

**TELEVISION EDUCATION NETWORK**

**FAMILY LAW PROPERTY ORDERS: SOMETHING OLD & SOMETHING NEW**

**20 MARCH 2007**

**Assessing Contributions: Superannuation Benefits**

Jacqueline Campbell  
Accredited Family Law Specialist  
Partner  
Forte Family Lawyers

**forte**  
family lawyers

Part VIII B was inserted into the *Family Law Act* on 28 December 2002. Since then superannuation can be split or flagged. If it is being split by Court order, it must be valued using a designated method. There is now a body of case law on how superannuation is treated when defining the property pool and assessing contributions.

### **Superannuation as "property"**

Under Pt VIII B *Family Law Act* superannuation interests can be divided on marriage breakdown. Superannuation is treated as "property" (s 90MC) for the purposes of para (ca) of the definition of "matrimonial cause" in s 4 of the Act. Superannuation is not defined as "property", only treated as property. The meaning of this distinction is unclear.

The first major reported case after Pt VIII B was introduced was *Hickey and Hickey* (2003) FLC 93-143. The Full Court in *Hickey* held (at para 75):

*the effect of s 90MC is that in proceedings in relation to property under s 79 the superannuation interest is to be treated as property irrespective of whether or not a splitting or flagging order is sought or proposed to be made.*

The five member Full Court in *Coghlan and Coghlan* (2005) FLC ¶93-220 quoted extensively and favourably from *Hickey*. However, it disagreed with the conclusions in *Hickey* as to the interpretation of s 90MC, saying (at para 40):

*superannuation interests are another species of asset which is different from property as defined in s 4(1), and in relation to which orders also can be made in proceedings under s 79.*

The majority considered that s 90MC did no more than confer jurisdiction on the courts to make orders in relation to superannuation. Section 90MC did not mean that superannuation was "treated" exactly the same as "property" as defined in s 4(1). Superannuation was "another species of asset" but the Full Court did not explain what this meant.

Regarding para 75 in *Hickey*, the majority of the Full Court in *Coghlan* said (at paras 38-40):

*In our opinion, s 90MC does no more than operate to extend the definition of 'matrimonial cause' by extending the jurisdiction, which the various courts which exercise the jurisdiction under the Act, have in proceedings between parties to a marriage with respect to their property, to include a jurisdiction to make orders with*

*respect to the superannuation interests of the parties to property settlement proceedings.*

*... There is nothing in our view in s 90MS(1) which indicates that superannuation interests are to be treated as property in proceedings under s 79 (irrespective of whether or not an order under Pt VIII B is sought in those proceedings). Indeed, the only stated purpose anywhere in Pt VIII B for superannuation interests being 'treated as property' is for the purposes of the definition of 'matrimonial cause' which, as earlier explained, is the jurisdiction conferring provision.*

Warnick J, in the minority, considered the trial Judge was in error in departing from *Hickey*, and not treating superannuation as if it was property. He disagreed with the majority's interpretation of s 90MC and did not accept that in the circumstances the Full Court could depart from *Hickey*.

There remains considerable lack of clarity as to the meaning of s 90MC.

#### **Global or asset-by-asset approach?**

The majority of the Full Court in *Coghlan* said that the practical implication of its analysis was that superannuation should be included in a list of property under "the first step" in the s 79 process, whether or not a splitting order is sought.

The preferred approach, however, was to deal with superannuation separately from non-superannuation property. Generally, there should be a list of each. The effects of this approach are:

1. the direct and indirect contributions by either party to superannuation are more likely to be given proper recognition
2. "the real nature" of the superannuation interests can be taken into account.

The second aspect of this allows an opportunity for the Court to look at such matters as whether or not it is a defined benefit interest or accumulation interest, whether it is in the growth phase or the payment phase and whether it will be paid or is being paid as a lump sum or as a pension.

O'Ryan J agreed with Warnick J's views about the treatment of superannuation and s 90MC. He also agreed that the Full Court was bound by *Hickey*. He said (at para 124) that the majority's view was "confusing and likely to promote uncertainty".

Cases such as *Coghlan* have meant that there is greater acceptance that an asset-by-asset or two pools approach may be appropriate. In *M and M* (2006) FLC 93-281, *McKinnon and McKinnon* (2005) FLC 93-242 and *Trott and Trott* (2006) FLC 93-263, which are discussed later in this paper, an asset-by-asset approach was adopted.

