THE FAMILY COURT'S NEW POWERS IN RELATION TO SUPERANNUATION SPLITTING

Michael Paul

Palm Cove July 2005

In 2001 significant amendments were made to the Family Law Act.

These amendments for the first time gave the Court power to:

1. Treat superannuation interests as property in Property Settlement proceedings; and
2. Split superannuation interests in Property Settlement proceedings.

SUPERANNUATION INTERESTS

The Act commenced on 28 December 2002 and so far as is relevant to this paper was in the following terms:

- **SECT 90MA**

Object of this Part The object of this Part is to allow certain payments (splittable payments) in respect of a superannuation interest to be allocated between the parties to a marriage, either by agreement or by court order.

- **SECT 90MC**

Extended meaning of matrimonial cause **A superannuation interest is to be treated as property for the purposes of paragraph (ca) of the definition of *matrimonial cause* in section 4.**

- **SECT 90MH**

Superannuation agreement to be included in financial agreement

(1) A financial agreement under Part VIIIA may include an agreement that deals with superannuation interests of either or both of the parties to the agreement as if those interests were property. It does not matter whether or not the superannuation interests are in existence at the time the agreement is made.

- **SECT 90MS**

Order under section 79 may include orders in relation to superannuation interests

(1) In proceedings under section 79 with respect to the property of spouses, the court may, in accordance with this Division, also make orders in relation to superannuation interests of the spouses.

Note 1: Although the orders are made *in accordance with* this Division, they will be made *under* section 79. Therefore they will be generally subject to all the same provisions as other section 79 orders.
Note 2: Sections 71A and 90MO limit the scope of section 79.

(2) A court cannot make an order under section 79 in relation to a superannuation interest except in accordance with this Part.

- **SECT 90MT**

Splitting order

(1) A court, in accordance with section 90MS, may make the following orders in relation to a superannuation interest (other than an unsplittable interest):

a. if the interest is not a percentage-only interest—an order to the effect that, whenever a splittable payment becomes payable in respect of the interest:

i. the non-member spouse is entitled to be paid the amount (if any) calculated in accordance with the regulations; and
ii. there is a corresponding reduction in the entitlement of the person to whom the splittable payment would have been made but for the order;

b. an order to the effect that, whenever a splittable payment becomes payable in respect of the interest:
   i. the non-member spouse is entitled to be paid a specified percentage of the splittable payment; and
   ii. there is a corresponding reduction in the entitlement of the person to whom the splittable payment would have been made but for the order;
c. if the interest is a percentage-only interest—an order to the effect that, whenever a splittable payment becomes payable in respect of the interest:
   i. the non-member spouse is entitled to be paid the amount (if any) calculated in accordance with the regulations by reference to the percentage specified in the order;
   ii. there is a corresponding reduction in the entitlement of the person to whom the splittable payment would have been made but for the order;
d. such other orders as the court thinks necessary for the enforcement of an order under paragraph (a), (b) or (c).

(2) Before making an order referred to in subsection (1), the court must make a determination under paragraph (a) or (b) as follows:
   a. if the regulations provide for the determination of an amount in relation to the interest, the court must determine the amount in accordance with the regulations;
   b. otherwise, the court must determine the value of the interest by such method as the court considers appropriate.

The effect of all these provisions is that whereas previously the Court could not deal directly with a superannuation interest to which a party to a marriage was entitled, whether at the time of the hearing (i.e. when the interest was in the payment phase) or prospectively (i.e. when the interest in the fund was in the accumulation phase), it can now do so, subject to this being done **as part of the determination of a property settlement application** and to **procedural fairness** being afforded to the trustee of the fund.

Previously all that a Court could do was to have regard to the existence of the superannuation entitlement as if it were a prospective entitlement, in accordance with the scheme set out in Section 75(2) of the Act which effectively required the Court after making a finding as to the contribution based entitlement to the property of the parties to make an adjustment to that have regard to:

(f*)… the eligibility of either party for a pension, allowance or benefit under –*

(i) any law of the Commonwealth, or a State or Territory or another country; or

(ii) any superannuation fund or scheme whether the fund or scheme was established or operates within or outside Australia.

And the rate of any such pensions, allowance or benefits being paid to either party.

The Court had to disregard any entitlement to an income tested pension, allowance or benefit (75(3)).

