Property - the latest on Contributions and Superannuation

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Introduction

The assessment of contributions to property is a fraught area. Clients often want to argue that their contributions should be given more weight. This is particularly problematic when dealing with initial contributions, post-separation contributions, windfall such as inheritance and Tattslotto wins.

This paper gives some background to the problems and discusses recent cases.

CONTRIBUTIONS

Mallet

The starting point in considering the assessment of contributions must always be the High Court's judgment in *Mallet v Mallet.*[1] In separate judgments the High Court rejected in strong terms, the notion or presumption of equality of contributions as a normal or proper starting point after a long marriage. Gibbs CJ said:

> The respective value of the contributions made by the parties must depend entirely on the facts of the case and the nature of a final order made by the court must result from a proper exercise of the wide discretionary power... unfettered by the application of supposed rules for which the *Family Law Act* provides no warrant.[2]

Fields & Smith

Contributions are assessed at the date of trial, not the date of separation. There is a tendency for parties, and sometimes the courts, to look at contributions differently after separation, as if there are "two pools". However, Bryant CJ and Ainslie-Wallace J in *Fields & Smith*[3] (for example) referred to several cases[4] where the Full Court had cautioned against automatically assessing contributions differently after separation, as s 79(4) requires a "holistic" assessment of the parties' contributions. There is a tension between these two approaches.

In *Fields & Smith*, the trial Judge had assessed the wife's post-separation contributions as less than her contributions during the marriage, and assessed the husband's contributions, which were

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[1] (1984) FLC 91-507
[2] at 210
[3] (2015) FLC 93-638
[4] e.g. *Dickons & Dickons* [2012] FamCAFC 154; *Lovine & Connor* (2012) FLC 93-515 and *Bolger & Headon* [2014] FamCAFC 27

primarily financial, as being greater than those of the wife both during cohabitation and after separation. The wife's contributions were primarily as a parent and homemaker. Following separation, her role had altered because the children had left home and the parties no longer belonged to a household where they provided each other with mutual support. After a 29 year marriage the trial Judge distributed the property on the basis of contributions as to 60% to the husband and 40% to the wife and made no s 75(2) adjustment.

Before the Full Court, the wife pointed to the "implicit prejudice" of failing to acknowledge the intrinsic changes to the role of a long term homemaker and parent as the children grow older, where the parties had accepted and agreed on that role during the marriage. Bryant CJ and Ainslie-Wallace J agreed that there was a potential for prejudice but pointed out that s 75(2) could be used to take account of matters other than contributions where it was appropriate to do so. May J found that the trial judge had “impermissibly ignored the wife’s continuing contributions” and that the proper exercise of discretion ought to have led to a finding that the property be divided equally.

The problem of comparing financial contributions with homemaking and parenting contributions was described in *Norbis v Norbis*[5] (the ultimate High Court decision on the asset-by-asset approach) in a passage recently quoted by Ainslie-Wallace and Ryan JJ in *Stone & Stone*.[6] Mason & Deane JJ said in *Norbis*, whilst stating that the general preference was for a global approach that this was for reasons of convenience:

> Although it is natural to assess financial contributions under s 79(4)(a) by reference to individual assets, it is also natural to assess the contribution of a spouse as homemaker and parent either by reference to the whole of the parties' property or to some part of that property. For ease of comparison and calculation it will be convenient in assessing the overall contributions of the parties at some stage to place the two types of contributions on the same basis, ie on a global or, alternatively, on an "asset-by-asset" basis. Which of the two approaches is the more convenient will depend on the circumstances of the particular case. However, there is much to be said for the view that in most cases the global approach is the more convenient.[7]

It is also problematic that some contributions such as inheritances and lottery wins are capable of precise assessment in monetary terms but perhaps only in historical monetary terms, and other contributions, such as parenting, are incapable of measurement in monetary terms[8]. The Full Court in *Fields & Smith* accepted that assessing the contributions of a homemaker/parent after the children had grown up as less than those of the primary income-earner could be unfair and that s 75(2) factors (presumably s 75(2)(j) and (k)) were relevant.

Relevance of timing of contribution

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[5] (1986) FLC 91-712
[6] [2015] FamCAFC 18
[7] at 523
[8] e.g. *Lovine & Connor* (2012) FLC 93-515 at 41-42

An early and often quoted case on the relevance of the timing of a particular contribution when contributions are being assessed is *Aleksovski* & *Aleksovski.*[9] During an 18-year marriage each party provided their labours towards the acquisition, conservation and improvement of assets, and towards the welfare of the marriage generally. Late in the marriage, the wife received a large capital sum due to a personal injury claim arising from a motor vehicle accident. Baker and Rowlands JJ said:

> It is therefore necessary that trial Judges weigh and assess the contributions of all kinds and from all sources made by each of the parties throughout the period of their cohabitation and then translate such assessment into a percentage of the overall property of the parties or provide for a transfer of property in specie in accordance with that assessment.
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> It really comes down to questions of weight. Whilst weight would and must be given to a contribution which a party makes shortly before the separation, less weight may be given to a contribution made by one of the parties to a marriage early in the cohabitation period of a long marriage, particularly in circumstances where the contribution has gone into the parties' assets or been used up in the payment of family expenses.[10]

Kay J, in a more frequently quoted passage, albeit the minority judgment, said:

> In my view whether the capital sum was acquired early in the marriage, in the midst of the marriage or late in the marriage, the same principles apply to it. The Judge must weigh up various areas of contribution. In a short marriage, significant weight might be given to a large capital contribution. In a long marriage, other factors often assume great significance and ought not be left almost unseen by eyes dazzled by the magnitude of recently acquired capital. A party may enter a marriage with a gold bar which sits in a bank vault for the entirety of the marriage. For 20 years the parties each strive for their mutual support and at the end of the 20 year marriage, they have the gold bar. In another scenario they enter the marriage with nothing, they strive for 20 years and on the last day the wife inherits a gold bar. In my view it matters little when the gold bar entered the relationship. What is important is to somehow give a reasonable value to all of the elements that go to making up the entirety of the marriage relationship. Just as early capital contribution is diminished by subsequent events during the marriage, late capital contribution which leads to an accelerated improvement in the value of the assets of the parties may also be given something less than directly proportional weight because of those other elements.[11]

All three judges allowed the appeal by the husband. The majority considered that less weight may be given to a contribution made by a party early in a long period of cohabitation than one made shortly before separation. This "erosion" principle is discussed later in this paper. Kay J considered that the time at which the contribution was made did not necessarily affect the outcome. All contributions needed to be weighed up.

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[9] (1996) FLC 92-705
[10] at 83,437
[11] at 83,443

Cronin J in *Murdock & Tucker*[12] quoted with approval the above passage of Baker and Rowlands JJ. He said:

> There is also a risk that the isolating of one or more items of property creates an artificial approach where percentages are applied to certain items but not others. Such a focus can ignore long and consistent contributions because of the attraction of a very recent

[12] [2015] FamCA 23

> financial one. That attention may also ignore long periods of homemaker and parent roles.[13]

In *Bolger & Headon*[14] the Court was required to weigh up the wife's inheritance received at around the time of separation (valued at $250,000 at the time of trial), as against the husband's initial contribution of $774,900. The trial Judge accepted the submission of the wife's counsel that she should receive a 7.5% credit for her contribution in a $1.5 m pool. The trial judge gave the husband a 7% credit his contribution. The husband appealed. The Full Court said that the trial Judge erred in assessing the wife's inheritance at 7.5% while assessing the value of the husband's initial contribution made 7½ years earlier as requiring an adjustment of 7%.