### **Factors to consider in determining a split**

Whether superannuation will be split and in what proportions, will depend upon the circumstances of the case. Possibly relevant factors were set out by Moore J in *Levick and Levick* (2006) FLC ¶93-254, Young J in *BAR and JMR* (2005) FLC ¶93-231 and *Coghlan and Coghlan* (2005) FLC ¶93-220. These include:

- whether there are children
- if splitting the superannuation means the primary carer can keep the home
- the needs of the parties for cash and saleable assets
- the value of all the property and the proportion of the property pool which is superannuation
- the type of fund
- the ages of the parties
- the length of time before the parties reach a condition of release
- tax implications such as whether a party is close to the superannuation reasonable benefit limit (RBL) and the ETP components. For example, some pre-1983 tax benefits may be lost if the fund is split. After 1 July 2007, RBLs will be abolished and the tax implications will change. Tax will be payable on "excess contributions" and high income earners may prefer to retain their superannuation rather than split it.

The Full Court confirmed in *Doherty and Doherty* (2006) FLC 93-256 that the mix of superannuation and non-superannuation was discretionary.

### **Nature and value of the superannuation "pool"**

Section 90MT(1) *Family Law Act 1975* requires the Court to value a superannuation interest which is being split. The valuation must be at the "relevant date" (reg 28(1) *Family Law*

(*Superannuation*) Regulations 2001). The relevant date is defined in reg 3 as:

- (a) *in relation to a payment split under a superannuation agreement or flag lifting agreement:*
- (i) *the date agreed on for that purpose by the parties to the agreement; or*
  - (ii) *if no date is agreed on by the parties to the agreement and the agreement is dated — the date shown on the agreement; or*
  - (iii) *if no date is agreed on by the parties to the agreement and the agreement is not dated — the date when a copy of the agreement is served on the trustee of the relevant eligible superannuation plan; and*
- (b) *in relation to a payment split under a splitting order — the date determined by the court.*

The valuation provisions do not apply to:

- self managed superannuation funds (*Family Law (Superannuation) Regulations 2001* reg 22(2)(b)). Self managed superannuation funds are valued by reference to their contents such as shares and real property
- splits effected in superannuation agreements or the superannuation provisions of financial agreements. Parties can choose their own method of valuation.

There are different valuation methods for a superannuation interest depending on whether the interest is in the "growth phase" or "payment phase" (pension). The *Family Law (Superannuation) Regulations 2001* focus largely on the adjustments to interests where a base amount is stipulated. Superannuation interests can also be split according to a nominated percentage but this is less common. The percentage method is mainly used, and is the preferable method, when the superannuation being split is a pension in the payment phase.

The majority of superannuation interests are in the growth phase and are accumulation interests. Valuations will, therefore, usually be straightforward. A member's statement and/or completed Superannuation Information Form will be sufficient.

For other funds, the first step is to have the fund complete a Superannuation Information Form. Depending on the fund, this may give the valuation. If it does not, an expert in superannuation splitting may need to be engaged.

The Attorney General is also able to approve special methods or factors (reg 38). Funds with approved special methods as at 1 December 2006 were:

Commonwealth Parliamentary Contributory Superannuation Scheme

Commonwealth Public Sector Superannuation Scheme

Commonwealth Superannuation Scheme

Defence Force Retirement and Death Benefits Scheme

Ford Employees Superannuation Fund

Ford Management Retirement Plan

GlaxoSmith Kline Superannuation Fund

Hanson Australian Pty Limited as a participating employer in Sunsuper (formerly the Pioneer International Limited Staff Superannuation Plan)

Military Superannuation & Benefits Scheme

New South Wales Energy Industries Superannuation Scheme

New South Wales Energy Industries Superannuation Scheme

New South Wales Local Government Superannuation Scheme

New South Wales Police Association Superannuation Scheme

New South Wales State Authorities Non-contributory Superannuation Scheme

New South Wales State Authorities Superannuation Scheme

New South Wales Police Superannuation Scheme

Queensland Local Government Superannuation (known as LG Super)

Queensland Parliamentary Contributory Superannuation Scheme

Queensland Superannuation (State Public Sector) Scheme (known as QSuper)