This led to many apparent injustices in circumstances particularly those referred to in cases such as *Crapp*[1] (there were a number of cases involving Qantas Pilots) where the extent of the prospective superannuation interest was significantly greater than the assets built up during the marriage.

The Court's armoury then was limited to giving the whole of the realisable portion of such property, as there then was, to one party and then adjourning the matter under Section 79(7) in circumstances where the Court could take the view that:

> *"There is likely to be a significant change in the financial circumstances of either or both of the parties…by reason that the parties to the marriage –*
>
> *a) is a contributor to a superannuation fund…. or*
>
> *b) may become entitled to property as a result of the exercise in his or her favour by the trustee of a discretionary trust."*

THE NEW POWERS

There have not been a great many decisions as to how the Court is to exercise its new powers. At first instance, one of the earlier cases was a decision of Justice Moore in *Levick*[2], delivered on 31 January 2003.

The parties had lived together for 20 years, the husband was 45 and the wife 42. There were two children, the residence of whom was shared between the parties. The husband was in receipt of a substantial income as an investment banker.

---

[1] (1979) FLC 90-615

At the date of the hearing the total property excluding superannuation was found to be $1.280 million. The superannuation entitlements of the husband were valued at $421,180.

Her Honour did not allow any discount for tax which would be payable whenever it was that the husband chose to take the super.

Her Honour found that the wife would have "*little left over as a buffer for contingencies and independent living*".

The husband had argued that whatever be the split of assets (**including superannuation**) between the parties that this should be reflected overall so that the wife should get a particular precise percentage proportion of the assets and **the same precise percentage proportion of the superannuation.**

He argued that superannuation splitting on such a basis "*was consistent with the underlying purposes of the changes of the Act which was to the effect that he should not be left in a position of being superannuation rich and asset poor*".

The Trial Judge decided after consideration of the matter that:

> "*The wife's position of taking her superannuation entitlement by an adjustment to the other assets might be a better arrangement for her… the probabilities are that she would have little or no retirement funds… the tension between these possible outcomes has led me to include that the better arrangement would be for her to take her entitlement partly by a splitting order and partly by an increase to other assets*".

Her Honour then went on to say that:

> "*Counsel for the husband submitted in essence that both parties should have to wait for the superannuation entitlement to be paid out. Superannuation has long been regarded as a joint venture to which the parties contribute and plan for their retirement. The intent of the super splitting legislation is to ensure that the artificial divide whereby one party, commonly the husband, has the*

[2] (2003) FamCA 40

> *sole benefit of superannuation saved for during cohabitation, no longer operates*".

and:

> *"Because of the super splitting legislation the non-member party, usually the wife, can share in the benefits of retirement planning through superannuation".*

Does this mean that the Court must order the distribution of the assets in accordance with the findings otherwise made pursuant to Section 79(4) and Section 75(2) to both a splittable superannuation and also the available assets?

In my opinion it does not. The Court is enjoined to consider the particular circumstances of each case and hence deliver individual justice. Thus in some cases it will be appropriate to order that a party can take their superannuation entitlement by way of an adjustment with respect to other assets.

It will be recalled that in *Crapp* Fogarty J commented about the unsatisfactory nature of the treatment of superannuation saying "*the result frequently is that the Court is forced into a position which of its very nature is incapable of producing a satisfactory result for the parties in many cases and often resulting in a real sense of grievance in one or both of the parties*".

This was referred to by the Full Court in the first and only reported Full Court decision dealing with superannuation, namely, *Hickey*[3].

This case, decided in 2003, contains dicta about how the Court might go about the treatment of superannuation **without however having to decide that issue.** This was because the matter was referred to the Full Court by the Trial Judge who had been simply asked to deal with proposed consent orders. The questions for the Full Court were really confined to the procedural issues that were involved including procedural fairness requirements and even whether or not the superannuation interest had to be valued.

There was nothing before the Court which in any way would have permitted the Court to have made a decision which could be looked upon as a precedent for, or guidance in relation to future applications concerning, the splitting of superannuation entitlements.

---

[3] (2003) FLC 93-143

This was despite the fact that the Attorney General sought to and was granted leave to intervene on behalf of the Commonwealth.

In an apparent attempt to turn back the clock, as it were, the Solicitor General and Counsel for the husband both submitted:

> "*That the rights of a member of a superannuation fund under… the trust deed… are a chose in action which is property, and to that extent, superannuation is first and always has been property (within the meaning of the Act) and thus amendable to the exercise of power pursuant to the exercise of power pursuant to Section 78 and 79*".