A further difficulty with the approach of the trial Judge was that she assessed contributions by attributing specific percentages to each component of the contributions and used 50/50 as a starting point. This was described by the husband's Counsel as "a suppressed assumption that you start from equality"[15] - an approach which was erroneous and inconsistent with *Mallett*.

The Full Court in *Bolger* quoted the above passages from *Aleksovski* and then quoted from the Full Court in *Dickons & Dickons*, emphasising a holistic rather than a mathematical approach to the assessment of contributions:[16]

> There can be little doubt that the classification of contributions by reference to terms such as “initial contributions”, “contributions during the relationship”, and “post-separation contributions”, can be helpful as a convenient means of giving coherent expression to the evidence in a s79 case and to giving coherence to the nature, form and extent of the parties’ respective contributions. However, the task of assessing contributions is holistic and but part of a yet further holistic determination of what orders, if any, represent justice and equity in the particular circumstances of this particular relationship. ... The essential task is to assess the nature, form and extent of the contributions of all types made by each of the parties within the context of an analysis of their particular relationship. …
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> The necessarily imprecise “wide discretion” inherent in what is required by the section is made no more precise or coherent by attributing percentage figures to arbitrary time frames or categorisations of contributions within the relationship. Indeed, we consider that doing so is contrary to the holistic analysis required by the section and, in the usual course of events, should be avoided.[17]

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[13] at para 69
[14] [2014] FamCAFC 27
[15] at para 15
[16] [2012] FamCAFC 154
[17] at paras 24, 26

The Full Court in *Bolger* also quoted favourably the following passage from the Full Court in *Lovine & Connor*[18] on the difficulty of weighing up contributions when not all are measurable in money terms:

> As part of the process of ultimately determining just and equitable orders under s 79 there is included a complex of discretionary assessments and judgments of many components of contribution, only some of which are capable of measurement in money terms and then often only in historical, rather than present, money terms. Any dictate to the effect that in the course of assessment each disparate component part or kind of contribution must be assigned a discrete and identifiable value or percentage is antithetical to the nature of the discretion involved.[19]

The Full Court (in a bench which included Kay J) said in the earlier case of *Williams & Williams*,[20] that looking at the value of an initial contribution at the commencement of cohabitation without looking at its value at the time it was realised or at the time of the trial was incorrect, although it was important to weigh up all contributions. The Full Court said:

> We think that there is force in the proposition that a reference to the value of an item as at the date of the commencement of cohabitation without reference to its value to the parties at the time it was realised or its value to the parties at the time of trial, if still intact, may not give adequate recognition to the importance of its contribution to the pool of assets ultimately available for distribution towards the parties. Thus where the pool of assets available for distribution between the parties consists of say an investment portfolio or a block of land or a painting that has risen significantly in value as a result of market forces, it is appropriate to give recognition to its value at the time of hearing or the time it was realised rather than simply pay attention to its initial value ... But in so doing it is equally as important to give recognition to the myriad of other contributions that each of the parties has made during the course of their relationship.[21]

Consistently with *Williams,* in *Agius & Agius*[22] the Full Court looked at the values of the assets brought into the relationship by the wife at the time of trial and not just at the times they were purchased. The wife won a Tattslotto prize of about $450,000 shortly prior to the commencement of the 10 year period of cohabitation. At the commencement of cohabitation, the husband had no significant assets whereas the wife had 2 properties and the balance of her Tattslotto winnings. A third property was purchased during the marriage in the name of the husband largely using the wife's Tattslotto winnings. The wife's father also lent monies to assist the wife with the purchase of all 3 properties. The wife always earned substantially more than the husband.

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[18] (2012) FLC 93-515
[19] at para 42
[20] [2007] FamCA 313
[21] at para 26
[22] [2010] FamCAFC 143

The Federal Magistrate found that the husband's contribution based entitlements were 25% of a pool of about $1m, which meant that he could retain the cheapest of the 3 properties, being the one purchased during the relationship. There was no s 75(2) adjustment.

In upholding the decision of the Federal Magistrate, the Full Court referred to the fact that at the time of trial the 2 properties which the wife owned at the commencement of cohabitation were worth $775,000 and represented approximately 72% of the current net assets. The third property, which was retained by the husband (although the husband had made no financial contribution to it) had a value of $250,000. At the commencement of cohabitation, the wife's 2 properties and the balance of her Tattslotto win were approximately $645,000 which amounted to about 60% of the pool at trial.

"Erosion" Principle

Despite Kay J's often quoted passage from *Aleksovski*, later contributions are usually given more weight than early contributions. This is known as the "erosion" principle.[23] For example, in *Bonnici & Bonnici*[24] and *Burke & Burke*[25] the courts credited the recipient of an inheritance received shortly prior to or after separation entirely with that contribution, effectively quarantining it from the pool. By contrast, in cases such as *MVB & SDB*[26], early inheritances were not given much weight.

The Full Court in *Pierce & Pierce*[27] added a gloss to the erosion principle:

> In our opinion it is not so much a question of erosion of contributions but a question of what weight is to be attached in all the circumstances, to the initial contributions. It is necessary to weigh the initial contributions by a party with all other relevant contributions of both the husband and the wife. In considering the weight to be attached to the initial contribution, in this case of the husband, regard must be had to the use made by the parties of that contribution.[28]

Most recently, in *Wallis & Manning*[29] the Full Court summarised the position with reference to *Aleksovski*, *Dickons* and other cases as:

> By those central submissions the parties approached the assessment of contributions by suggesting that “an adjustment” should be made to a result reached otherwise by reference to a miscellany of other contributions. Her Honour adopted a similar approach. Such an approach is by no means uncommon to both the presentation of cases and the structure of judgments. It is convenient in this case, as it is more broadly, so as to describe a contribution or contributions of a particular type said to have particular importance and to distinguish it or them from other contributions.

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[23] *Pierce & Pierce* (1998) FLC 92-844
[24] (1992) FLC 92-272
[25] (1993) FLC 92-356
[26] (2005) FamCA 389
[27] (1999) FLC 92-844
[28] at p 85,881
[29] (2017) FLC 93-759

> Yet, that approach must also ensure that the "myriad of other contributions" and the duration over which, and circumstances in which, the miscellany of other s 79(4) contributions were made is not accorded a subsidiary role. The essential s 79(4) task is for "trial Judges [to] weigh and assess the contributions of all kinds and from all sources made by each of the parties throughout the period of their cohabitation.[30]

A different approach was taken by Cronin J in *Sinclair & Sinclair*[31] (see also *Murdock & Tucker* quoted earlier in this paper) where he suggested that greater weight might be given to early contributions:

> The longer the relationship, the greater the importance of the early non-financial contributions because like an initial financial contribution from which more wealth grows, they form the foundation of the relationship. They set up needs and obligations of the parties about support for one another and children. They set up assets that require ongoing maintenance and preservation. Thus, what happened from 1959 to 1985 in this case is important. The inherited wealth had not significantly materialised until towards the end of that period and it has the tendency to distract attention from the importance of the early period of this relationship when both parties worked extremely hard at whatever commitments they had made to each other to fulfil. True it is also that some of those contributions are offset by the benefits received but all this shows the inability of the law to simply process the outcome by some mathematical formula.[32]

Recent "windfall" cases

Eufrosin

In *Eufrosin & Eufrosin,*[33] the husband argued that he had contributed to the wife's gambling win of $5 million received six months after separation. There was uncertainty as to the source of the funds used to purchase the ticket. Stevenson J accepted that the source was the wife, rather than the husband. Stevenson J agreed with the wife that it was "pure sophistry" to credit the husband with a contribution to the funds used for the purchase of the winning ticket. She referred with approval to the English decision of *S* v *AG*[34] where Justice Mostyn remarked:

> The price of the ticket, £1 or £2, is so inconsequential as can be safely disregarded. Arguments that the £1 or £2 derives from the joint matrimonial economy are, it can be said, pure sophistry. The money could just as easily have been found on the pavement.[35]

Stevenson J adopted a two pool approach. Pool 1 consisted of the assets, liabilities and financial resources at separation (although not necessarily at that value or quantum) and Pool 2 consisted of the assets, liabilities and financial resources representing the balance of the wife's share of the

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[30] at paras 19-20
[31] [2012] FamCA 388
[32] at para 96
[33] [2013] FamCA 311
[34] [2011] EWHC 2637
[35] at para 11

lottery win. The net property in Pool 1 was $2,437,987 and in Pool 2 was $3,368,530.

