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Superannuation Benefits and Consent Orders in the Family Court

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Law Claims has recently received a number of notifications in relation to consent orders in the Family Court dealing with superannuation entitlements.

Below are some examples of these types of claims:

Case #1

The legal practitioner acted for the wife in a family law property settlement that involved a superannuation splitting order. A property settlement order was made by consent in the Federal Magistrates Court.

The sealed consent orders provided for a superannuation split from the former husband's super fund to the wife's super fund. The superannuation split to the wife's fund was never effected as a copy of the sealed orders were never served upon the super fund. The relevant account was subsequently closed and the former husband had withdrawn the entirety of his superannuation entitlements. The husband had no funds to pay the agreed amount. A claim was made against the legal practitioner alleging negligence in not serving the order on the trustee, of the superannuation fund.

A claims payment was made on behalf of the legal practitioner as a result of the failure to serve the trustee of the superannuation fund with the consent orders.

Case #2

The legal practitioner acted for the wife in family law proceedings for divorce and a property settlement. The wife agreed to pay the husband a certain amount to be divided as cash and a specified sum split from her superannuation. Consent orders were made in the Federal Magistrates Court and a copy order was served on the trustees for the superannuation fund.

Subsequently, the wife received advice from her super fund that the super account had in fact been reduced by a significant amount of money as a result of the splitting order. A subsequent review of the splitting order found that the family law split had in fact been implemented correctly. However, the legal practitioner did not appreciate that the separation amount that was to be deducted from the superannuation splitting order did not simply equal the base amount specified in the court orders and was to be calculated in accordance with a formula in the Rules. A payment was made on behalf of the legal practitioner due to the loss suffered by the wife.

Case #3

The legal practitioner acted for the wife in relation to consent orders for property settlement in circumstances of distribution of matrimonial assets. An agreement was reached between the parties to the effect that the wife was to receive a sum from her husband's superannuation fund by way of a superannuation splitting order as part of a property settlement order made by consent in the Family Court. At the time the orders were drafted and signed by the wife there were two separate superannuation funds and both had recently changed names. This resulted in some confusion as to the identification of the particular superannuation fund for the purpose of the Order.

It transpired that the superannuation fund nominated in the draft orders from which the husband was to pay the sum was the wrong fund and did not have sufficient funds to pay the agreed amount. The legal practitioner then sought to amend the draft orders which the husband agreed to doing and fortunately, resulted in no claims payment being made

In this case there was a failure by the legal practitioner to obtain specific / detailed instructions from the wife. The legal practitioner in fact stated to Law Claims post claim notification:

"I remain unclear as to whether I was instructed specifically in relation to the particular superannuation fund or whether I inferred the particular fund from the limited information provided by the client".

Summary

It is clear from the above cases that the question of superannuation entitlements can be problematic for both clients and solicitors. Law Claims recommends the following in relation to the division superannuation benefits:

- Ensure the sealed orders are promptly served upon the relevant superannuation fund;
- Ensure specific instructions are obtained from the client;
- Ensure both the legal practitioner and client are fully informed;
- Obtain a full and up-to-date statement from the superannuation fund (with the authority of the relevant party) and, if there is any doubt about enforceability of orders or the value of benefits, seek specific advice from the trustee;
- When discussing values and benefits, ensure that both parties are referring to the same thing;
- Ensure written advice is provided to the client regarding the entitlement and the division of the superannuation benefit which sets out the calculations, the type of benefit, the date of which the calculation is being made and the need for the orders to be sealed;
- Check the rules of the superannuation fund as to how the base amount of the superannuation splitting order will be used to calculate the amount to be deducted from the fund. If in any doubt on how the formula will operate obtain either clarification from the fund or obtain clients instructions to obtain an expert report on the value of the splitting order.

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