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Newsletter

# Superannuation Judgments post Coghlan

specialising in superannuation valuations for family law purposes since 2003

**Abstract** – There has been a steady stream of superannuation cases reported since June 2005, that being the reporting date for Full Court's decision in C& C [2005] FamCA 429 – the case that established the two pool approach. Whilst none of the cases since that date have had the impact of C & C, there have been nevertheless noteworthy cases reported. A selection of such cases is presented in this newsletter.

The superannuation policies of the Rudd Labor Government have been analysed and the major changes presented.

**DJ & AJ *[2006] FamCA 961***

Issue: - Is double counting involved where superannuation features both as an asset and as an income stream?

Circumstance: - This appeal case involved a husband who was on an invalidity pension of $52,146 pa. The husband objected to his superannuation being included in his income asserting that it is double counting to include it as an asset and as income. The wife's income was $40,000. The family law value of the husband's superannuation in the growth phase was $407,000 and $865,000 in the payment phase.

Outcome: - The Full Court of Bryant, Finn & Coleman dismissed the appeal. The Court ruled that the nature of the "income" is different. The wife earned her income by her own labour whereas his income was through superannuation. The husband does not have to work for his income – the wife does!

Comment: - Invalidity pensions generally have a high family law value relative to a retirement pension. This causes practitioners to query the family law valuation. The husband's double counting argument has featured in many invalidity cases – after all, the wife's income is not capitalised so why should the husband's income be capitalised?

Has the issue now been settled? Superannuation granted to an invalid generally consists of two components - a retirement component and an income replacement component. In other words, superannuation for invalidity purposes includes an element for foregone future services. No evidence was tendered to value these two components separately. It may be possible to run an argument that recognises that superannuation accrued to date of invalidity is ordinary retirement superannuation whereas superannuation after invalidity includes both retirement and income replacement components. The compensation element could then be viewed as income akin to working resulting in a contributions adjustment.

It remains to be seen whether the above argument finds favour.

Practitioners are reminded that not all invalidity cases are equal. The family law value assumes an average life expectancy. There is an opportunity to argue for an adjustment to the family law valuation if it can be shown that the member's life expectancy is limited.

***M & M [2006] FAM CA 913***

This appeal case is all about the demise of the West and Green formula. This formula was used to divide superannuation referable to marriage based on straight-line apportionment. If the marriage was for 10 years and the scheme membership was for 20 years, then the formula allotted 50% of the superannuation to the marriage period. An earlier newsletter - click here addressed this case in detail.

Instead of an arbitrary formula, the Courts are looking for evidence. Such evidence would be the family law value at marriage and at separation to deduce the superannuation referable to the marriage period.

***McCulough & McCulough [2006] FamCA 840***

The Full Court said that the trial judge, in departing from the preferred approach in C & C, gave no reason for doing so. The case reinforces the virtual mandated use of the two pool approach, allowing separate considerations to be given to the contributions and 75(2) considerations to the two asset classes.

***Fayette & Fayette [2007] FamCA 834***

Contributions to the non-super pool were deemed to be equal. In contrast, the contributions to the super pool were assessed at about 67/33 to take into account the husband's pre-cohabitation contributions and post separation contributions. This case was reported after the full court case of M & M, which led to the demise of the West and Green approach. This case supports the concept of the amount of superannuation referable to the marriage period.

***D & D [2006] FamCA 199***

This appeal was about the mix of assets and is a contrast to the following case of *L & L.* The parties were aged 41 & 42. His income was $73K and hers was in the range of $9-16K. The asset pool was modest. The Federal Magistrate ordered the wife to retain the family home and the husband to retain his superannuation. The husband appealed for a share of the tangible assets. The appeal was dismissed on the basis that the husband did not establish the lack of just and equitable considerations by the absence of a splitting order. The following quotes are a good summary:

***"****Since the availability of such orders following the introduction of Part VIIIB, consideration of the constitution or mix of the assets with which each party will be left as a result of proposed orders would seem a necessary, if not critical, factor in determining the justice and equity of proposed orders in each case in which superannuation interests are involved" - para 17*

*"…there had been no evidence before the learned Magistrate of any particular purpose or need for which the husband would use such cash as he might receive from a sale of the home…" - para 22*

***L & L [2006] FLC 93-254***

In this appeal case, the wife wanted all the non-superannuation assets. The application was granted in part with the wife being awarded a lesser component of the superannuation.