Stevenson J assessed the parties' contributions to Pool 1 as equal and that the husband made no contribution to Pool 2. No s 75(2) adjustment was made to Pool 1. The husband argued for a 33.3% (or $1,111,615) adjustment in his favour in relation to Pool 2. The wife argued that it should be only 5% (or $168,426). Section 75(2)(b) was relevant because as a result of the contributions assessment, the wife had over $4.5 million and the husband, after a 20 year marriage with 2 adult children, had just over $1.2 million on contributions. Stevenson J rejected both proposals and made an adjustment of $500,000 out of Pool 2 to recognise the husband's future needs.

On appeal in *Eufrosin & Eufrosin*[36] the Full Court rejected the significant focus by the husband at trial on the source of funds used by the wife to purchase the winning ticket. The parties were living "separate" lives, including separate financial lives. The Full Court said:

> That crucial matter, the importance of which is reinforced by the High Court in *Stanford*, renders reference to the sources of the funds or nomenclature such as "joint funds" or "matrimonial property" unhelpful in assessing what is just and equitable.[37]

The Full Court said this approach was consistent with *Zyk* and *Anastasio* where the tickets were purchased during the relationship:

> As this Court in *Zyk* made clear, the source of funds should not "determine the issue" of how a lottery win should be treated for s 79 purposes. What is relevant, in our view, is the nature of the parties' relationship at the time the lottery ticket was purchased. In our view, the authorities just cited, together with what was said by the High Court in *Stanford* regarding the "common use" of property, is sufficient to dispose of the husband's contention that her Honour erred in failing to find that he contributed to the wife's lottery win. At the time the wife purchased the ticket, regardless of the source of the funds, the "joint endeavour" that had been the parties' marriage had dissolved; there was no longer a "common use" of property. Rather, the parties were applying funds for their respective *individual* purposes.[38]

The Full Court upheld the two pool approach and the orders made by the trial Judge.

Singerson & Joans

In *Singerson & Joans*[39] the Full Court took a "two pool" approach. The outcome was that the wife received a significant proportion of the husband's inheritance, based on her contributions to the marriage prior to it being received, as well as her post-separation contributions. The husband's father died in February 2009, in the same month as, but just prior to, the parties' separation. The husband received an inheritance of approximately $3 million.

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[36] [2014] FamCAFC 191
[37] at para 8
[38] at para 11
[39] [2014] FamCAFC 238

During the marriage the wife made greater contributions to the responsibilities of caring for the children, and her financial contributions (except for the inheritance) were much greater. After initially working as a professional, she operated a successful business. The husband was retrenched in 1991 and suffered from depression from time to time in the years that followed. His employment since 2001 had been sporadic. Separation occurred 4 years prior to trial, during which period the parties shared the care of the children.

The trial judge's assessment was that the wife receive 60% of the property excluding the inheritance (valued at $4,806,000) and a 20% share of the husband's inheritance (valued at $2,619,105). This translated to the wife receiving 46% of the combined property and the husband receiving 54%. In practical terms, the wife retained $3,408,000 and the husband retained $4,017,000 of the total pool of $7,425,000. The trial Judge adopted an asset by asset approach, but compared the ultimate result to outcomes based on other possible approaches including a global approach.

On appeal, the husband sought 40% of the property (excluding the inheritance) and to retain the balance of his inheritance. This equated to about 61% of all the property. The wife sought 65%, but her position before the Court was to seek 55% of all the property, including the inheritance.

The Full Court found that the trial Judge, in desiring to give the parties a speedy resolution by delivering judgment promptly after the end of the trial:

> … intermingled his assessments on contributions with s 79(4)(e) matters when utilising a separate approach. In doing so we find he fell into the error identified by Nygh J of "mistaking the trees for the forest.[40]

The Full Court was critical of the manner in which the trial Judge assessed the wife's contributions to the husband's inheritance. It said:

> We are of the view that his Honour misled himself, and thus fell into error, in identifying only the four years between separation and trial as being the appropriate time upon which to assess contributions to the inheritance rather than across their 15 year relationship.
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> Section 79(4) of the Act is clear. There is nothing to suggest that any category of contributions needs to be quarantined and applied solely to particular assets. The court is mandated to look at the totality of what the parties have contributed in a financial and non-financial sense, including contributions to the welfare of the family and to the acquisition, conservation and improvement of assets. The court is required to evaluate

[40] at para 45

> the significance of all the various contributions to the property, notwithstanding there may be different categories of that property.[41]

The Full Court therefore impliedly dismissed any notion of a "fractional contemporaneity"[42] being a requirement in the assessment of contributions and gave the wife 73% of the property excluding the inheritance, which was 47.5% of all the property including the inheritance, with the net result that the wife retained about $3.6 m and the husband retained about $3.9 million. The Full Court concluded that, over a period of approximately 15 years cohabitation and a further 4 years between separation and the trial, the wife made significantly greater contributions to the property acquired prior to separation, both in a financial sense and as a homemaker and parent. The Full Court said:

> Despite the timing of the receipt of the inheritance we consider that over this long marriage a global approach is appropriate. The contributions the parties made to various components of their assets are assessed carefully and then looked at holistically to arrive at an overall assessment.
>
> On this basis and utilising the trial judge's largely unchallenged findings of fact we would assess the parties' contributions to all their property to the date of trial as 52.5 per cent in favour of the husband.
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> This assessment acknowledges the initial contributions of the husband and also his post separation inheritance. However, this is more than matched by, inter alia, the considerable contributions of the wife to the family including her post separation contributions.[43]

The husband's position after the appeal, was over $100,000 worse than it was before (without taking legal costs into account).

Bishop

In *Bishop & Bishop*[44] the court had to weigh up the husband's initial contribution and the wife's inheritance received later in the marriage. The trial judge considered he was constrained by the authority of *Bonnici*[45] to leave the wife's inheritance out of the calculation of the pool. The Full Court said:

> We agree … that his Honour was not constrained by what the Full Court said in *Bonnici* about the treatment of inheritances. As the Full Court emphasised in that decision, and as we cannot emphasise too strongly, each case in this jurisdiction will depend on its own facts or circumstances.[46]

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[41] at paras 65-66
[42] Guest J in (2000) FLC 93-060
[43] at paras 96-8
[44] (2013) FLC 93-553
[45] (1992) FLC 92-272
[46] at para 28

The Full Court did not, however, interfere with the trial judge's decision on this ground, as taking the inheritance into account as a s 75(2) factor only, was an approach which was open to him.

