Valuing Superannuation for Family Lawyers, by Jacqueline Campbell, Forte Family Lawyers, released October/2011

ABOUT THIS PROGRAM

This program focuses on valuation of superannuation interests in family property proceedings – recognising that super often represents a major part of the property pool.

The program covers:

- ***relevant provisions of the Family Law Act;***
- ***valuation methodologies prescribed under the Family Law (Superannuation) Regulations;***
- ***where the Regulations do not apply;***
- ***obtaining required information – including the importance of timeliness;***
- ***making or arranging valuations;***
- ***particular issues affecting pensions;***
- ***particular arrangements for self-managed super funds;***
- ***discretions exercisable by the courts; and***
- ***a range of relevant cases.***

Valuing superannuation can be straight forward or complex. Valuing accumulation interests is similar to valuing bank accounts, although they have risen and fallen dramatically in value during the past few years. The value of a self managed superannuation fund depends upon the value of the assets owned by the fund, such as shares or real estate. Defined benefit funds are more difficult to value. The reported judgments on valuation of superannuation primarily deal with these funds. The Explanatory Memorandum to the Bill for the Family Law Legislation Amendment (Superannuation) Act 2001 identified the problem as being that the final value at retirement for defined benefit funds is not known with certainty at the time of separation. Its final value is dependent upon future events.

This paper refers to provisions of the Family Law Act (FLA) which deal with married couples. However, for separations after 1 March 2009, de facto couples (and in South Australia after 1 March 2010), provided they meet the jurisdictional requirements are, of course, under the FLA.

1. Superannuation as property

Under s 90MC FLA, superannuation is treated as property for the purposes of para (ca) of the definition of "matrimonial cause" in s 4(1). This was discussed in Coghlan and Coghlan (2005) FLC ¶93-220. The Full Court majority (3:2) said (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 Full Court went on to say (at para 56):

It may well be that it was the intention of the legislature that where no order is sought under Part VIIIB, then the superannuation interests of the parties are to be treated in the same way as such interests were treated prior to the introduction of Part VIIIB. The difficulty, however, with that argument is that the Court has an obligation in property settlement proceedings to make an order which is just and equitable. In the circumstances now prevailing since the introduction of Part VIIIB, in which a valuation which provides an indication of the true worth of a superannuation interest can be made available and in which the Court has the capacity to make a splitting order in relation to payments made in respect of a superannuation interest, a Court may well only be able to satisfy itself that any order it makes will be just and equitable, if it applies to its consideration of the superannuation interests, the criteria for determining a just and equitable order – those criteria being in effect the matters contained in s 79(4) of the Act.

Warnick J dissented, saying (at para 88):

In my view, if the legislature had required references to “property” in s 79 to read “property and/or superannuation interests” rather than, as it did, requiring that, for the purposes of paragraph (ca), superannuation be treated as property, there is no apparent reason why it could not have said so.

He concluded (at paras 99-100):

In my view, the relevant context here includes the (already noted) words in s 90MC which include that for the purposes of paragraph (ca) a superannuation interest is to be treated as property; the terms of s 90MO(2), namely:

Subsection (1) does not prevent the court taking superannuation interests into account when making an order with respect to the other property of the spouses.

which implies that superannuation is property, or at least to be treated as property; the terms of s 90 MT(2) requiring the Court to determine a value of a superannuation interest, where an order under Part VIIIB is sought, [the same as is done for property] and; the note to s 90MS(1), the terms of which have been already set out in the reasons of the majority, and which indicate that all the same provisions will apply to orders in relation to superannuation interests as apply to other s 79 orders.

I consider that this context supports the treatment of superannuation interests in s 79 proceedings, as if they were property.

O'Ryan J, also dissenting, said (at paras 130-133):

In my view, the trial Judge was in error in failing to treat the superannuation interests as property and include the interests in the list of property. This had the unfortunate consequence that he then failed to assess contributions to the superannuation interests, and failed to give proper consideration to the impact of superannuation interests when considering the adjustment, if any, to be made having regard to the matters in s 79(4) (d), (e), (f) and (g) and in particular s 75(2) by reason of s 79(4) (e).

The trial Judge said that the valuation of the husband’s pension had an “air of artificiality” about it but he failed to explain what he meant. As I indicated in the course of submissions, in my view, the husband’s pension which was in the payment phase was property as defined in s 4(1) and thus Pt VIIIB had nothing to do with the interest unless a splitting order was sought that would be binding on a third party. As to the valuation of the pension of $231,906, which was agreed, the majority point out that in the circumstances now prevailing since the introduction of Pt VIIIB valuations may be obtained which provide an indication of the true worth of a superannuation interest.

That said there is nothing new about the capitalisation of income streams. It is a well established practice with logical foundation. For example, a party might purchase an annuity for a sizeable lump sum. It would be incongruous if the party’s entitlement then ceased to have a calculable value merely because it was an entitlement limited to a periodic payment during the party’s lifetime.

Another example is given in the written submissions of the wife that “There is no inherent artificiality in ascribing a value to an income stream. It is done regularly. An example is the capitalisation of future maintainable earnings in valuations of goodwill.” I agree... In my view, the trial Judge failed to consider whether the value of $231,906 reflected that it was payable in a periodic form. If it did then I do not understand how it is contended that there is an “air of artificiality” about the value.