The Full Court in answer to that simply said:

> "*We agree with the submission that Part VIIIB is intended to provide Courts with greater flexibility in dealing with superannuation interests and to overcome many of the difficulties previously identified and that it* ***supplements the other powers of the Court****".*

The Court went onto consider the effect of Section 90MC(above) and said:

> "*It was in proceedings (for Property Settlement) that superannuation is to be treated as property irrespective of whether or not a splitting or flagging order is sought or proposed to be made… the expression "treated as property" should be understood as meaning "treated as if it were property even though it is not" and that it should be so treated for the purposes of Section 79 and … it follows that it will be included in the list of property and valued at what is step one of the preferred four step approach to the determination of an application pursuant to Section 79*".

The Court had set out the "four step approach" in this fashion:

> *"The case law reveals that there is a preferred approached to the determination of an application brought pursuant to the provisions of Section 79. That approach involves four interrelated steps. Firstly, the Court should make findings as to the identity and value of the property, liabilities and financial resources of the parties at the date of the hearing. Secondly, the Court should identify and assess the contributions of the parties expressed as a percentage of the net value of the property of the parties. Thirdly, the Court should identify and assess the relevant matters referred to in ss 74(4)(d), (e), (f) and (g), ("the other factors") including, because of Section 79(4)(e),*

the matters referred to in Section 75(2) so far as they are relevant and determine the adjustment (if any) that should be made to the contribution based entitlements of the parties established as step two. Fourthly, the Court should consider the effect of those finding and determination and resolve what orders is just and equitable in all the circumstances of the case".

The Court then went on to deal with the next steps in these matters by referring to steps three and four. The Court said:

> "*At step three the superannuation interest may be taken into account, as are other items of property and financial resources pursuant to the provisions of Section 75(2) if the interest in relevant.*

That was not a major announcement but then the Court suggested:

> "*The superannuation legislation introduced reforms which are directed as to how a Court will deal the superannuation interest at steps one and four and the preferred four step approach in the determination of an application under Section 79. **The legislation did not amend Section 75 or 79***".

Steps one, two, three, and four are the steps which as my other paper indicates are the matters to be dealt with sequentially as steps one, two, three and four of any property settlement application.

The Court offered no real guidance when in the following paragraph it said:

> "*For this reason in our view it is not necessary for us to resolve the issue raised by the submissions that superannuation interest is property as defined in Section 4(1) apart from the provisions of Part VIIIB*".

All the Full Court did in *Hickey* was to state what was required to be done where consent orders were sought to be made, and reiterated what the High Court had said in *Harris and Caladine*[4] to the effect that where consent orders were sought by parties who are legally advised and are at arms length nothing more is required by the Court that it is satisfied of the bona fides of the consent, that legal advice has been given, and that the parties have considered the relevant statutory provisions.

[4] (1991) FLC 92-130

None of this had anything to do with the way in which the Court considering the implication in an appropriate case of the new legislation should exercise its discretion or jurisdiction.

Stephen Burke in an article published in a recent issue of the *Australian Family Lawyer*[5] discusses the manner in which, in his view, the Court should approach the problem.

He commences with the premise that the High Court had set out in *Norbis*[6] which I will discuss in my other paper today, that the Court had an absolute discretion in any particular case whether to determine a matter by way of a global approach, or on an asset-by-asset approach.

The clear indication is that there is a very serious preliminary question for a Judge in determining a matter in which a superannuation splitting order is sought, as to whether or not, in looking at the answer to this question, the Court should lump together the whole of the property including superannuation interests and make an Order expressed as a percentage of the total or whether the Court should look at the property of the parties including superannuation, on an asset by asset basis. The essence of an approach on the latter basis is that the Court can ascribe to and make a different finding about the contribution of each party to each particular asset including superannuation. Burke argues:

> "*That with superannuation being treated as property a variation of the alternatives is emerging*".

He takes the view that "*the distinguishing feature of the cases seems to be that the global approach is adopted where inclusion of the superannuation does not* ***distort the asset pool".***

He goes on to argue that these are cases where the asset pool is modest and "*not more than 50% of the property pool".*

CARL

A potentially significant decision was made by Justice Coleman in Carl (unreported).