The husband referred to the unfairness of the different treatment of his initial contribution in 1982 with the wife's inheritance received before separation. The Full Court said:

> It is relevant to mention in this context that counsel for the husband endeavoured to persuade us that it was in some way inconsistent, or even unjust, that the wife's inheritance had been effectively quarantined, while the rural property which could be traced to an initial contribution by the husband was included in the so-called "asset pool", and that the husband's contribution of that property was ultimately given no greater weight than the wife's contributions to the parties' property (being property other than her inheritance and both parties' superannuation interests).
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> The difficulty with such an argument is that although the husband brought some rural property (subject to a mortgage) into the marriage, over the years of the marriage, that property, and the property subsequently acquired with the proceeds of sale of the first property, were used for the benefit of the family (as a home and a source of income), with the wife having made significant financial and non-financial contributions to both properties. On the other hand, the husband was found to have made no contribution to the wife's inheritance.
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> His Honour cannot be said to have been wrong in having treated, in what can be termed, separate categories, property to which both parties had contributed and property to which only one (or perhaps neither) had contributed. Whether each party's contributions to the property to which they had contributed were adequately recognised by his Honour is a different consideration, and is one to which we will return.[47]

The appeal was allowed on other grounds.

Elford

Elford & Elford[48] involved a lottery win by the husband of $622,842 in January 2004, about a year after cohabitation of slightly less than 10 years commenced. The husband had been using the same numbers since 1995 and always paid for the weekly tickets. He retained the winnings in a separate account, topped up by about $27,000 from his savings and that sum of $650,000 remained intact at the end of the marriage.

Roberts J distinguished the facts from those in *Anastasio & Anastasio.*[49] The husband in *Elford* never intended the weekly purchase of lottery tickets to be "a joint matrimonial purpose" of the type in *Anastasio*. Roberts J quoted from *Eufrosin & Eufrosin*[50] the passage which referred to the "common use" of property discussed in *Stanford v Stanford.*[51] He then said:

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[47] at paras 30-32
[48] [2014] FCCA 2531
[49] (1981) FLC 91-093
[50] [2014] FamCAFC 91
[51] (2012) FLC 93-518

> In my view, it is not only "*the nature of the parties' relationship at the time the lottery ticket was purchased*" that sets this case apart from so many of the decided "lottery winnings" cases; it is also the manner in which the husband and the wife conducted their financial affairs after those winnings were received by the husband in 2014. Those winnings were placed into an account in the husband's sole name and that is where they remain to this day. The parties also kept all their other finances separate for the entirety of their relationship.
>
> In view of those circumstances, I consider it appropriate to treat the husband's lottery winnings of $622,842 in January 2004 as a contribution by the husband alone.[52]

The wife initially sought $480,000 from the husband, but reduced her claim to $360,000. The husband sought to pay her $50,000 after initially seeking that her claim be wholly dismissed. At the time of trial the husband's assets were worth $1,313,500 and the wife's were $89,600. At the time of the lottery win and taking into account the win, their respective assets were $1,158,000 and $130,000.

Roberts J assessed the wife's contributions as 10%. Based on contributions and after taking into account $14,800 used by the wife from the sale of shares to pay her legal costs, the husband would have to pay the wife $51,000 to bring her proportion of the pool up to 10%. The husband was older, in poor health and effectively blind. The wife worked full time and had three children but the husband had no legal liability to support them. Their respective incomes were similar. No adjustment was made for s 75(2) factors. Roberts J effectively treated the husband's lottery win as Kay J's gold bar in *Aleksovksi*.

Perhaps not surprisingly, the wife appealed. She failed, although as a majority of the Full Court said:

> Some or all of us **may** have reached a decision different to His Honour but that circumstance does not warrant appellate interference. In the absence of any demonstrable criteria by which it is said that His Honour's decisions [sic] was "plainly wrong", we are in the position of being asked to provide a "second opinion" as to the appropriate exercise of discretion. We are unable to persuade ourselves that the result is outside the parameters upon which reasonable judicial minds might differ.[53]
> [emphasis added]

This was certainly a case where the husband was rewarded for not sharing. If he had put his win into a home for the parties, he would not have walked out with his winings intact.

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[52] at paras 53-4
[53] at para 64

SUPERANNUATION

The main issues which arise with respect to the assessment of contributions to superannuation are:

1. How to take account of the superannuation of the parties at the commencement of cohabitation?

2. How to take account of contributions to superannuation compared to contributions to non-superannuation during the relationship? The preferred *Coghlan* approach of separate pools enables contributions to be assessed differently to superannuation and non-superannuation. But should they always be assessed differently?

3. How to assess indirect financial contributions or homemaking and parenting contributions to superannuation? Sometimes they are assumed to be non-existent.

Coghlan

The five member Full Court in *Coghlan* & *Coghlan* (2005) FLC 93-220 said as to the interpretation of s 90MC (at p 79,642):

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

The majority considered that s 90MC did no more than confer jurisdiction on the courts to make orders in relation to superannuation. Section 90MC did not mean that superannuation was "treated" exactly the same as "property" as defined in s 4(1). The court did not explain precisely the consequences of superannuation being "another species of asset". This phrase has not been widely adopted since.

The Full Court majority in *Coghlan* said that superannuation can be included in one pool with non-superannuation property:

- by agreement, or
- if the court is satisfied that the interest is property within the definition in s 4(1), or
- if the interest is not within that definition, but is of relatively small value in terms of the other assets, or
- there are features about the interest which lead the court to conclude that this is an appropriate approach.

The majority said that the preferred approach was to deal with superannuation separately from property as defined in s 4(1). This approach meant that the direct and indirect contributions by either party to superannuation were more likely to be given proper recognition, and "the real nature" of the superannuation interests taken into account. It was relevant to "the real nature" of a superannuation interest, that an interest "may be no more than a present or future periodic sum, or perhaps a future lump sum, the value of which at date of receipt is unknown" (at p 80,203). All matters in s 79(4)(a)–(c), including the factors in s 75(2), had to be considered in relation to a superannuation interest, regardless of whether or not it was being split.

The majority concluded there was insufficient evidence before it to enable it to re-exercise its discretion, and remitted the case for a rehearing in accordance with the principles it had enunciated.

The two pool approach outlined in *Coghlan* allows courts to assess contributions differently to superannuation than to non-superannuation. Usually, this is to the disadvantage of the non-member. Sometimes it occurs because one spouse came into the relationship with more superannuation than the other. Sometimes it occurs because the court gives more weight to the direct financial contributions of the member and the member's employer to the superannuation rather than the indirect financial contributions or homemaking and parenting contributions of the non-member. This approach is contrary to the accepted approach that non-financial or homemaking and parenting contributions are given the same weight as financial contributions (eg *Mallet* v *Mallet* (1984) FLC 91-507).

Warnick J and O'Ryan J gave separate minority judgments. They disagreed with the majority's interpretation of s 90MC and considered that the Full Court was bound by *Hickey & Hickey* (2003) FLC 93-143. They both said that s 79(4)(a)–(c) did not apply to a superannuation interest if it was not being split.

Prior to the superannuation splitting scheme, superannuation entitlements were usually not property with a defined or ascertainable value, but rather a financial resource which was taken into account as a factor under s 75(2).

Will a splitting order be made and, if so, what order?