Dowdell

In Dowdell and Public Trustee of the Northern Territory [2007] FamCA 1276, the parties were married for 46 years. The husband committed suicide about 18 months after separation. The wife argued that the husband suicided, in part, to deprive the wife of his Defence Force Retirement and Death Benefits Scheme (DFRDB) pension. She relied on Kowaliw and Kowaliw (1981) FLC ¶91-092 and argued that by his intentional act he reduced the property of the parties by the value of the pension, namely $287,149.

Strickland J refused to add back the pension to the pool, saying (at para 120):

I do not consider that the evidence supports a finding that a reason for committing suicide was to deprive his wife of benefiting from his pension. I find that it was solely to do with his state of health... The husband has not acted 'recklessly, negligently or wantonly' with his pension and thereby reduced or minimised its value …

The wife argued that the Court was able to split 100% of the husband's DFRDB pension because the proceedings had started prior to the husband's death, and the operative time (for the order to operate) could be before the death because there was no temporal limit on the operative time in either the FLA or the DRFDB Act. The latter simply adopted the definition of 'operative time' in the FLA, namely, '…the time specified in the order'. The Public Trustee did not oppose the order but the trustee of the DFRDB scheme did.

Strickland J agreed with the submission of the fund trustee that the Court was unable to make a splitting order as there was no longer any superannuation interest. Upon his death the husband's entitlement to a pension ceased and nothing was payable to his estate. The trustee relied on Casey, discussed below.

Casey and Braione-Howard and DFRDB Authority

Casey and Braione-Howard and DFRDB Authority (2005) FLC ¶93-219 was a case stated to the Full Court. After his divorce, the husband remarried. During the course of property proceedings with his first wife, he died. His new wife was entitled to a spouse's pension under the DFRDB Scheme. The former wife sought an order splitting the payments made to the widow.

The Full Court said (at paras 43 - 44):

In our view, the legislative intention evidenced by the DFRDB Act is clear. No part of the Act in our view provides for a former spouse to share in the superannuation interest of a member of the DFRDB Scheme other than during the lifetime of the member. The operation of Pt VIIIB of the Family Law Act, and subsequent enactment of Pt VIA of the DFRDB Act, enabled a former spouse to seek orders pursuant to the provisions of the Family Law Act with respect to such interests prior to the death of the fund member…

Crucial to the power under Section 79 is in our view that there be, in the circumstances of this case, "property" of the deceased member. It is clear that, upon his death … nothing became payable by the DFRDB Authority to the Estate of the deceased member … On his death, on the proper construction of the DFRDB Act, the deceased member ceased to have a superannuation interest in the scheme…

Hayton and Bendle

In Hayton and Bendle [2010] FamCA 592, the Court had to consider whether the husband's NSW judicial pension was '"an eligible superannuation plan" within the meaning of s 90MD. The Court held that as the Pension Act was a scheme for the payment of "retirement or death benefits" and, thus, was a public sector superannuation scheme. This meant it was a superannuation fund within the meaning of the Superannuation Industry (Supervision) Act 1993 ("SIS Act") and an "eligible superannuation plan" within s 90MD.

Murphy J concluded that even though the husband's entitlements to retirement benefits were contingent or prospective, he was a member of a superannuation interest and that interest although entirely prospective, was a superannuation interest under the FLA. The Regulations did not provide a method for valuing this superannuation interest, a percentage-only interest, at the time.

In order to value the interest, the single expert used the method in the Family Law (Supervision) Regulations 2001 ("FLS(R)") for determining the gross value of a defined benefit interest in the "growth phase". Another expert gave evidence that this type of interest had "a nature, form and characteristics similar or identical" to the percentage only interest. The Court accepted the valuation as there was no contrary evidence.

2. Approach to valuation

If a splitting order is being made, Part VIIIB is very specific. The Court must value a superannuation interest in accordance with s 90MT(2) when making a splitting order under s 90MS. Before making an order the Court must make a determination under paragraph (a) or (b). If the Family Law (Superannuation) Regulations provide a method for the determination of that interest, the Court must determine the amount in accordance with the Regulations.

Otherwise, the Court must determine the value of the interest by such method as the Court considers appropriate. Section 90MT(2) provides:

Before making an order... 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.

Section 90MT(2) is irrelevant if either:

1. The parties resolve property matters with a financial agreement (including a superannuation agreement); or
2. No splitting order is made.

3. Methods of valuation

Often, superannuation can be valued simply by obtaining a recent member's statement. This is accurate for interests in accumulation funds in the growth phase and is acceptable evidence under reg 31 (2) FL(S)R.

Further steps may be required if:

- orders are sought (by consent or otherwise) which deal with a superannuation interest. The Financial Statement and Application for Consent Orders require a Superannuation Information Form to be attached for each of the deponent's superannuation interests if property orders are sought. This requirement is, however, often ignored
- a court order is made requiring further steps
- the interest is a defined benefit or percentage interest or is in a self-managed superannuation fund
- the member's statement is more than about 3 months old, depending on the level of the member's income or the fluctuations in the share market.

There are various methods to value an interest. In broad terms, these are:

1. For an accumulation interest in the growth phase, a member's statement is sufficient (reg 31).
2. The completion by the fund of the form in the FL(S)R, a Superannuation Information Form (SIF), and perhaps an expert valuation by an expert such as an accountant, financial planner or actuary.