RACV Superannuation Fund South Australian Judges' Pensions Scheme

South Australian Local Government Superannuation Scheme

South Australian Parliamentary Superannuation Scheme under the Parliamentary Superannuation Act 1974 (SA)

South Australian Police Superannuation Scheme South Australian Superannuation Scheme

UniSuper (the Superannuation Scheme for Australian Universities)

South Australian Superannuation Scheme

Victorian Parliamentary Contributory Superannuation Fund

Victorian Racing Industry Superannuation Fund

Victorian State Superannuation Fund

WA Government Employees Superannuation Fund

Western Australian Gold State Super Scheme

Woolworths Group Superannuation Scheme

Woodside Superannuation Fund

## Assessment of contributions to superannuation

The court's approach to assessing contributions to superannuation separately from contributions to other assets was illustrated by Faulks DCJ in *B and B* [2005] FamCA 624. Following *Coghlán*, Faulks DCJ held it was particularly appropriate in the circumstances of that case, to deal with superannuation separately from other property.

Faulks DCJ looked at whether the wife contributed to the husband's superannuation. It was still in the accumulation phase and potentially would be for another 12 years. The husband contributed to his superannuation for four years before the relationship commenced. The wife argued that she contributed indirectly to it for 17 years. Faulks DCJ said in relation to the wife's argument (at para 43) that it was:

*based in part on the proposition that during the period of cohabitation, funds available to the family or to her were not available because money was being paid by the husband into his superannuation.*

He considered that this argument was partly based "on the fallacious assumption that the husband had a choice about his contribution". However, Faulks DCJ said that the husband had no more choice about the contribution than he did about the taxation deducted from his pay. The wife's argument had more force if the husband had made voluntary contributions.

Faulks DCJ concluded though, that the superannuation was accumulated during the course of cohabitation. The wife made contributions to the relationship during this period both financial and non-financial and as homemaker and parent.

Faulks DCJ said (at para 46):

*Although the contrast in treatment of contributions to the superannuation entitlements is to some extent anomalous, it would be inappropriate to disregard those contributions. Indeed on a contributions basis, in my opinion it would be reasonable to say that the wife has contributed about 45% and the husband 55% of the superannuation. The differential takes account of the earlier contributions by the husband.*

The wife had superannuation in the payment phase. As the wife's entitlements accrued prior to cohabitation, the husband had made no contributions to it. The income stream was valued at about \$333,400. The wife argued that if it was included in the assets, then he should treat the wife as having no income. Faulks DCJ considered there was some force in that submission.

Under s 75(2)(f), Faulks DCJ examined the nature of the superannuation entitlements after assessing contributions. He reduced the wife's entitlements to the husband's superannuation to 20% for s 75(2) factors.

Faulks DCJ assessed the contributions of the parties to the non-superannuation property as 52% by the wife and 48% by the husband. Due to s 75(2) factors (including that the wife's superannuation was not otherwise taken into account) the parties' entitlements were adjusted so that the wife's entitlements were 57% and the husband's were 43%. As neither party sought a splitting order, the wife received a non-superannuation adjustment of \$52,000 on account of the husband's superannuation.

### **Pre-cohabitation and post separation contributions**

Most arguments about contributions to superannuation relate to the period of membership before cohabitation or after separation. Formulas were popular before the advent of super-splitting to assess the proportion of a member's entitlements which the non-member could claim and the amount of that claim. The most popular formula arose in *West and Green* (1993) FLC 92-395. Since super-splitting, the *West and Green* formula has been used to calculate the percentage split of superannuation to which the non-member is entitled rather than, as it was used before super-splitting, to adjust the parties' interests in other assets. In *West and Green* the Court considered that the wife's entitlements to the husband's superannuation could be secured by the husband taking out a life interest policy to the expected value of the wife's entitlements or the wife lodging a charge over the husband's property. The amount of her entitlements would not be known until the precise figure the husband received at retirement was known.

The *West and Green* formula is:

$$A \times B/C \times 50\% = \text{non-member's share}$$

Where:

A = the lump sum net of taxation payable to the member

B = years of cohabitation

C = years elapsed between the date the member joined the superannuation fund and the date of retirement.

An example of how it works is:

- The husband has \$300,000 of superannuation at the end of a 10-year relationship and 15 years of employment
- 10 years as a proportion of 15 years is  $\frac{2}{3}$
- $\frac{2}{3}$  of \$300,000 is \$200,000
- The \$200,000 is divided equally between the two parties.
- The non-member receives \$100,000 and the member retains \$200,000.