Whether superannuation will be split and in what proportions will depend upon the circumstances of the case. Superannuation and non-superannuation need not be divided in the same proportions (*Engelbrecht* & *Moss* [2015] FCWA 10). Possibly, relevant factors were set out in such cases as

Levick & *Levick* (2006) FLC 93-254, *BAR* & *JMR* (2005) FLC 93-231 and *Coghlan* & *Coghlan* (2005) FLC 93-220. These include:

- whether there are children
- if splitting the superannuation means the primary carer can keep the home
- whether one party has little or no superannuation
- the needs of the parties for cash and saleable assets
- the value of all the property and the proportion of the property pool which is superannuation
- the type of fund
- the ages of the parties
- the length of time before the parties reach a condition of release, and
- tax implications such as whether a party is close to the employment termination payment components. For example, some pre-1983 tax benefits may be lost if the fund is split.

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

Engelbrecht* & *Moss

In *Engelbrecht* & *Moss* [2015] FCWA 19 Walters J considered whether or not the wife should receive part of her property entitlements in the form of a share of the husband's superannuation, as proposed by the husband. The wife wanted to retain as much non-superannuation property as possible so she could acquire a home for herself and the children. Neither party would be able to access their superannuation entitlements for at least 15 years in normal circumstances. Walters J said (at para 228) that:

> If the wife's entitlement is 72.5% of the property 'pool', then it is at least arguable that she ought to receive 72.5% of the net realisable property and 72.5% of the superannuation entitlements.

However, he went on to say (at para 229):

> Justice and equity do not require both 'types' of property to be divided in the same way. Clearly, the Court has a wide discretion as to how to structure the proposed property settlement. Put another way, this Court has always had power to allocate individual items of the parties' property as it sees fit, and in such a way as to achieve what it considers to be an appropriate division of the property as a whole. It is in the course of this process that the structure, style and balance of the actual orders the Court proposed to make are considered. The provisions of s 79(2) permeate this

process as they do all other aspects of the property settlement exercise.

Walters J made orders which meant that the wife should retain or receive approximately 84% of the parties' net realisable assets (which included paid legal fees) and 47.5% of the total value of the parties' superannuation entitlements. The husband received approximately 58.5% of his overall entitlement in the form of superannuation. The husband was "allocated" about $49,000 over and above his paid legal fees. Some of this was in the form of the husband's furniture, chattels and effects, his net interest in his motor vehicle and his savings.

Bellenger* & *Bellenger

In *Bellenger* & *Bellenger* [2015] FamCA 645 the husband did not seek a superannuation split. Although the wife considered the fact that she had about $162,000 more superannuation than the husband was reasonable due to her greater superannuation at the commencement of their 10-year relationship (about $78,000 more), she proposed a split in the husband's favour of about $50,000. Berman J took into account that the wife's superannuation scheme was more generous than that of the husband. He reflected the wife's greater initial contribution to superannuation by assessing contributions to the superannuation pool as 60/40 in the wife's favour but he gave the husband a further 5% on account of s 75(2) factors. Berman J said (at para 151):

> "It is however reasonable to consider s 75(2) factors in respect of the disparity in superannuation and in this regard the greater potential for the wife's financial security arising out of her more generous superannuation entitlement and the likely exponential growth arising out of greater income and higher accrued multiple is such that would warrant an adjustment of 5 per cent in the husband's favour with an overall outcome of 55/45 per cent."

This meant that the husband was entitled to a superannuation split of about $54,000. The non-superannuation pool was adjusted 53% to 47% in favour of the husband on the basis of contributions alone as no party sought a s 75(2) adjustment.

Assessment of contributions to SMSFs

The management of investments in an SMSF may also be an issue when contributions are assessed. The Full Court in *Kane* & *Kane* (2013) FLC 93-569 dealt with the issue of whether the husband's contributions to an SMSF were a "special" contribution. The Full Court found that they were not. Although not the decisive factor, all three judges, in two separate judgments, considered that it was relevant that the husband would not have argued that he bear all the losses if his investments had made losses.

Similarly, Benjamin J in *Idoni* & *Idoni* [2013] FamCA 874, refused to take into account the husband's extra contributions to the SMSF or his losses on the investment in the fund in his

assessment of the parties' contributions. The husband had transferred his superannuation entitlements of about $166,000 into the fund and the wife had only transferred $40,000. Over a period of about six years the fund fell from an asset base of between $200,000 and $300,000 to about $22,000. The husband had effective control of the funds and oversaw what Benjamin J described as its "decimation". Benjamin J said (at para 35):

> "The husband could have at any time taken steps to sell the options and reduce the losses. He did not, as he did with the other investments, draw a line in the sand. He stood mute while the fund was reduced to where it is now."

Benjamin J ordered that the balance of the fund be transferred to the wife. He said (at para 147):

> I have considered the superannuation fund both in the context of contribution and s 75(2)(o) factors. As to contribution the husband put aside a relatively large sum and the wife a lesser sum. That arose from the different, but agreed, paths the parties took during their relationship. As indicated earlier I have treated those, as part of a holistic approach, as equal. As to the disastrous post-separation superannuation investments, it was open for the husband to discuss this fund (in which the wife had a significant interest) with her. He did not do so. It was also open for the wife to become involved in the management of the fund, she did not do so. I have not made an adjustment in favour or against either party in the context of contributions. I have included a modest percentage (3 per cent) in the overall adjustment in favour of the wife under the s 75(2) factors.

Out of the total pool of $575,207, the husband received $171,886 or 32%. The parties' contributions were assessed as equal but the wife received a s 75(2) loading of 15% (including 3% for the husband's wastage of the fund) plus an adjustment of $12,500 for half of the legal costs drawn down by the husband.

In *Courtnay* & *Courtnay* [2015] FamCAFC 108, the Full Court upheld the trial judge's decision that the husband was partly responsible for the losses to the value of his self-managed superannuation fund. He lost $400,000 from his entitlements of $633,173 over two years. Prior to 2008 when he retired, his superannuation had been in an accumulation fund. The husband did not adequately explain his usage of his entitlements and did not provide disclosure to establish that the losses were attributable to the global financial crisis, which was his verbal explanation for the losses.

Weight given to contributions to superannuation before cohabitation and after separation

Prior to December 2002, when superannuation could not be split, courts and legal practitioners sometimes used formulas to calculate the amount of "extra" non-superannuation assets which the non-member would receive to adjust for the member retaining all of their superannuation.

Under a formula based on *West* & *Green* (1993) FLC 92-395, the non-member sometimes received extra non-superannuation calculated on the following formula:

50%	×	period of cohabitation period of membership	×	estimated net value of current superannuation	

Formula approaches were described as "artificial" by the Full Court in such cases as *Tomasetti* & *Tomasetti* (2000) FLC 93-023 and *Bartlett* & *Bartlett* (1996) FLC 92-721. Since the commencement of the superannuation splitting regime, the Full Court's criticisms of a formulaic approach were repeated in *M* & *M* (2006) FLC 93-281, which is discussed below.

When used post-December 2002, *West & Green* is used to calculate the percentage split of superannuation to which the non-member is entitled on the basis that the member's pre-cohabitation and/or post-separation contributions are quarantined from being divided between the parties. Contributions and s 75(2) factors are not assessed on this quarantined amount.

Example:

- the husband has $300,000 of superannuation at the end of a 10-year relationship and 15 years of employment
- 10 years as a proportion of 15 years is two-thirds
- two-thirds of $300,000 is $200,000
- $200,000 is divided equally between the two parties. Before December 2002 this could only be done notionally. The non-member received their share from non-superannuation assets, and
- the non-member receives $100,000 and the member retains $200,000.