3. Some funds have sought and obtained approval from the Attorney-General's Department for scheme specific methods or factors for valuation. Some funds do the calculations and include the valuation in the SIF. For others, the figures in the SIF are used to obtain a valuation of the interest.
4. An interest in a SMSF is valued by such method as the Court considers appropriate (s 90MT(2)(b)). The individual assets are valued separately.
5. If superannuation is not being split, the Court need not accept the valuation under the FL(S)R (s 90MT(2)). It can value the superannuation in other ways such by varying the formula to use a different retirement date or assume retirement for disability.
6. Courts are sometimes reluctant to give superannuation its full value under the FL(S)R because superannuation is not as immediately useful as real estate or savings. This leads to circular arguments. If the Court does not accept that the valuation is fair it can decide not to split the superannuation. As the superannuation is not being split, the Court is not bound to value the superannuation in accordance with the FL(S)R. However, there needs to be sufficient other property to achieve a just and equitable settlement.
7. If the FL(S)R do not contain a method for valuing a particular superannuation interest "The court must determine the value of the interest by such method as the court considers appropriate" (s 90MT(2)(b)).

4. Date of valuation

Superannuation should be valued at the date of the hearing, or as close to it as possible (Woodland and Todd (2005) FLC ¶93-217; Omacini and Omacini (2005) FLC ¶93-218).

If there has been a significant change in the value of the superannuation between the date of separation and the date of the hearing, the Court can take this into account when assessing the parties' contributions to the fund.

Kapoor and Kapoor

In Kapoor and Kapoor [2010] FamCAFC 113, Finn J, sitting as the Full Court, considered an error made by the expert in valuing the interest of the wife in the Commonwealth Superannuation Scheme ("CSS"). The Court noted the importance of obtaining up-to-date information from the fund before valuing the entitlements.

The expert's valuation of $481,917 as at 27 April 2007 was, in effect, an update of a valuation of $321,481 as at 1 April 2005. The earlier valuation was based on factors or "inputs" from the fund. The expert did not have up-to-date information from the fund of the factors or "inputs" when he prepared his updated valuation, but simply adjusted those factors himself.

The husband later obtained completed SIFs from the fund with the factors or "inputs" as at 27 April 2007 and 27 April 2008. He obtained further valuations of the wife's interests as at 27 April 2007, being $456,158.80, and as at 27 April 2008, being $480,885.50. The difference between the revised valuation of $456,158 as at 27 April 2007 and the valuation used by the trial Judge of $481,917 was $25,759. This was not an insignificant proportion of the pool. The husband conceded that the error was of sufficient magnitude for the appeal to be allowed.

Finn J said (at para 94):

The Contributing Member Statement, on which the wife relied, is a document which essentially shows what a member's entitlements in the scheme are, particularly on leaving the scheme. The Family Law Information statements serve an entirely different purpose, that purpose being, the valuation of superannuation interest for the purposes of Part VIIIB of the Act, that is, for the purpose of property settlement proceedings under the Act. Moreover, such statements are accorded an evidentiary status under reg 68B(2) of the Superannuation Regulations. It may be that a Contributing Member Statement might be used for the purpose of preparing a valuation of a superannuation interest for family law proceedings, but in circumstances where a valuation is available which is based on a Family Law Information statement, that latter valuation must be preferred.

Finn J re-determined the matter using the valuation of the expert as at 27 April 2007 on the basis of the SIFs to that date provided by the fund. She used the valuation as at 27 April 2007 rather than as at 27 April 2008 because the other major asset of the parties, the matrimonial home, was valued at approximately that time, as was the husband's Zurich superannuation interest. It was unfair to the wife to value her superannuation interest as at one date and the other assets at the later date.

5. Superannuation Information Form

To obtain information from the trustee, a Form 6 Declaration and a SIF (also known as a Family Law Information Sheet or Statement) must be signed by the applicant and sent to the trustee by an "eligible person". Section 90MZB defines an "eligible person".

The declaration must state that the applicant requires the information for either or both of the following purposes:

a. to assist the applicant to properly negotiate a superannuation agreement;
b. to assist the applicant with the operation of Pt VIIIB.

Information about the member spouse (their name and date of birth) is required to complete the form. The fund must also be identified and this can be difficult to do without a member's statement.

The ESSSuper, a major Victorian Government fund, has additional requirements:

- a certified copy of the applicant's driver's licence, passport or other photo ID which contains a signature (if ESSSuper does not already have a copy of the signature on file)
- if the applicant is married, a certified copy of the marriage certificate
- if the applicant is not married, one of:
    - a Certification of Registration on the Relationships Register (pursuant to the Relationships Act 2008)
    - a Declaration by the Family Court under s 90RD(1) as to the existence of the de facto relationship
    - a Statutory Declaration as to the existence of the relationship (including information regarding the geographical location and length of the relationship)

The trustee of the relevant fund is entitled to charge a "reasonable fee" for providing the required information:

- the value of the superannuation "account" or interest as at certain specified dates (except for self-managed superannuation fund benefits still in the growth phase). For a defined benefit interest, the statement does not have to give the valuation, however, it must give the components to enable a valuation to be done
- any withdrawals made between those dates
- details of any payment flags or previous splits
- any fees that it will charge for payment splits and flags
- the member spouse's eligible service period and date of commencing membership in the fund
- preservation and components of the superannuation benefit
- vesting terms and scales
- details regarding reversionary beneficiary entitlements if the benefit is in the pension phase.

6. Pensions in the payment phase

Pensions in the payment phase pose particular challenges to the Courts. Some pensions are referrable to a capital sum which can easily be identified. Other pensions are not. The valuation process gives a capital value to a pension even if the member can never receive a lump sum. Courts, lawyers and clients struggle with this concept. The Courts have variously said that giving a capital value to a pension may be "artificial" or, by contrast, may "show its true value."

