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Trott and Trott – Assessing the Percentage of the Super Split

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Superannuation splitting has added a greater level of complexity to family law property settlements. Superannuation in the payment phase raises specific problems but the valuation, contribution and s 75(2) issues are relevant to many other cases involving superannuation.

In *Trott and Trott* (2006) FLC 93-263, the husband, a police officer, was entitled to a pension before the usual retirement age because of an injury he received after separation.

Facts

The parties separated after 10 years of marriage. They were both aged about 40 and had two children aged 8 and 11. The net property pool excluding superannuation was about \$540,000. The parties agreed to treat the wife's superannuation as part of the general property pool.

The single expert valued the husband's superannuation at about \$1,809,000, but under the Regulations it was valued at about \$1,865,000. The parties and the court accepted the lower value, seemingly contrary to s 90MT(2)(a).

The husband had two superannuation interests in defined benefit funds. One was a pension in the payment phase and the other was in the accumulation phase. Watts J said that it was important to analyse the "real nature" of the husband's superannuation and the different contributions made to each interest.

The Category 1 interest was a CPI indexed pension which was currently \$91,414.51 gross per annum. It was valued at about \$1,390,000. The husband proposed that the wife receive 10% or about \$180,000 of his superannuation by way of adjustment against other property. The wife sought variously 25-50% of the superannuation and a 75/25 split in her favour of non-superannuation.

Value of superannuation

Watts J did not accept that giving a lump sum value to a pension had "an air of artificiality" (Coleman J in *Cahill and Cahill* (2006) FLC 93-253). It was reasonable to conclude that a similar purchase price was required to obtain an annuity with the income streams to which the husband was entitled. Prior to Pt VIII B being introduced, superannuation was often undervalued.

Watts J rejected the husband's argument that until normal retirement age, his pension was like payments under an income protection policy.

The value of the superannuation under the Family Law (Superannuation) Regulations 2001 differed from the single expert's valuation adopted by the parties and the court because, for example:

- The Regulations used a discount factor to age 65. Due to the injury, the husband was entitled to a pension until the age of 60
- The Regulations did not have a method to value the pension which might later be commuted
- The Category 2 superannuation had a different formula than if the husband worked to the usual retirement age
- The Category 1 superannuation was not based merely on the length of time in the fund. The circumstances of the injury and the amount of salary at the time of the injury were also relevant.

Wife's contributions to husband's superannuation

The wife did not directly contribute to the husband after his injury by way of nursing or otherwise. However, her role as a parent increased. More importantly though, her earlier contributions were relevant to the amount of the husband's salary at the date of his discharge. She supported the husband in applying for promotions, relocated twice with their children to facilitate promotions and left her employment. His increased employment responsibilities placed greater burdens on her.

Watts J assessed the wife's contributions to the Category 1 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* (1993) FLC 92-395. In *Coghlan and Coghlan* (2005) FLC 93-220 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.

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%.

Should there be a splitting order?

The wife sought a splitting order but the husband did not. Watts J, referring to *Mackey and Mackey* [2005] FamCA 276 held (at para 197) that:

"Much of the debate as to whether or not valuation methodology leads to "a quite artificial and largely arbitrary exercise" is eliminated, if the facts of an individual case allow the utility of s 90MT

(1)(b) to be used. I find that in this case it can be.”

Based on contributions, he proposed a splitting order of 15% in the wife’s favour of the Category 1 superannuation interest and a splitting order of 40% in the wife’s favour of the Category 2 superannuation interest.

The trustee said that invalidity pensions were only splittable payments if they had been in the payment phase for more than two years.

Provided the husband satisfied the definition of permanent incapacity, the single expert considered the pension payment was splittable. Watts J was satisfied that the husband was suffering from a permanent incapacity and was medically discharged from the police force on that basis. However, he also made an order against the husband personally.

Section 75(2) factors

Under the third step, Watts J considered whether s 75(2) adjustments should be global even if contributions were assessed on an asset-by-asset approach. Although *Coghlan* allowed either approach, he found it more convenient to consider all of the net property and superannuation together.

An appropriate adjustment under s 75(2) was \$94,359 and this converted to 4% of the total pool.

Wife’s entitlements

The wife was entitled to 37.5% of the net non-superannuation property based on contributions and a further 17.5% at step 3, being a total of 55% of the net property excluding superannuation. In addition, she received 15% of each splittable payment of the category 1 superannuation and 40% of each splittable payment of the Category 2 superannuation. In total, she received 28.65% of the net property. The dollar values were:

Percentage received by wife	Total value of assets	Value Wife received
55% of the property and liabilities	\$539,168	\$296,542
15% of the category 1 superannuation	\$1,389,163	\$208,347
40% of the category 2 superannuation	\$419,443	\$167,777
	\$2,347,774	\$672,666

Conclusion

Trott and Trott illustrates that the “one size fits all” approach of valuing under the Regulations can lead to a valuation that does not reflect the “true value” of the superannuation. Although the court was bound by s 90MT(2)(a) to accept the value under the Regulations, the parties agreed with the single expert that a different figure should be used. The court accepted this.

Although superannuation is treated as property (s 90MC) the court is prepared to treat superannuation differently to non-superannuation. An asset-by-asset approach or two pools approach rather than a global approach is being regularly applied (eg *B and B* [2005] FamCA 624, *McKinnon and McKinnon* (2005) FLC 93-242) but by no means consistently so (eg *Ilett and Ilett* (2005) FLC 93-221). The discussion by Watts J of assessing contributions and s 75(2) factors in superannuation cases is practical and readily applied to cases not involving splitting in the payment phase.

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