The outcome supports the concept that a combination of superannuation and non-superannuation assets can be a just and equitable outcome.

***McKinnon & McKinnon [2005] FamCA 1245***

This case involved a re-exercise of discretion by Coleman J following successful appeal. The Federal Magistrate erred in making in making both a contributions assessment and a 75(2) finding for Defence Force Retirement and Death Benefits (DFRDB) pension. This was found to be double counting.

The husband was in receipt of a pension. His service for a DFRDB (which gave rise to the pension) concluded 9 years prior to cohabitation. As was to be expected, it was found that the husband's contribution to DFRDB was 100%.

In the end, a 10% 75(2) factor was awarded.

**Mary & William *[2006] FamCA 1046***

This appeal case is noteworthy as it is the first to feature flagging orders. The issue to be determined was whether the Courts have power to make a flagging order under s90MS? The result was a "yes" but subject to the Courts determining whether they should exercise their discretion. This was the question that was addressed next.

The Husband was a State court judge. His superannuation did not vest until the 10 year point. The husband was not eligible for the pension until 2015. In common with most judges' schemes, there is no provision for a separate interest. The only circumstance that would provide for a superannuation payment prior to 2015 would be if the husband were declared an invalid. This was considered to be unlikely.

It was held that the flagging order would provide no protection to the wife as the proceedings should be finalised within 2 years – well before 2015.

Analysis: For discretion to be exercised, there must be a valid reason. One possible reason might be that a condition of release is imminent. In these circumstances, a flagging order would provide protection for the non-member.

**Hyde & Hyde *[2007] FamCA 515***

This is an interesting case following the BAR's case (see *2005 FamCA 1097*) where Justice Young ordered the superannuation to be split in the payment phase even though the interest was currently in the growth phase.

The wife wanted an order in the payment phase similar to BAR's case (mainly because of low FLV relative to member statement value). The wife valued the husband's defined benefit superannuation at the member statement value of $326,827. In contrast, the family law value was $263,651. The case has an interesting discussion on the difference between these two values.

The family law value was accepted and the interest was split in the growth phase. C & C provided the rationale. Pre-marriage contributions and post separation contributions of superannuation were also discussed.

***Dudley and Dudley FamCa 2007*** – decision delivered Oct 2007

It was contended that the husband committed suicide to deprive the wife of his Defence Force Retirement and Death Benefits (DFRDB) pension. The wife asked for a splitting order with an operative date one day before the date of death. Under the DFRDB Act, the pension

ceased on the death of the member as there were no reversionary interests as the parties had separated. There was simply no pension to split irrespective of the operative date. The court could not make an order over a superannuation interest that was not in existence.

If the order had been made prior to death, the wife would have received a benefit in her own name and the above situation would not have arisen.

Practitioners should communicate to their client the risk that the death before orders are made will deprive the spouse of a benefit and in some schemes, even after orders are made. The risk is primarily in the older defined benefit schemes. The only mitigation is life insurance.

**Conclusions**

The raft of superannuation cases since C & C have a number of themes. The first is that there is now little discretion to use other than the two pool approach. Secondly, any combination of superannuation and tangible assets is possible but the outcome must be just and equitable. Thirdly, the concept of superannuation referable to the marriage period is well established but evidence should be tendered in support rather than relying on a West and Green style formula. Fourthly, flagging orders are discretionary and application for them need to be supported with reasons.

**Superannuation Policy Directions Under Labor**

You will not find a definitive listing of superannuation changes under a Rudd Labor government. However, various publications have been issued over the last few years that give an indication as to the direction of change. Most of the policy statements back the present arrangements with only minor tweaking. The single biggest change was announced in the context of the 2007 election campaign being the 'First Home Saver Account'. In essence, this is a savings account for eligible first home purchasers that would sit outside of superannuation. The main advantage of the account is its tax free status.

**Feedback**

Please email me any feedback or topics you would like covered in future newsletters.

**Curriculum Vitae -** click here to view my CV.


**Christmas Greetings –** I take this opportunity to wish all practitioners a Merry Christmas and a prosperous New Year.

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