However, if the actual superannuation at the start of a 10-year relationship can be ascertained, this is better evidence than saying, as under the above formula, that after 15 years of employment, one-third of the superannuation was accrued prior to the relationship. Clearly, one-third of the superannuation did not accrue prior to separation. In most cases, contributions in money terms were less in the first five years than in the final five years. There would also have been growth in the fund during the relationship.

In long relationships, pre-cohabitation contributions made to non-superannuation are often of little, if any, significance. Using this formula for superannuation may seem unfair because it gives more weight to pre-cohabitation contributions to superannuation than are often allowed for pre-cohabitation contributions to other property. It also ignores other factors which were referred to by the Full Court in *Coghlan* & *Coghlan* (2005) FLC 93-220 at p 79,646:

> In the context of a consideration of the matters [in s 79(4), FLA] … the following matters may well be relevant: the relationship between years of fund membership and cohabitation; actual contributions made by the fund member at the commencement of the cohabitation (if applicable), at separation and at the date of hearing; preserved and non-preserved resignation entitlements at those times; and any factors peculiar to the fund or to the spouse's present and/or future entitlements under the fund.

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

Even where the *West & Green* formula is not used, family law courts frequently "quarantine" pre-separation contributions to superannuation in a way which they do not usually do with respect to other contributions, such as the equity in a home at the time of cohabitation. For example, in *Ritter* & *Ritter* [2014] FCCA 2640, there was unchallenged expert evidence as to the value of the husband's pension at the commencement of cohabitation. O'Reilly J quarantined this figure and gave the husband full credit for the dollar value of this contribution.

Disputes about the date of valuation of superannuation usually relate to the weight to be given to post-separation contributions. Assets are usually valued as at the date of trial. Post-separation contributions affect the percentage division of the overall pool and any contributions made or assets acquired after separation are not usually "quarantined" at their full value. Usually, if there are children of the marriage, contributions to the family after separation offset contributions by the primary income earner to property, including superannuation after separation. For example, *Spiteri* & *Spiteri* (2005) FLC 93-214.

M & M

In *M & M* (2006) FLC 93-281, the Full Court seemed to be trying to close the door on formula approaches. It considered that the cases in which formulas can be usefully applied to an adjustment of non-superannuation assets, taking into account contributions to superannuation, were rare. Despite this statement, formulaic approaches have continued to be used. Using the *West & Green* formula to assess the wife's contributions to the husband's superannuation, the trial judge in *M & M* found that the wife made an equal contribution to 13/20ths of it. She was therefore entitled to over $330,000. However, the trial judge only awarded the wife $80,000 from the non-superannuation.

The strength of the Full Court's criticisms of formulaic approaches was diminished by its finding that it could not order a superannuation split as neither party sought one. It also referred to other advantages for not splitting superannuation in this case. It adjusted for the husband's pension entitlement by giving the wife a greater share of the non-superannuation. The most the wife could

secure for her $330,000 “contribution” to the husband’s superannuation was about $158,000, being the husband’s equity in the home. This was about double the amount ordered by the trial judge and less than 50% of the *West & Green* formula was used as a rough rule of thumb.

Palmer* & *Palmer

The Full Court of the Family Court in *Palmer* & *Palmer* (2012) FLC 93-514 allowed the wife’s appeal against a decision of a Federal Magistrate on the grounds that he had erred in assessing the wife’s interest in the parties’ superannuation. The Federal Magistrate awarded the wife a figure of $260,000 which, together with her superannuation, gave her $286,988 of superannuation. This represented approximately 32% of the total superannuation of the parties or, disregarding the wife’s superannuation, approximately 30% of the husband’s superannuation. The Federal Magistrate did not explain his reasons for arriving at this figure. The Full Court said that it was impossible to determine what weight the Federal Magistrate gave to the husband’s pre-relationship contributions and how he arrived at the figure of $260,000.

The Federal Magistrate also made an error of fact when he found that some of the husband’s superannuation, valued at $864,386, was attributable to post-separation contributions by the husband. In fact, the husband’s superannuation was valued at the date of separation and there was no evidence as to its value at the time of the hearing two years later.

The husband argued that the value of his superannuation to be included in the pool should be determined at the time of separation so that 62% of the total value of his superannuation of $864,386 was attributable to the relationship, or $535,920. The Full Court said that the husband’s argument was “superficially attractive”. However, the Federal Magistrate had not purported to explain the result on that basis. The Full Court also noted that the Federal Magistrate had a valuation of the husband’s interests in 1993, which was the date of the marriage and about a year after cohabitation commenced. This valuation had been properly prepared and was the only evidence as to pre-cohabitation values. The Full Court said (at para 55) that the proper approach was:

> His Honour was obliged to consider the totality of the parties' contributions to the superannuation and non-superannuation assets, to take account of any relevant factors under s 75(2) and then to consider whether the overall result he arrived at was just and equitable.

Lester* & *Lester

In *Lester* & *Lester* [2014] FamCAFC 209 after an 18 year marriage and four children the pool of almost $1m was divided by the trial judge so that the wife received net assets of about $746,000

including superannuation of $312,000 (being about 77% of the pool including virtually all of the non-superannuation property) and the husband received net assets of about $223,000 of which his remaining superannuation was about $198,000. The husband's 23% of the pool was overwhelmingly constituted by superannuation. The husband's appeal was allowed.

The husband sought that the order that his superannuation be split so as to give $158,000 of it to the wife, be set aside and the parties property would, as a consequence, be divided as to approximately 61% to the wife and 39% to him.

The Full Court upheld the finding of the trial judge that the contribution-based entitlements of the parties were 52%/48% in favour of the wife, but found that it could not discern a proper basis upon which it could be determined that an adjustment of 25% in favour of the wife for s 75(2) factors was appropriate. The Full Court found that the appropriate adjustment for s 75(2) factors in favour of the wife was in the range of 8–10%. While the trial judge correctly gave weight to the significant disparity in the parties' incomes and earning capacities and the wife's sole responsibility for the day-to-day care of the four children, the husband also paid significant child support.

However, also relevant (at para 80) was:

> "Worthy of even greater weight is the fact that the husband will receive his property settlement as superannuation. It will be a number of years before the husband is able to access his superannuation, with the probability being that, whereas the wife has capital assets which are immediately available to her and at least provide her with the comfort of a home (plus superannuation), the husband is left with a modest income and no tangible assets from which he must in effect start again, without there being any clear prospect that he could ever manage to acquire a home of his own."

Pensions in the payment phase

Pensions in the payment phase pose particular challenges to the Family Law Courts. The parties and the courts wrestle with the concept of giving a lump sum value to an entitlement which may never be commuted into a lump sum. This may be because either:

- once the payment phase of the pension has commenced, the pension cannot be converted to a lump sum
- the particular fund only pays a pension and never pays a lump sum, eg federal judiciary pensions.

In some cases, a splitting order may no longer be ineffective if the non-member dies. Prior to the enactment of the *Judges & Governors-General Legislation Amendment (Family Law) Act 2012*, the spouse of a judge could obtain an order for a split of the pension but those payments could not commence until the judge retired. The non-member spouse can now have a separate interest benefit created.

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 (*Coghlan and Coghlan* (2005) FLC 93-220, *Edwards & Edwards* (2009) FLC 93-409).

Pursuant to s 90MT(2), the valuation under the *Family Law (Superannuation) Regulations 2001* must be used if the superannuation is being split by a court order. However, it need not be used if the superannuation is not being split or the split is effected by a financial agreement.

