

# Marital/De facto Breakdown

## LEADING TO FINANCIAL SEPARATION

### Introduction

Working through a marital/de facto separation is not easy. As an SMSF Trustee, you have added responsibilities which need to be attended to. This sheet will give you some important facts about Superannuation and your role as Trustee, it is not designed to give you the answers on what you should do. Reading this fact sheet in full will provide you a base level of understanding of how to deal with a financial separation in your SMSF. Without understanding the basic principles and your options, the process will be more difficult to navigate, impacting your ability to move on to bigger and better things.

### What do I need to know? General Information

#### 1. Your members balance (or anyone else's) can't be moved out of your SMSF unless:

- A. You met a condition of release (retirement after 60 or reaching 65); and/or
- B. You have an executed family court order (or binding financial arrangement) detailing your Superannuation Split; or
- C. You are rolling out of your SMSF to an eligible Superannuation Fund.

Just because you have access to the bank account does not give you to legal ability to move money around or make payments to members. Members balances belong to the members until a financial agreement has been made between the members. You are not able to make changes to your SMSF members balances without documentation (Family Court Order or Binding Financial Agreement) determining compensation between members.

**Therefore, please do not move any money out of your SMSF until you have some advice about meeting the above criteria. There are additional conditions of release (the above conditions of release are not exhaustive) that need to be assessed on a case-by-case basis.**



## 2. SMSF Bank Account

We recommend that if one member currently has sole authority to withdraw funds from your SMSF bank account, you contact your SMSF bank to require both members to authorise payments. This will remove any suggestion that money can be moved without acknowledgement of both members.

## 3. If a Trustee/Member leaves the SMSF

- A. Their member balance needs to be professionally calculated by Supervision prior to any money leaving the SMSF.
- B. If they have not met a condition of release, they must roll their member balance into another Superannuation product.
- C. If a member leaves before any Family Law Court orders is issued, then the Members new Superannuation Fund will be subject to any Family Law Court orders.
- D. Any Family court orders will need to be supplied to the new Superannuation provider if it is impacted.

## 4. Family Court orders provide certainty to all members

- A. A Family Court order is the result of a negotiated settlement between individuals and once stamped by the court is enforceable and final.
- B. There are other types of legal agreements you can enter into (binding financial agreements), but they may leave you exposed to a dispute at a future time.
- C. The Trustees must conform to the final orders.
- D. Supervision will comply with a Family Court Order as it is law.

The Family Court process may take longer and become frustrating, depending on your personal circumstances. The advantage of completing a family court order is that it gives long term certainty to the members. It also provides a final split of Superannuation which must be followed and completed within the prescribed timeframe.

Stamped family court orders are final and there are legal consequences for anyone not following the agreement. It also gives your SMSF's auditor certainty that any subsequent money movements are legal and will not result in contraventions in your SMSF.

## 5. You have two roles inside of your SMSF

- A. As Trustee (decision maker of the SMSF)
- B. As Member (beneficiary of the SMSF)

Our experience tells us that when emotions run high, you can lose sight of your responsibilities as a Trustee and only think about your rights as a member.

You have duties as the Trustee to manage the SMSF and meet its obligations. In the past, legal representatives (lawyers) of Trustee/Members have advised our clients "not to sign anything" whilst proceeding through separation negotiations.

We need to inform you that as Trustee, you have an obligation to carry out your duties to keep your SMSF compliant regardless of what is going on around you.

If you have already received advice to not sign any documents (including in your SMSF), we urge you to clarify with your lawyer the ramifications of not meeting your Trustee obligations.

Not signing documents will result in your SMSF being removed from the ABN registry and other members will not be able to contribute, which could become a legal problem for you as Trustee.

If you have suspicions or evidence that one of the Trustees is not running the SMSF properly, you need to act immediately. Please remember that as Trustee you are responsible for the management of your SMSF and if there is wrongdoing, you need to act when you become aware. If you do not, you may be in breach of your own Trustee duties.

## 6. Supervision has a duty to act for your SMSF as the SMSF's tax agent.

A. If Trustees request individual advice on how to maximise their Superannuation with their own interests at the core of your questions, it will instantly create a conflict of interest for Supervision.

B. As a Trustee, you must act in the best interests of all members of your SMSF.

C. If you cannot include all members/trustees in your communications, then please refrain from sending those emails to Supervision.

D. If we respond to your individual questions (without including all Trustees), we will not be able to act in the best interests of the SMSF.