Prior to December 2002, the problem of dealing with a pension in the payment phase arose in Perrett and Perrett (1990) FLC ¶92-101. The Full Court refused to look at the husband's fortnightly Defence Forces Retirement and Death Benefits Scheme pension ("DFRDB") as anything more than an entitlement to receive a series of fortnightly pension payments for the rest of his life. It was a financial resource. The only "property" was the next fortnightly payment due.

Superannuation must now be "treated as property" even if it is a pension in the payment phase and it must be given a capitalised value if it is to be split.

Cahill and Cahill

In the 2003 case of Cahill and Cahill (2006) FLC ¶93-253, the husband had a DFRDB fortnightly pension entitlement of just under $1,000. The husband's entitlement was valued at about $430,000. Coleman J said this value had an "air of artificiality". He said (at para 75):

It is one thing to 'treat' superannuation as 'property' to enliven the jurisdiction of the Court to make an order in respect of superannuation, but another altogether to suggest that superannuation must be treated the same way as existing or tangible assets.

His Honour found he could not make a contribution finding in relation to the DFRDB pension. The substantial guaranteed income stream was, however, a powerful s 75(2) factor. This approach does not appear to be consistent with the four-step approach required under s 79.

Trott and Trott

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. The single expert valued the husband's two defined benefit superannuation entitlements at a total of about $1,809,000, but under the FL(S)R they were valued at about $1,865,000 or about $59,000 more. The parties and the Court accepted the lower value, seemingly contrary to s 90MT(2)(a).

One of the husband's interests 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 CPI indexed pension of $91,414.51 gross per annum was valued at about $1,390,000. It was a non-commutable pension to age 60 (normal retirement age) with a partial pension to commence at age 55. The other interest was a commutable indexed life pension after the age of 60.

The husband proposed that the wife receive 10% or about $180,000 of his total superannuation as an adjustment against other property. The wife sought variously 25-50% of the superannuation and a 75/25 split in her favour of non-superannuation.

Watts J rejected Coleman J's view in Cahill and Cahill that giving a lump sum value to a pension had "an air of artificiality". He said that 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 VIIIB being introduced, superannuation was often undervalued.

The value of the superannuation under the FL(S)R was higher than the single expert's valuation. The single expert, the parties and the court adopted the single expert's lower valuation because:

- the FL(S)R used a discount factor to age 65. Due to the injury, the husband was entitled to a pension until the age of 60
- the FL(S)R did not have a method to value a pension which might later be commuted (converted to a lump sum)
- the FL(S)R did not differentiate between value before and after normal retirement age
- the Category 2 superannuation used different formulas if the husband worked to the usual retirement age or was hurt on duty before that time. It was valued at $264,346.48 on 22

March 2004 by applying a multiple based on completed years of service to the attributed salary at the date of the member's retirement or discharge. As he was hurt, it was valued at $419,443.87 by applying a multiple of 10.92 times the indexed pension as at age 60

- 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 factors
- based on contributions, His Honour made a splitting order of 15% in the wife's favour of the larger interest and a splitting order of 40% in the wife's favour of the smaller interest

The wife sought a splitting order but the husband did not. Watts J held (at para 197):

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, Watts J 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 fund trustee said that invalidity pensions were only splittable payments if they had been in the payment phase for more than two years. If the husband satisfied the definition of permanent incapacity, the single expert considered the pension was splittable. Watts J was satisfied that the husband was suffering from a permanent incapacity. However, as there might be a dispute, he also made an order against the husband personally.

Watts J's approach was followed by Fowler J in Wheeldon and Wheeldon [2011] FamCA 40 where the husband had a similar superannuation entitlement.

Treloar and Treloar

In Treloar and Treloar (No 2) [2007] FamCA 1127, the husband joined the Defence Force about 16 years prior to cohabitation and was discharged at his request 7 years after the start of cohabitation. His fortnightly net pension of $604 was valued at $350,000. The wife assessed her entitlements to the husband’s superannuation by applying a formula comparing the time the husband was in the fund and the period of cohabitation prior to the husband’s discharge from the Defence Force. This sounds like West and Green (1993) FLC ¶92-395 but was weighed up in the context of all the other contributions made by the parties which Strickland J said was consistent with Coghlan and Coghlan.

The husband had made greater contributions than the wife to his pension as he was a member approximately 15 years before cohabitation. The contributions for the 7 years of cohabitation were assessed as equal, but after factoring in the husband’s initial contributions and looking at the history of contributions, Strickland J assessed the contributions of the parties to the pension as 85%/15% in the husband’s favour. Due to the absence of evidence as to the husband’s entitlements at the commencement of cohabitation and whether the rate of contributions to the fund altered, Strickland J said this assessment was almost an impossible task.

The effect of Strickland J’s findings on contributions and s 75(2) factors was that the husband was entitled to net non-superannuation assets of $91,300 and the wife was entitled to net non-superannuation assets of $74,700. The husband was entitled to a split of the wife’s superannuation entitlements of $4,355. His Honour ordered that the wife be paid 12.5% of each splittable payment of the husband's pension.

Strickland J accepted the husband’s submission that there should be no splitting order of the wife’s superannuation but set off the $4,355 against the $60,700 payable by the husband to the wife with respect to non-superannuation. He refused to waive the $4,355 which the wife argued was only a small amount.

