or her full entitlement.

### **Orders that Featured a Percentage Amount and are in the Growth Phase**

The amount determined for the non-member would reflect the current family law value of the member's balance multiplied by the percentage specified in the orders.

### **Orders that are in the Payment Phase – Base Amount**

The current value of the base amount is calculated by using AWOTE plus 2.5%. The non-member gets the current base amount less what has already been paid. The member's superannuation entitlement is corresponding reduced.

### **Orders that are in the Payment Phase – Percentage Split**

The methodology is still being developed. The system will be either to value the pension at the

current day, apply the percentage split and then deduct what has been paid to date. Alternatively, the trustees may go back to the operative date, apply the percentage, determine a base amount, and then subtract what has been paid to date.

Either way, the non-member will be paid a lump sum after taking into account what has been paid to date.

### **What Will the Trustees Do?**

The trustees will write to the non-member and member advising of the creation of the separate interests and its financial consequences.

### **What Should Family Law Practitioner Do?**

Where the non-member spouse's interest was significant or where either party was concerned about the lack of a separate interest, the practitioner could write to the parties anticipating the changes.

**Curriculum Vitae** - click [here](#) to view my CV or to read my previous Newsletters.

Peter Skinner  
17 Feb 2009



## SCHEDULE OF FEES - 2009

### Defined Benefit Funds

- Family Law Valuation Report per fund - \$330 + gst
- Two dates, same person, same fund - \$600 + gst
- Three dates - \$800 + gst
- Four dates - \$1000 + gst

### Accumulation Funds

- Family Law Valuation Certificate per fund - \$150 + gst
- Multiple Family Law Valuation Certificates - \$100 + gst per fund

### Superannuation Referable to Marriage Period

- Accumulation Funds - \$500 + gst
- Defined Benefit Funds - \$1000 + gst (Includes FLV at marriage and separation, calculation of super for marriage period, and interest from date of separation to current date to exclude post separation contributions.) Phone for a pro-forma report.

### Urgent Requests

- For each valuation required same or next business day, an additional \$70 + gst applies.

### Estimating Inputs

- \$70 + gst

### Self Managed Superannuation Funds

- Orders and Valuations – poa

### Hourly Rate

- \$250 per hour + gst. Fixed price quotes available, including deferred payment

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