E. If conflicts of interest can't be resolved, you will need to engage another SMSF professional at your expense to answer your questions.

Being engaged as the tax agent for your SMSF means that we need to act in the best interest of all members. We are not able to act for individual Trustees/Members or advise them separately.

If you want to keep things private in this process or gain advice excluding fellow Trustees, we respect your view, but you will need to engage another professional at your own expense. If you send an email to Supervision, please write it as if all Trustees/Members are reading it.

We insist that all members are copied into all communications from the date that we are informed of your separation, so that it removes any conflicts of interest.

Our Team have been caught in the middle of emotional separations in the past. Supervision is here to help and does not need to be copied into personal correspondence between separating Trustees/Members. In a nutshell, please be respectful of our team and of each other as Trustees. If you are, the SMSF part of your financial separation will be much easier.

## What's Next?

### You have 4 options.

1. One member leaves immediately and their member balance is rolled over to another Superannuation Fund **before a family law court order** is issued, and the remaining member/s continue to run the SMSF.
2. One member of the SMSF leaves **after a family law court order** is completed and the remaining member/s continue to run the SMSF.
3. Both members leave the SMSF and the SMSF is wound up **before or after** a family law court is issued.
4. The SMSF continues as is without any changes to the membership of the SMSF

### Option 1. Rolling 1 Member out of the SMSF (before court order is issued)

Your SMSF can continue after the member leaves as long as two natural trustees remain OR one director of a Corporate Trustee remains. In order to be removed as a member, the members balance must be calculated up until the day of leaving. If you have any unlisted assets (i.e. direct property) you will need a licenced valuation to determine the current market valuation.

The SMSF also needs enough liquid cash to meet the needs of the departing member. If cash is not available, the Trustees will need to make changes to their investment strategy in order to create enough liquid cash. The Trustees will need to arrange any asset sales as Supervision does not have this access. You must also supply new Superannuation details to Supervision so that we can facilitate the transaction using Super stream. The details that we require to facilitate Roll Overs are as follows:

**Superannuation Fund ABN:** (destination fund Australian Business Number)

**Member Number:** (Your personal identification number)

**USI:** (Unique Superannuation Identifier is a number that identify the Superannuation product)

Once the roll over is completed, any future splits (determined by a family court order) will need to be handled by the new Superannuation fund.

#### Costs & Procedure

Roll Out of Member= **\$880**

- Includes ABN registry Removal
- Removal of Director at ASIC
- Updating Members Balances
- Minutes & Documentation
- Investment Strategy Documentation
- Trust Deed Update to Reflect Changes to Members

### Option 2. After Court Order is issued

Family Court Orders will determine the financial split. The Court will provide the exact amount or a percentage of the SMSF's total for member entitlements.

See Option 1 above for the costs and procedure which are identical.

### Option 3. Winding Up SMSF after Roll Outs

All assets of the SMSF will need to be liquidated to cash. Both members will need to supply Roll Over Details as per option. If Family Court Orders have been supplied, the Roll Outs will be in line with these orders. If no orders have been supplied, then the members balances will be as per their member statements calculated on the day that the roll overs need to take place.

Wind up procedures will be implemented with final tax returns.

#### Costs & Procedure

Roll Out Member=**\$220**/Member

SMSF Wind Up = **\$880**

- Includes last Audit, Final Tax Return Lodgement, Cancellation of Registrations (ASIC & ATO) & Corporate Trustee Closure (if applicable)
- Supervision will arrange the final members entitlement minus any tax obligations

#### **Option 4. Remain the Same**

This option is highly unlikely to be a long-term solution considering the close working relationship required between Trustees. This option can be advantageous if the assets of the SMSF are not able to be liquidated (turned into cash) and the Trustees can maintain a functioning working relationship- making decisions for the SMSF. This does not take into consideration any requirements of Family Law, in terms of financial separation. Please discuss with your legal representation the ramifications of remaining a Trustee of your SMSF with your soon to be ex-spouse.

There are no fees for this work unless you require additional support or a meeting to discuss.

## **I need more help!**

**If you wish to book a meeting to discuss this information sheet, please email [mail@supervision.com.au](mailto:mail@supervision.com.au) . There will be a booking fee of \$225 for this meeting. If you need personal legal representation through this process, we can provide a referral to a law firm selected to provide that support. The other fees quoted above will be directly debited from your account and the work completed as soon as possible. Please inform us of the option you would like to undertake.**

## **DISCLAIMER**

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