Glover and Glover (No 2)

In Glover and Glover (No 2) [2009] FamCA 411 the husband received a Defence Forces Retirement and Death Benefits Scheme or DFRDB pension of $1,241 gross per fortnight with CPI increases. It was valued at $609,139. The Court faced a problem which frequently arises where there is a pension entitlement, namely that there were only modest assets besides the pension. Moore J said (at para 14):

But whatever its capitalised value, the difficulty here is that there is no sufficient other property to give to the wife a proper apportionment of the capitalised value in recognition of her contributions. They have both resolved this difficulty by proposing the wife receive the whole of his net after tax entitlement for a period of 13 years, which is not without implications for obligations and entitlements related to child support, Centrelink benefits and income tax assessment.

The wife received:

- 60% of the cash = $37,200
- 60% of the total superannuation entitlements = $59,547 (allocation of a base amount of $42,547)
- $313,326 from the DFRDB entitlement over 13 years or a shorter period.

Moore J said (at para 27):

Since the entitlement is to be passed through to the wife over those years and not paid in a lump sum, it is a flawed exercise to calculate the proportion this total sum bears to... its value... but nonetheless it can be noted that $313,326 is a little over 51% of $609,139 or, to put it another way, it is close to 53% of the value attributed to the period of marriage of $593,750.

Laporte and Penfold

In Laporte and Penfold [2008] FMCAfam 1093, the parties cohabitated for 28 years. The husband was invalided out due to Crohn's disease. He received an annual indexed pension for life of about $325 per week. The fund was valued at $285,582.38.

Contributions during the marriage were equal but post-separation contributions towards the non-superannuation assets favoured the husband. Brown FM divided the parties' net non-superannuation assets 52/48 in the husband's favour.

The husband argued that the parties' contributions towards the acquisition of his pension should be assessed independently of their contributions to other property. As the pension resulted from his personal disability, he argued that his contributions towards that pension were intrinsically different to those made by the wife and should essentially be regarded as totally made by him.

Brown FM considered this approach potentially inequitable to the wife, given the value of the husband's superannuation, when compared with the rest of the pool. In addition, the husband's interest in the pension was acquired entirely during the parties' marriage. It was irrelevant that the husband's disability triggered the entitlement.

Brown FM was not satisfied that any s 75(2) adjustment was justified with respect to non-superannuation. The issue was more complicated with respect to the pension. It was fundamentally inequitable to the husband if his recurrent income was dramatically reduced by half as he was so significantly incapacitated. However, the wife was a low income earner earning approximately $30,000 per annum. She had limited scope to provide for her retirement, but in comparison to the husband, her income situation, although modest, was vastly superior.

Brown FM gave the wife a 25% split of the pension, leaving the husband with an indexed pension of around $12,700 per annum. This meant that the wife, at her option, was able to direct her share of the husband's pension, around $4,200 per annum, into her own superannuation. This gave some prospect for the parties to have an approximately equal income in retirement. The value of the fund was not a consideration in the split. The Court was interested in the income it produced and retirement outcomes.

Edwards and Edwards

In Edwards and Edwards (2009) FLC ¶93-409, the Full Court was dealing with the husband's interests in a DFRDB pension and an accumulation fund 15 years after separation when an informal division of non-superannuation had occurred.

The Federal Magistrate gave the wife a 40% split of the husband's accumulation interest. This was made up of two elements, being $44,415 for the wife's entitlement to the husband's accumulation interest and $39,585 as her entitlement to the husband's DFRDB pension. The Federal Magistrate said that the effect of the orders was that the wife received 56% of the liquid assets and 43% of the available splittable superannuation. However, these calculations excluded the husband's DFRDB pension. Overall, the wife received 17.7% of the superannuation and 39.5% of the total assets.

The wife said that an adjustment of 18.85% of the husband's accumulation interest to reflect her entitlement to the DFRDB pension was manifestly inadequate. She argued that to allow her $39,585 of an agreed value of $313,994.66, or approximately 12.6% of that interest, was not a reasonable exercise of discretion.

The wife relied on the parties' lengthy period of cohabitation, being 22 years, that contributions from the husband's earnings to the DFRDB Fund concluded prior to separation and that there was no reliable evidence as to the value of the husband's interest in the DFRDB Fund at the date of marriage, which was 2 years and 2 months after the husband became a member it. The wife contended that she had contributed equally to the DFRDB Fund.

The Full Court said in relation to the wife's assertion that the trial Judge should have used the value determined in accordance with the Regulations (at paras 90-91):

As the authorities recognise, the percentages resulting from the exercise of judicial discretion do not have any particular "magic". In a case such as this, that is particularly so. Nothing to which we have been referred persuades us that her Honour was obliged in the circumstances of this case to include the husband's DFRDB pension at the value determined in accordance with the regulations.

As her Honour clearly recognised, the husband's entitlement to the DFRDB Fund was in the payment phase, had always been in the payment phase and could only ever be in the payment phase as a pension. In those circumstances, regarding the husband's pension in the way in which her Honour did was logical and realistic. So doing did not lead to her Honour's discretion miscarrying. Her Honour carefully considered the real value and impact of the husband's DFRDB pension entitlement, and the effect of the orders she proposed in relation to it.

The Full Court said (at paras 112-114):

It was submitted to be relevant to the exercise of discretion that the adjustment in the wife's favour by reason of the husband's DFRDB pension was based on a benefit which could not be commuted to a lump sum but that such adjustment, when made, resulted in an adjustment which could be commuted to a lump sum. The wife was thus submitted to have received a benefit which was not, and could not be, available to the husband.

There is substantial logic underpinning that proposition. The learned Federal Magistrate was clearly alive to the differing natures of the superannuation interests with which she was concerned.