The correctness of many of the cases discussed below which involve the valuation of a pension in the payment phase has been thrown into doubt by the Federal Court in *Campbell* v *Superannuation Complaints Tribunal* [2016] FCA 808. Justice Logan heard an appeal from the Superannuation Complaints Tribunal. He held that Mr Campbell's vested entitlement to an invalidity pension was, for the purposes of the *Family Law (Superannuation) Regulations 2001*, an "accumulation interest". Mr Campbell was receiving invalidity benefits under the Military Superannuation Benefits Scheme (MSBS). He applied for information about his superannuation interest under the MSBS under s 90MZB of the *Family Law Act 1975* using a superannuation information form. The Commonwealth Superannuation Corporation (CSC) provided two responses: one with respect to his preserved benefit which was in the growth phase and one with respect to the invalidity pension which was in the payment phase.

Mr Campbell objected to receiving information with respect to his invalidity pension and argued that it was not superannuation. The Federal Court accepted that it was superannuation. It was not disputed that MSBS was a superannuation fund within the meaning of the SIS Act and thus, within the definition of s 90MD of an "eligible superannuation plan". That definition is "an interest that a person has as a member of an eligible superannuation plan".

However, the Federal Court found that the invalidity pension was not a defined benefit interest as reg 5(2) removed it from the scope of reg 5(1) because the pension was "only payable on invalidity".

Regulation 5(2) states:

> (2) A superannuation interest, or a component of a superannuation interest, is not a ***defined benefit interest*** for these Regulations if the only benefits payable in respect of the interest, or the component, that are defined by reference to the amounts or factors mentioned in subregulation (1A) are benefits payable on death or invalidity.

The effect that determination of Mr Campbell's invalidity pension as an accumulation interest rather than a defined benefit interest on its value was not set out in the judgment. Logan J remitted the matter to the Superannuation Complaints Tribunal.

Craig* & *Rowlands

The Full Court in *Craig* & *Rowlands* (2013) FLC 93-535 considered an appeal by the husband and concluded that appealable error was demonstrated because the Federal Magistrate:

- failed to demonstrate an appreciation of the different character or real nature of the DFRDB in the final stage, together with the necessary assessment of whether the orders were just and equitable.

- double counted the DFRDB by determining the parties' entitlement to it in one separate pool, then having regard to it again as a s 75(2) factor in the division of the other pool.

Strickland J said in relation to the double counting issue (at para 123):

> At the very least, having taken the benefit into account as its capitalised value (and allocating a percentage entitlement to the wife) it was double-dipping to then take it into account under s 75(2) of the Act.

May and Forrest JJ said (at para 70):

> The Federal Magistrate correctly used the capital 'value' of the DFRDB fund and then discretely decided the entitlement to it by each party and the s 75(2) impact of such a finding in isolation. The Federal Magistrate then took the husband's DFRDB into account in deciding the s 75(2) considerations which might apply flowing from the property division of the other pool. There was a double count. As importantly, the Federal Magistrate failed to demonstrate an appreciation of the 'different character' of the DFRDB in the final stage, together with the necessary assessment of whether the orders were just and equitable.

In both instances, the Full Court concluded that appealable error was demonstrated. See also *Semperton & Semperton* [2012] FamCAFC 132.

Janos

In *Janos & Janos* [2013] FamCA 846, the property pool was modest and the husband's superannuation was the most significant part of it. The husband was aged 58 and in receipt of an invalidity pension of $900 per week. It had been valued at $631,767 for family law purposes. At aged 60, he could commute the whole of his pension entitlement to a lump sum of $225,000 or commute part of it only.

The Family Court accepted that there should be a notional add-back of certain assets to the property pool, as the husband had either wasted assets or given no explanation as to how they had been dissipated. The adjusted property pool, including the add-backs and using the commutation value for the superannuation rather than the family law value, was only $305,640. The Family Court said (at [39]):

> Otherwise the valuation obtained is a capitalisation of a future income stream which, if included in the asset pool, would result a distortion in relation to the available assets of the parties for division.

For the wife to receive 60% of the property pool, she was entitled to a superannuation split of 80% of the commuted lump sum. Although that would reduce the husband's income in circumstances where the wife, aged 49, had an income of $60,000 per annum, the husband was in receipt of workers' compensation payments of about $28,600 per annum. There was no evidence to support his assertion that he had no capacity for employment following his recovery from heart surgery. He would receive the balance of his superannuation pension indexed for life.

The Family Court, in relying on the commutation value of the pension rather than the family law value, said (at [164]):

> The capitalised value of the pension is significantly in excess of its realisable value on commutation.

Russo & Wylie

In *Russo & Wylie* (2016) FLC 93-747, the Full Court said that the difficulties faced by the trial judge in dealing with the husband's Military Superannuation Benefit Scheme defined benefit interest ("MSBS benefit") were compounded by the fact that both parties asked him not to make a splitting order in relation to the benefit and they each took different approaches to dealing with it. The husband sought that it be excluded from the pool but the wife sought that it be included.

The pension was $33,531.16 per annum indexed and had been valued at $416,804 for family law purposes. The Full Court referred favourably to the distinction made between the exercise of the property power under s 79(4) and 75(2) (in this case, as it was a de facto relationship, s 90SM(4) and 90SF(3). The Full Court upheld the trial judge's approach, which was that:

- the husband's pension was not property available for distribution (whilst the wife's was)
- the parties made equal contributions to the pool of $1,554,236
- the wife received 7% ($103,000) for s 90SF(3) factors.

This approach meant that the wife was left with approximately $200,000 more in available assets than the husband.

The Full Court said (at [54]):

> Whilst, of course, orders under s 90MT must be made judicially, there is nothing in either s 90MS or s 90MT that evinces an overarching obligation to make orders that are just and equitable regardless of the wishes of the parties. It is to be recalled that it is implicit in the parties' requests that the court make orders other than superannuation splitting orders that the parties accepted such orders would be just and equitable.

Welch & Abney

In *Welch & Abney*(2016) FLC 93-756, the Full Court allowed the appeal of the wife against the manner in which the trial judge dealt with her non-commutable Total & Permanent Disability Pension (TPD). The grounds upon which the wife's appeal succeeded were that the trial judge fell into error in the following respects:

> (a) by adopting, as the present value of the TPD pension, the capitalised amount determined pursuant to s 90MT(2) Family Law Act. This value (or, more accurately, "amount") is mandated solely for the purpose of a splitting order of a superannuation interest being made. No splitting order was made by the trial judge and therefore the trial judge was not required to use that value or amount
>
> (b) by disregarding the evidence of the single expert as to the TPD pension entitlement being considered in a similar manner to earnings from employment, and that expert's evidence as to the different nature of the TPD pension entitlement from normal superannuation interests
>
> (c) as a consequence of (a) and (b), ignoring the imposition of taxation upon the TPD pension and making orders which left that substantial burden entirely with the wife
>
> (d) as a consequence of (a) and (b), ignoring contingencies operative upon the TPD pension and making orders that left those contingencies entirely with the wife and, conversely, relieved the husband of any impact of them.

The TPD pension was paid to the wife in monthly gross sums liable to taxation. The wife could not commute any part of the pension into a capital lump sum. It was not a guaranteed fixed-term or life-time pension. Its continued receipt was subject to conditions. She was 49 years of age at the time of trial and she might continue to receive the pension until she attained the age of 65 years. However, her continued receipt of the pension was contingent upon her continued survival, and upon medical assessments from time to time confirming her continued incapacity for gainful employment and the wife not in fact undertaking gainful employment. The single expert confirmed that if the wife ceased to be eligible to receive the disability pension "tomorrow", then his calculation of the disability pension amount would be a "nil" value.