However, if the actual superannuation at the start of a 10-year relationship can be ascertained, this is better evidence than saying, as under the *West and Green* formula, that after 15 years of employment, one-third of the superannuation was accrued prior to the relationship. Clearly, one-third of the superannuation did not accrue prior to separation. In most cases, contributions in money terms were less in the first five years than in the final five years. The growth in the fund during the marriage would also have been greater at the end of the relationship. In long relationships, pre-cohabitation contributions made to non-superannuation are often of little, if any, significance. *West and Green* may seem unfair because it gives more weight to pre-cohabitation contributions to superannuation than are often allowed for pre-cohabitation contributions to other property.

While over time the "value" of pre-cohabitation contributions to other property falls (eg *Bremner and Bremner* (1995) FLC ¶92-560, *Pierce and Pierce* (1999) FLC ¶92-844), the *West and Green* formula increases the "value" of pre-cohabitation contributions.

Disputes about the date of valuation of superannuation usually relate to the weight to be given to post-separation contributions. Assets are usually valued as at the date of trial. Post-separation contributions may affect the percentage split rather than the value of assets. The usual approach has been that if there are children of the marriage, contributions to the family after separation offset any contributions by the primary income earner to property, including superannuation after separation (eg *Spiteri and Spiteri* (2005) FLC ¶93-214). However, the courts have more recently seemed to be more prepared to consider that post-separation contributions to property superannuation may not be off-set by post-separation homemaking and parenting contributions.

In *Ilett and Ilett* (2005) FLC ¶93-221 the wife appealed against an order giving her 70% of a pool from which a home acquired post-separation was excluded. She received only 36.5% of the total pool. The parties' superannuation had increased considerably since separation. The wife was the primary carer of the children who were aged 4 and 6 at the time of separation, 8 ½ years before the trial. Up until the time of separation the parties' contributions were assessed as equal. The Full Court (consisting of the same Judges as in *Coghlan and Coghlan*) assessed contributions to the time of trial as 65% by the husband and 35% by the wife. A 10% adjustment in favour of the wife for s 75(2) factors meant that the wife was entitled to 45% of the pool.

In *Coghlan* the parties had been separated for about two years at the time of trial and about three years at the time of the appeal. The Full Court considered that a separate assessment of contributions to both non-superannuation assets and superannuation was required.

The *West and Green* formula was applied by Coleman J sitting as a Full Court in *McKinnon and McKinnon* (2005) FLC ¶93-242 on appeal from the Federal Magistrates Court. The wife's contributions to the husband's Australia Post superannuation were assessed as one-sixth because they cohabited for four out of the thirteen years of his employment. She made no contributions to his DFRDB superannuation as this related to employment which ended nine years before cohabitation. Coleman J dealt with the superannuation as a separate pool, saying (at para 16) "that recent discussions of the Full Court suggest such an approach to be less heretical than in earlier times".

Coleman J held that:

*Whilst the determination of contribution entitlements involves the exercise of a wide discretion, and does not readily permit mathematical precision, the figures indicated above are useful for present purposes.*

Coleman J made an adjustment under s 75(2) in favour of the wife regarding the other assets. Her contribution to the asset pool (excluding \$248,774 referable to the DFRDB pension) of \$596,000 was 15.5%. A 10% adjustment was made for s 75(2) factors. The 10% figure equated to four years of the husband's superannuation pension.

In *Trott and Trott* (2006) FLC ¶93-263 the husband was a member of two funds. Watts J assessed the wife's contributions to the pension as 15%. The husband was a member of the

fund for 10 years before the marriage. Relevant matters to the treatment of contributions before and after cohabitation included:

- The importance of the imbalance in initial contributions lessens as the period of cohabitation increases, even if there is equality of contributions during cohabitation (*Bremner and Bremner* (1995) FLC ¶92-560)
- It was not practical or desirable to approach cases in a pseudo-mathematical way, but this was a "rough initial point of reference" (*Clauson and Clauson* (1995) FLC ¶92-595)
- It was "not so much a matter of erosion of contribution but a question of what weight is to be attached, in all the circumstances to the initial contribution" (*Pierce and Pierce* (1999) FLC ¶92-844)