It was further submitted on behalf of the husband that the learned Federal Magistrate had regard to the reality that the wife was "seized of 56% of the parties' liquid assets and the husband 44%", and that her Honour had regard to that imbalance in reaching a conclusion...

The Full Court rejected the argument that in contravention of **s 90MT**, the Federal Magistrate went behind the valuation of the husband's DFRDB pension determined in accordance with the Regulations. It concluded (at para 128):

The learned Federal Magistrate's conclusion was that the parties were equally entitled to their assets and superannuation interests in 1993. We are satisfied that, quite independently of the disparity in the values of the parties' liquid assets, which favoured the wife in any event, the effect of the learned Federal Magistrate's orders was to place the parties in substantially the same position.

Cleary and Cleary

In Cleary and Cleary [2007] FamCA 999, a 42-year-old husband was on leave from his employment as a police officer as a result of being "hurt on duty". He had two superannuation interests and in relation to the first, smaller interest, Cronin J said (at paras 33-34) that it:

... was shown to be valued as at 1 May 2002 at $14,441.91 and updated to 26 July 2007, at $26,959.64. The difficulty however is that as a result of the husband ceasing to be a working police officer, in other words, applying for the "hurt on duty" classification, it is possible for him to trigger the entitlement to roll out the... entitlement. It was clear that the valuation according to the FL(S)R meant that for the purposes of the pool, I should use the value of $26,959.64. However, if the husband goes on to the superable salary entitlement, a payment out to him may occur providing he is ultimately declared totally and permanently incapable of working. He is not in that position as I understand it at the moment and in any event, according to Ms K, there was a "window of opportunity" at the moment under which the husband could file two medical reports that would enable him to achieve that status. Whether that is so and whether in fact it can be done having regard to all of the assessments of the husband is unclear. However, it may be that the husband's entitlement is something closer to $38,000 if those events are triggered. That is the real position rather than the regulation valuation. However, I am not at all comfortable about saying what will happen regardless of what orders I make and accordingly, the safest course is for me to adopt the regulation valuation of $26,959.64.

If that was split by an order, the husband would not have the benefit of it nor would he probably have the benefit of any of the lump sum considerations to which I have just referred and accordingly, my understanding is that the best that the wife could hope for would be a very modest pension entitlement actuarially calculated.

The second and more significant component of the husband's superannuation was the Police Superannuation Scheme. In 2001, it was valued at around $212,000. Six years later in 2007, it was valued at $387,304.04, assuming no change to the husband's salary or working life. The husband intended to apply for "hurt on duty" status to give him a pension for life. There was some prospect that he could commute the pension entitlement at age 60 but Cronin J said that time was so far away that it was dangerous to try and guess what might happen. The circumstances had to be dealt with as they currently were.

The expert recalculated the valuation under the Regulations taking into account that the husband was to receive 72.75% of his superable salary. Cronin J said (at para 37) that the: "valuation completely skews the picture and it rises to $1,176,670.74." He said (at para 38):

It is clear that the superannuation value is determined actuarially. It is not cash in the hands of the husband but it is determined accordingly [sic] the philosophical concept that it would cost that sort of money to fund an income stream for the life of the recipient. On any mathematical view, that is probably a conservative value. The real benefit for the husband, however, is the fact that:

a. this pension is payable for life; and
b. this pension is payable regardless of whether the husband works and earns extra income or not."

The expert's evidence was that a splitting order would affect the husband's pension entitlement. The impact was uncertain but might not be significant. If a pro-rata type concept was applied, the reduction was about 4%. There were also taxation implications. The rules of the fund were unclear as to whether the wife could receive a split of the husband's benefits even if he was declared “hurt on duty” and received a pension.

The net non-superannuation assets totalled $203,994 whereas the total superannuation was close to $1.4 million. Cronin J considered that it was appropriate to consider the notional value of the pension of $1.176 million in a separate pool, but to also look at its "true value".

Cronin J ordered that the wife retain her $172,286 of superannuation, receive all of the husband's smaller fund of $26,959.64 and net non-superannuation of $69,750.

8. Discretion with respect to valuation

Although superannuation is usually valued using the FL(S)R or scheme specific factors, there can be discretion in the process. Discretion may arise, for example:

a. if the parties use a financial or a superannuation agreement rather than Court orders to formalise the property settlement, they can agree to value superannuation in a different way
b. when taking into account contributions to superannuation made prior to the relationship commencing. This is discussed further below.
c. about the date at which superannuation should be valued. However, post-separation contributions to superannuation are usually taken into account at the second step of the four step process rather than superannuation being valued at the date of separation.
d. the valuation methods do not apply to SMSFs. The assets held by an SMSF such as shares and real estate can be valued as if they were held directly by the parties. Taxation considerations (including CGT) are relevant if the assets owned by the SMSF must be realised.
e. if superannuation is not being split, the Court is not bound to accept the valuation in accordance with the regulations (s 90MJT(2).

BAR and JMR

In BAR and JMR (No 2) (2005) FLC ¶93-231, Young J dealt with some of the uncertainties of the super-splitting scheme. His conclusions included:

1. A valuation under the FL(S)R may not be just and equitable
2. Formula approaches, such as West and Green (1993) FLC ¶92-395, can produce an artificial and unfair result
3. A flag order with a splitting order in the payment phase may give a more just and equitable result in certain circumstances than a splitting order in the growth phase
4. If a valuation under the FL(S)R is not fair, s 75(2) can be used to achieve a fairer outcome.

The husband was a member of the ESSS. The parties were litigating prior to the super-splitting scheme coming into operation. Interim property orders were made pending the scheme. Young J was considering the matter after a 6 year adjournment. The parties had at that time been separated for 8 years.

