



## Marital split makes for SMSF minefield

**Asset division** The intricacies of DIY super funds can be costly for divorcing couples sorting out who gets what, writes Duncan Hughes.

Divorce, super and tax laws are largely co-ordinated to make splitting assets easier. PHOTO: GETTY IMAGES

**Untangling the assets** in couples' DIY super funds when they divorce has become a multibillion-dollar affair for lawyers and advisers.

Latest government figures reveal 1000 couples a week – half of them with children – decide to untie the knot after only 12 years together, often adding a financial mess to their bitter emotional legacy.

Veteran divorce lawyers warn that nearly all uncoupling couples have also spent a lot of emotional capital and will often lie about assets if there is an opportunity to hide them from the other half – in some cases pushing tens of millions of dollars and even

second families offshore. "There's generally going to be a fight as to who gets what, so be prepared," says Marilyn Hauptmann, managing partner of the family law division for Swaab Attorneys.

"Both genders use something to try and get the upper hand in the divorce negotiations," Hauptmann warns. "Many men use money, many women use the children."

But traditional gender battle lines are blurring as stereotypes break down and parental roles merge.

DIY super funds should be among the most transparent of marital assets as annual financial statements will provide a

breakdown of assets, which can range from cash to property.

However, a huge increase in limited recourse borrowing to buy investment property through the funds is creating a new set of problems, as superannuation schemes work out how to divide liabilities and assets.

Hauptmann and other divorce specialists say they are seeing a significant increase in the number of SMSFs in divorcees' assets.

Australian Taxation Office monitoring does not include statistics about spouses, so much of the feedback about numbers is anecdotal. Nearly seven out of 10 funds have

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Andrew Aitken, Aitken Lawyers

two members – suggesting a big chunk of the nation's \$560 billion of SMSF savings is owned by couples – with an average balance of \$1 million.

The median value of assets in a fund is \$600,000, which suggests there are many wealthy couples with several million dollars in their fund.

The assets are listed in the trust documents at their original cost, which means they might have increased in value.

They have to be independently valued and they are often divided in their existing form, rather than sold and having cash distributed to avoid capital gains tax. So couples need to factor this in the after-tax consequences when negotiating a deal.

Catherine Robson, principal of financial advisory group Affinity Private, says divorce, superannuation and taxation laws are largely co-ordinated to make splitting assets easier and fairer.

"Different types of assets will be treated differently to prevent adverse tax consequences," she adds. This includes allowing superannuation assets to be split without losing tax benefits.

But it will never stop the haggling over who is going to get the cash, or the unlisted shares with an uncertain value, or the worth of the real estate in the super fund.

Jointly purchased properties using SMSFs for limited recourse loans are creating new headaches, particularly when it is used by the family business or one of

the spouse's office, surgery or chambers. "Protracted legal negotiations on how assets will be split up can often cause enormous diminution of business, even when it is not intended," Robson says.

She recommends financial counselling so that everyone "sees the bigger picture" and former partners don't get bogged down by emotional attachments that might not be good long-term investments, particularly if both spouses worked in the business.

"You can easily see a business being wiped out," she adds.

Andrew Aitken, a director of Aitken Lawyers, says: "Borrowing to buy an investment property through an SMSF can add an extra level of complexity. It is a practical problem new to the courts and you need to be very careful."

In the past, superannuation had only assets and never liabilities, such as a borrowing arrangement.

Depending on the circumstances, it is likely that liabilities will be transferred to one party because of the difficulty in splitting an investment property.

The property's sale can create problems with lenders, such as if the new arrangement breaches loan-to-value ratios or there is still money owing after a forced sale.

Divorcing and dividing the assets for a professional couple who have accumulated assets over a decade or two – especially in super – is also likely to cost \$100,000 or more in legal fees and tens of thousands in forensic accounting and counselling fees.

"Often assets being sold [such as a property in super] are not presented as well as they could, or should be, because of tension between divorcing parties," he adds.

Aitken says a divorce could be a "great tax-planning opportunity" for a spouse's underfunded super plan. For example, a top-up payment into a superannuation fund from the other half's super savings provides better income and capital gains tax benefits than the equivalent sum in cash.

Upon divorce, the court issues something called a splitting order that decides who gets what from the super fund.

"It is binding on the trustee of a superannuation fund to comply with it," says a spokesman for the Attorney-General's Department.

"It is just part of the overall splitting of the pool of matrimonial assets with the court using an extensive list of criteria, ranging from future earning capacity to length of marriage, both parties' contributions and any health issues," Aitken says.