[5] Stephen Burke "Super Splitting 2 years on" *Australian Family Lawyer* Vol 18 No 2
[6] (1983) 9 FamLR 385

There His Honour was dealing with a "*DFRB Pension in the payment phase".* In other words the former defence person had retired and was at the time of the hearing in receipt of a DFRB Pension.

The Regulations provide how such pensions should be valued. For example, a pension for a DFRB person at age 53 of $38,834 Per annum (indexed) can be valued under SIS Regulations at $659,673.

His Honour was at pains to point out that although one was obliged to include the value of the DFRB Pension as property in the pool of assets in accordance with the legislatively prescribed method of valuation:

> *"The Court was urged to adopt a formulaic proportion of the entitlement. That approach is not entirely acceptable. The appropriateness of a formulaic approach in general remains to be conclusively considered by the Full Court. Apart from anything else, a formulaic approach has no real regard to the value of money at any given time, nor does it have any regard to the impact upon the family of a contributor to a superannuation fund at any given time in the life of the family, nor does it, or can it, have regard to the families circumstances at the time".*

His Honour went on to say that:

> "*It will be discerned that the Court… is suggesting a distinction between taking into account, for the purpose of determining the assets of parties to the proceedings, assets which have a theoretical value such as the husband's DFRB entitlements and having regard to the realities of life surrounding such entitlements and reflecting them in their valuation of contributions…**it is one thing to "treat" superannuation as "property" to enliven the jurisdiction of the Court to make an Order in respect of superannuation, another altogether to suggest that superannuation must thereby be treated the same way as existing or tangible assets when entitlements of the properties are determined pursuant to Section 79 of the Act…"***

His Honour went on to suggest:

"*That to apportion (the value under the Regulations) of the husband's entitlement* ***as if it were asset*** *would be an exercise in artificiality in the matter … if one had regard to it and if one concluded that the wife's entitlement was any significant percentage that would be, in the Court's view, grossly unjust so far as the husband was concerned*".

It will have to be appreciated that the value determined by the regulations of pensions such as DFRB Pension are hugely significant.

His Honour went on to note:

"*It would seem that despite the absence of legislative amendment to Section 75(2) it could not possibly in justice or equity be the case that something brought in as an asset which has not yet materialised and will not materialise necessarily for the sum at which it is brought in can again be considered under Section 75(2)."*

OTHER DECISIONS

There were a number of other decisions including of Justice Chisholm in *Spagnardi*[7] where His Honour said:

"*I take into account, however, that the funds were not immediately available to (the wife) and that (the husband's Counsel's calculations) were based on assumptions that the wife was in good health and that she would remain at work until age 70".*

In *Turner*[8] the husband sought a division of 55/45 in favour of the wife and an equal splitting of his separation. Moore J took into account the history of the contributions including contributions to the fund itself.

Her Honour concluded:

"*Achieving a balance in the circumstances… is not easy…because … there is simply not enough capital to satisfy everyone by the establishment of two households to the same standard… when there was once only one. But in*

[7]Reported in Latest Developments Australian Family Law and Practice Reporter at 80 - 230

my opinion at the end of the day the scales tip in favour of a no splitting order being made and the wife having her entitlement. To do otherwise would see her not able to retain the home where the children are settled for the sake of $76,000 in superannuation with eligibility to the fund many years down the track. The additional cash available to the husband would no doubt enhance his capital position and reduce the amount he would have to borrow to rehouse himself and provide for the children on their visits. But as I see it, the amount involved is not of sufficient proportions or as such advantageous to his future position as to outweigh the detrimental impact upon the wife's future position if she is unable to secure the home."

What is to be made of all this?

I think the important matter to be taken into account is that, whereas it may well have thought initially that superannuation splitting, as part of the armoury of the Family Court in Property Settlement matters, was intended to deal with the asset rich / superannuation poor husband and to give that person a greater share of the assets, the results so far do not appear to have borne out this expectation.

It is clear that as Her Honour Federal Magistrate said in *H v H*[9] "*it will be a matter for decision according to the individual Justice required in the case".*

Practitioners who require to consider further the various decisions which have been handed down and the implications thereof would be rewarded not only by a study of the article of Stephen Burke but also of an article published in CCH by Jacqueline Campbell[10]

---

[8] unreported Moore J 14/11/2003
[9] [2003] FMCAfam 282
[10] Reported in Latest Developments Australian Family Law and Practice Reporter at 80 – 115 to 80-240