The single expert valued the husband's ESSS interest under the FL(S)R at about $404,000 in February 2005. The resignation benefit was $534,000, giving a difference of $130,000. He said that the FL(S)R did not give a fair and just valuation.

The valuation under the FL(S)R increased by almost $45,000 within a year. Young J considered this significant. He disregarded the difference in the two figures for valuation purposes, but found it relevant under s 75(2)(f) and (o). The wife was entitled to share in the growth. A splitting order in the growth phase disadvantaged the wife. Her base amount, rolled over into her own fund, could not appreciate in value in any way comparable to the husband's interest left in the fund.

Section 90MT(2) required the Court to "make a determination" rather than a valuation. Without contrary evidence, Young J said he was unable to look behind the valuation. He did not have to decide how to deal with contrary valuation evidence although he appeared to be interested in the conundrum which would arise.

The uncertainties and contingencies about the value of the husband's interest included:

- the husband's actual retirement date
- the husband's salary
- the applicable superannuation tax rates for each of the parties
- proposed changes to the ESSS Fund
- the husband's applicable multiple (from time to time)
- a just and equitable valuation as put by the single expert
- the failure to have evidence from the trustee of the ESSS Fund

By making an order in the payment phase Young J overcame these problems. The wife shared in the growth of the fund to give a just and equitable outcome. The valuation uncertainties, guess work and likely injustices were eliminated. A payment flag was imposed to protect the wife's interest until the husband's retirement. Young J did not, though, discuss the requirement in s 90 MU(2) that the Court take into account when deciding whether or not to impose a flag, whether a splittable payment will "soon" become payable.

Young J agreed with the husband that under the interim property orders, the wife received 35-40% for contributions and 20-25% for s 75(2) factors. He used the same s 75(2) adjustment on the superannuation.

On contributions, the wife was entitled to 10% of the superannuation. The husband was a member of the ESSS and its predecessor for over 30 years and the parties cohabited for nearly 13 years. Arguably, 10% was low given the years of cohabitation in proportion to the years of membership. The wife wasn't given any credit for indirect contributions to the husband's superannuation by caring for the child of the marriage post-separation. Adding 25% for s 75(2) factors, the wife was entitled to 35% of each splittable payment.

9. ***West and Green*** - Does it still apply?

Before super-splitting, there was no consistency to the approaches adopted to deal with superannuation. Sometimes, superannuation was ignored or given little weight as it was only a "financial resource" which the member might receive at the discretion of the trustee at a date in the distant future.

When assessing contributions to superannuation, Courts and lawyers often favoured the West and Green (1993) FLC ¶92-395 approach. However, formula approaches were described as "artificial" by the Full Court in such cases as Tomasetti and Tomasetti (2000) FLC ¶93-023 and Bartlett and Bartlett (1996) FLC ¶92-721.

The West and Green formula is:

$$50\% \quad \times \quad \frac{\text{period of membership}}{\text{period of cohabitation}} \quad \times \quad \begin{array}{c}\text{estimated after tax value}\\ \text{of current superannuation}\end{array}$$

The estimated tax was often provided by the fund rather than by a tax expert. In practice, the formula was applied in a variety of situations for which it was not designed. Kay J used it in West and Green to assess contributions made to the date of an order which would take effect upon the member's retirement in the future. However, in other cases, the non-member spouse often received extra non-superannuation. When used post-December 2002, the West and Green formula is usually used to calculate the percentage split of superannuation to which the non-member is currently entitled.

However, if the actual superannuation at the start of a relationship can be ascertained, this is better evidence than assuming, as under the West and Green formula, that contributions were made at the same rate in the early part of the relationship as at the end of the relationship. In most cases, contributions to superannuation in money terms are far less at the beginning than at the end. In long relationships, pre-cohabitation contributions made to non-superannuation are often given less significance than the weight given to contributions to superannuation under the West and Green formula. West and Green may seem unfair because it gives a higher value to pre-cohabitation contributions to superannuation than to pre-cohabitation contributions to non-superannuation.

It has also been pointed out that the values of superannuation at the commencement of cohabitation may not be calculated under the FL(S)R, thus making them difficult. to compare to the values at later dates (Lopez and Hagarty [2007] FMCA fam 908).

Coghlan and Coghlan

In Coghlan and Coghlan (2005) FLC ¶93-220, the Full Court took a broad approach, considering the following matters to be relevant to an assessment of contributions:

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.

Trott and Trott

In Trott and Trott (2006) FLC ¶93-263, discussed on page 10, Watts J assessed the wife's contributions to one 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 declines 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).

The Full Court's first point in Coghlan and Coghlan (see p 20) suggested to Watts J in Trott that there might 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.

Using 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%.

M and M

In M and M (2006) FLC ¶93-281 the Full Court held that the West and Green formula is rarely useful if superannuation is being split. However, in the absence of other evidence, it was a rough guide. The Full Court considered that 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.

In M and M, the parties separated after a 12 year marriage and 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 superannuation totalled $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. This decision was delivered before the Full Court delivered its judgment in Coghlan.

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 of it. However, the trial Judge awarded the wife $80,000 from the non-superannuation to adjust for the husband's 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 Full Court criticised West and Green saying (at paras 121 and 123):

We do not find a contribution assessment based on a calculation of years of marriage divided by the years the member had been in the fund to be helpful. In the context of considering contributions pursuant to **s 79** it has never been necessary to apply a mathematical formula in the way we have described. All that is required is that the contributions of the parties be evaluated in relation to superannuation as they are to other assets. Further there may be real injustice in doing so as there is frequently far less contributed to a fund in the early years of membership compared to later years.