A number of cases were discussed by Watts J which considered formulaic or "time served" approaches along the lines of *West and Green*. In *Coghlan*, the Full Court considered the following matters to be relevant:

1. The relationship between years of fund membership and cohabitation
2. The actual contributions made by the fund member at the commencement of cohabitation (if applicable), at separation and at the date of hearing
3. Preserved and non-preserved resignation entitlements at those times

Watts J noted that the Full Court's first point seemed to suggest that there may be life in a *West and Green* approach as a starting point to consider the initial contributions or post-separation contributions. However, the weight and effect of "time served" contributions had to be assessed in the context of the contributions made by each party. The second and third points might be important depending on the nature of the fund. Watts J did not, however, think that the *West and Green* approach fitted comfortably with how the court assessed contributions to other property.

On the *West and Green* formula, Watts J found that the wife's entitlements were 21.7% of the husband's superannuation. Watts J went on to assess the wife's contributions to the interest in the growth phase as 40%.

In *M and M* (2006) FLC 93-281, the Full Court decided that the *West and Green* formula is rarely useful if superannuation is being split. The *West and Green* formula had been over-

used and interpreted to cover situations far beyond its narrow facts. It was appropriate for assessing contributions to the date of an order which would take effect upon the member's retirement in the future. The formula was, however, more broadly applied to assess contributions to the date of hearing, and the adjustment was made in non-superannuation assets at that time rather than at the time the member became entitled to the superannuation.

The parties separated after a 12 year marriage and had three children. About 2½ years after separation the husband was medically discharged from the police force. His fortnightly pension, of approximately \$1,900, was valued at \$1,081,726. The net non-superannuation assets were \$488,752. The parties' superannuation was \$1,098,071.

The trial Judge ordered that the non-superannuation be divided 52.5%/47.5% in favour of the wife. The superannuation was not split. The judgment was delivered before the Full Court delivered its judgment in *Coghan*.

Using the *West and Green* formula to assess the wife's contributions to the husband's superannuation, the trial Judge found that the wife made an equal contribution to 13/20ths of it. She was therefore entitled to over \$330,000. However, the trial Judge only awarded the wife \$80,000 from the non-superannuation. His main reasons were:

- the husband was only entitled to a periodic pension
- the husband was not entitled to a large lump sum for at least 16 years
- a splitting order might be required if the adjustment was larger

The parties did not suggest other ways for the wife's substantial contributions to the husband's superannuation to be evaluated. The Full Court used the *West and Green* formula as a rough rule of thumb in the absence of other evidence and concluded that insufficient weight was given to the wife's contributions.

A further dilemma for the Full Court was that a splitting order was not sought by either party, although it was sought by the wife at trial (*SJM and DJM*, Coleman J, 22 April 2005). In any event, it was attractive not to split the superannuation as:

- the husband's income stream was preserved
- the wife's borrowings to retain the home were less
- the level of child support was maintained
- although the husband was unlikely to resume full time employment, if he did so, the pension split would terminate

The Full Court in *M and M* tried to close the door on formula approaches. It considered that only in rare cases could formulas be usefully applied to an adjustment of non-superannuation assets taking into account contributions to superannuation. The strength of the Full Court's view was, however, diminished by its finding that it could not order a super-split as neither party sought one. It also found other advantages of not splitting superannuation. It adjusted for the husband's pension entitlement by giving the wife a greater share of the non-superannuation. The most the wife could secure for her \$330,000 "contribution" to the husband's superannuation was about \$158,000 being the husband's equity in the home, about double the amount ordered by the trial Judge and less than 50% of the *West and Green* rough rule of thumb.

### **Conclusion**

Although there are some important cases, including of the Full Court, dealing with superannuation under Pt VIIB, there remains uncertainty as to how to include it in the pool and assess contributions to it.

Contributions to non-superannuation property post-separation have been relevant in several cases in the past few years. However, it is in superannuation cases that increased emphasis to post-separation contributions has been more noticeable.

The use of the *West and Green* formula in assessing contributions can be used as a rough guide but the overall circumstances will be relevant particularly if actual evidence of pre-cohabitation contributions or value is available.

© Copyright - CCH and Jacqueline Campbell. This paper uses some material written by the author for publication in *CCH Australian Family Law and Practice*. The material is used with the kind permission of CCH.