The challenge of ethical standards in divorce proceedings

The standard question in divorce proceedings used to be "who gets the dog?" These days, with almost 46% of marriages ending in divorce, there is a lot more at stake than just the dog.

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Ethics, divorce and financial services seem at first glance an incongruous mix but when superannuation is thrown in to the mix of assets that will need to be divided, the process of splitting the assets needs careful consideration.

While tried and true methods of dividing matrimonial property and other assets have been around for a very long time, the same is not true for superannuation assets.

Not being able to divide superannuation assets in the same way as property has, it seems, lead to situations where there is a less than optimal settlements. For example, one party owns the whole of the home and the other has all the superannuation assets.

Just about every household in Australia counts superannuation as part of the assets. In fact for most households, it is now the second largest asset after the family home. While just about every worker in Australia has superannuation, there is still a significant imbalance in the value of the superannuation assets in favour of working males.

The new Family Law Legislation Amendment (Superannuation) Act 2001 has potentially provided the flexibility needed in respect of this issue. While the Act received Royal Assent on 28 June 2001, the actual effective date is not likely to apply until the second half of 2002. So what does it mean for the financial services industry and what does ethics have to do with it?

Firstly, what is the effect?

- The legislation does not deal with defacto and same sex relationships – this being a jurisdictional issue;
- Binding financial agreements dealing with the division of the benefits will be a feature. These agreements can override trust deed provisions;
- New memberships can be created for non-member spouses in the fund of the member or transferred to a new fund; and,
- Fund trustees and their administrators may have to manage the "flagging" of benefits where the payment of future superannuation benefits is restricted by a divorce settlement. This is more likely to be a feature of defined benefit arrangements where an immediate split on divorce may not be appropriate or fair. Even so, it will be an option for defined contribution arrangements.

So what are some of the ethical matters?

- Trustees and their administrators will have to be careful about sharing personal information of the member. There are Privacy provisions in the legislation but great care will be required, especially where customer service staff are involved.
- The same applies to fund managers in respect of RSA's and annuity providers.
- Consider the financial planner who may be involved in giving advice to a client about the client's spouse at the time of a divorce settlement. Should the adviser concentrate on the client or is it possible to regard the client's spouse as a potential new client?
- Consider too, to what extent a financial planner should give advice on the affects of potential divorce when preparing a financial plan? J