A formulaic approach does not take account of the years in which greater contributions were made, often later in a marriage, nor the effect of contributions over many years of marriage which may have diluted initial contribution...

...However, in our view there is nothing said by the majority in Coghlan ... that would give any support for the application of some kind of a formula or that contributions to superannuation whatever the nature of the fund, should be treated in a different way from contributions to other property under **s 79(4)**...

The Full Court used the West and Green formula as a rough rule of thumb and concluded that insufficient weight was given by the trial Judge to the wife's contributions. However, a 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). Whether or not the Full Court was correct in considering itself bound not to order a split where none was sought by the parties remains unresolved. Murphy J in Guthrie and Rushton [2009] FamCA 114 said there was no doubt that the Court could exercise its discretion to do so based on clear findings about the justice and equity of an order in the particular circumstances of the case.

In any event, not splitting superannuation was attractive to the Full Court in M and M 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 considered that it was only in rare cases that formulas could be usefully applied to an adjustment of non-superannuation assets taking into account contributions to superannuation. However, the strength of the Full Court's view was diminished because it did not order a super-split. The wife was instead given a greater share of the non-superannuation assets. 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. This was double the amount ordered by the trial judge but less than 50% of the West and Green rough rule of thumb.

Fayette and Fayette

In Fayette and Fayette [2007] FamCA 834, the parties cohabitated for 15 years, though the husband had been in the fund for 25 years at separation, including 10 years prior to cohabitation. Brown J referred to M and M and commented (at para 61) that it was:

... puzzling to find the Full Court, when re-exercising the discretion, using as its 'rough starting point' a finding of an equal contribution to 13/20 of the husband's superannuation entitlements, being a fraction reflecting years of cohabitation over years of membership.

Her preference would have been that the matter was referred back to the trial Judge for further evidence to be given.

Brown J refused to use West and Green as a rough starting point.

In other cases such as Bishop and Lovett [2010] FamCA 761 and Kasioupoulos and Garapiperis [2010] FamCA 1184 the Family Court declined to use the West and Green formula.

Steele and Stanley

In Steele and Stanley [2008] FamCA 83, Benjamin J dealt with a defined benefit fund of the husband valued by a single expert on two different dates:

- The date of separation — October 2004 as $670,729
- The date of hearing — October 2007 as $815,222

His Honour acceded to the wife's request to use the lower figure for assessing contributions, but used the higher figure for determining the pool. He took the difference into account as a factor under s 75(2)(o).

The husband was a member of the fund for about 14 years before cohabitation and about 20 years after cohabitation commenced. About four years before separation, the husband retired and commuted the sum of $182,000 which he applied for the family's benefit.

Benjamin J said (at paras 176–177):

The essence of the wife's submissions are that I should assess the contributions as to sixty per cent by the husband and forty per cent by the wife in relation to the 2004 figure, vis $670,729. If I was to adopt that submission the wife would end up with an entitlement of $268,291 which is of course sixty per cent of the smaller sum but which amounts to about thirty three per cent of the current value of the fund.

I intend to adopt that approach as it, in effect, acknowledges the husband's superior contributions to the fund to those of the wife. It takes account that the wife made no contribution to the first fifteen years of the fund... I accept the submissions of senior counsel for the husband that the wife would not be entitled to any index pension or retirement pay, rather her interest accrues at the long term bond rate between the operative time (the effective date of splitting order) and the date on which the benefit becomes payable.

The non-superannuation property was divided as to 77% to the wife and 23% to the husband due to the wife receiving about $2.8 million from her family. The total of the non-superannuation property was $3,227,000. Adding the superannuation of $95,305 and deducting liabilities of $290,601, the net balance excluding the defined benefit scheme was $3,031,704. The wife was left with liabilities of $235,346 giving her net property of $2,911,649. Seventy-seven per cent of the property excluding the defined benefit superannuation was $2,334,412. The wife was ordered to pay the husband the sum of $577,237. The husband was left with 23% of the property (excluding the defined benefit scheme) being $697,292 (and his remaining interest in his defined benefit scheme).

CONCLUSION

We are fortunate that defined benefit interests are declining. Their appearance in reported judgments is disproportionate to their number. Valuing them is becoming harder, but probably because family lawyers understand them more. We know there are options.

The FL(S)R do not cover all situations. If s 90MT(2) seems to be an immovable barrier giving an outcome that seems unreasonable then there may be a way around it. If in doubt as to what to do then look at the four steps: identify and value the interest by looking at is real nature, look at contributions, and look at the section 75(2) factors particularly section 75(2)(o) if there is a discrepancy in the valuation.

The cases of Coghlan, BMR and JMR, Trott, Cleary and, (reluctantly), West and Green are helpful. In summary, if you want to argue against a valuation: don't split, argue contributions and push s 75(2).

STUDY POINTS

1. Explain subsection 90MT(2) of the Family Law Act.
2. Summarise the valuation regime in the Family Law (Superannuation) Regulations.
3. In what circumstances is subsection 90MT(2) irrelevant?
4. "A member's statement from the relevant fund is not, in itself, acceptable evidence under Regulation 31(2)."

True or false? Explain.

5. Explain the valuation regime affecting interests in self-managed super funds.
6. What is a "Superannuation Information Request Form" – and how is it obtained and used?
7. Summarise the key points from:
    - Kapoor and Kapoor; and
    - M and M