The Full Court followed *Semperton & Semperton* [2012] FamCAFC 132 and *Hayton* v *Bendall* [2010] FamCA 592 where the courts emphasised that it was important to consider the "nature, form and characteristics" of the superannuation interest.

The effect of the trial judge's orders where the capital value of the TPD pension was ascribed a value of almost $980,000 (or 34.8% of the total of the parties' combined property interests), was that the wife received net non-superannuation property of $368,608 whilst the husband received $1,119,111. The majority of the wife's 60% entitlement was constituted by the capital value ascribed to the TPD pension.

The Full Court also found that the trial judge fell into error by not considering the wife's contributions to the TPD pension. If her pension was to be taken as part of a global assessment of contributions and its value equated to 34.8% of the trial judge's determination of the overall pool, it was an error for the trial judge to find that the wife's contributions were only "modestly greater" than those of the husband. The matter was remitted for re-trial.

Goudarzi* & *Bagheri

In *Goudarzi* & *Bagheri* [2016] FamCA 205 the husband was receiving a pension of $3,068 per week. It was valued at $2.03m, which was equivalent to about 14% of the property pool. The court did not deal with it as an asset, but as a financial resource. This was because it was payable over the lifetime of the husband, whatever that period was, and was not presently available as a lump sum. A s 75(2) adjustment of 20% was made in the wife's favour, the majority of which was on account of the husband's pension. Her total property entitlements were determined at almost $8m and the husband retained $6.5m of property plus his pension.

Surridge

In *Surridge & Surridge* [2015] FamCA 493, Foster J adopted a two-pool approach with the wife's pension being a discrete second pool and the parties' other superannuation and non-superannuation assets being in the primary pool. The wife was in receipt of a hurt on duty pension under the *Police Regulation Superannuation Act 1906* (NSW). She received a pension of $900 net per week increasing to about $1,000 per week net at the time of trial. Foster J referred to the difficulty of assessing contribution-based entitlements to the type of superannuation interest held by the wife and quoted favourably from Watts J in *Schmidt & Schmidt* [2009] FamCA 1386. In *Schmidt*, the court assessed the wife's contribution to the husband's hurt on duty pension entitlement at 10%. The parties were together for seven and a half years and the husband was in

the police force for just over 21 years prior to his retirement.

In *Surridge*, the wife was aged 46 and her eligible service period commenced in June 1987. They commenced a relationship in 1991 and married in 1996. They separated in August 2012.

Foster J found that the wife was employed prior to cohabitation for nine years with the police force. He seems to have made an error here. They married nine years after she started with the police force but cohabitation commenced about four years after she started with the police force. The value of the wife's future pension was determined according to fund specific factors at $1,022,821. No lump sum was payable in the future to her but the effect of a splitting order was to allow an immediate lump sum to be paid to the husband or for a rollover of that lump sum to another superannuation fund or a combination of the two. The effect of any spitting order was to commensurately reduce the wife's pension.

His Honour found that the wife's contribution-based entitlement to the income stream was overwhelming and it was difficult to find any contribution-based entitlement of the husband. The pension was in effect unearned income, indexed and payable during the wife's lifetime. The consequence of any splitting order of the pension entitlement was to commensurately reduce the wife's pension and procure an immediate cash payment to the husband leaving the wife with the reduced periodic income.

His Honour found that a modest adjustment of 5% in relation to the wife's pension was appropriate in favour of the husband which equated to an approximate lump sum of about $20,000. The outcome of the orders was that the wife had a cash equivalent of about $1,621,250 from the primary pool less an adjustment of $20,000 in favour of the husband from the pension pool leaving a net figure of $1,601,250. She otherwise retained her pension intact. The husband had an entitlement of $993,050 including the $20,000 adjustment of the wife's pension.

Contributions to the primary pool were assessed as equal. A s 75(2) adjustment of 12½% was made in favour of the wife who had the continuing care of the children aged 16 and 15 with little prospect of financial support from the husband. The s 75(2) adjustment also took into account unexplained funds received and disbursed by the husband of $800,000.

On appeal in *Surridge & Surridge* (2017) FLC 93-757, the Full Court found that Foster J's approach to the wife's hurt on duty pension was erroneous, even though both parties urged him to adopt that approach. Even though no ground of the wife's appeal referred to the error, their Honours considered it to be "a matter of significance and is productive of injustice. We consider ourselves bound to correct it" (at [13]). The Full Court found that it was not just and equitable to make a splitting order in respect of the wife's pension and stated (at [34]):

> The failure to consider any of these important considerations and, conversely, to take up the gross value of the wife's pension in the manner in which his Honour did, has resulted in the miscarriage of the trial judge's discretion leading to orders which are unjust to the wife.

The Full Court found (at [27]) that it was not just and equitable to make a splitting order with respect to the wife's pension. Indeed, there was "… a compelling case for not doing so". The reasons for this conclusion were:

> 1. Importantly, the property and superannuation interests of the parties permitted justice and equity to be achieved without such an order. The wife had only a possible residual capacity for some form of future part-time employment, her pension income of $50,000 per annum was modest and she had the continuing full-time care of two children, one of whom was only 12 and had little prospect of receiving child support or other financial assistance from the husband, although he had a significant earning capacity.
>
> 2. Once the trial judge determined not to make a splitting order, there was no requirement to value the interest (s 90MT).
>
> 3. The wife could never receive the calculated lump sum amount in specie. Nor could she commute any part of the pension to a lump sum. Her only entitlement was to an income stream for so long as she remained entitled to receive the pension. If no splitting order was to be made but an assessed percentage entitlement was attributed to the lump sum on account of the husband's contributions (even if those contributions were assessed to be modest as the trial judge considered them to be) the husband was receiving a lump sum entitlement from a lump sum that the wife could never receive.
>
> 4. The pension was taxed, but the scheme-specific methodology by which the capital sum was calculated referred to the gross amount of the pension.
>
> 5. If the wife's pension was to be included in the parties' assets and liabilities, even if part of a separate pool, her very significant contributions to it needed to be considered and the trial judge did not do so.
>
> 6. The proper way to deal with the wife's pension was under s 79(4)(e) as income in the hands of the wife.

There was no actuarial assessment of the "value" of the projected income stream of the husband of $340,000 per annum based on his earning capacity (as he had chosen not to work, his projected income was irrelevant), to compare to the lump sum calculation of the wife's pension income stream.

The Full Court increased the wife's entitlements overall to 75% by way of a s 79(4)(e) adjustment of 25%, mainly because of large transactions made by the husband which were unexplained and significantly depleted the pool, although they could not be precisely quantified because of the husband's attempt to mislead the wife and the court.

Conclusion

It is difficult to reconcile *Singerson & Joans* with such cases as *Eufrosin*. Perhaps the answer lies, unsatisfactorily for legal practitioners and clients, in the wide discretion which can be exercised under s 79 as emphasised by the Full Court in *Dickons & Dickons* and *Bolger & Headon* quoted earlier in this paper. However, in the future this will hopefully be addressed by the use of "comparable cases" as confirmed by the Full Court in *Wallis & Manning* (2017) FLC 93-759.

In the world of superannuation, there has recently been a complete turn-around in the manner in which courts deal with pensions in the payment phase. If they cannot be converted to a capitalised sum which can be split, they are now usually viewed as a financial resource and looked on as income rather than property.