[2005] FamCA 429

FAMILY LAW ACT 1975

IN THE FULL COURT

OF THE FAMILY COURT OF AUSTRALIA

AT SYDNEY

Appeal No. EA 92 of 2004
File No. SYF 4174 of 2002

IN THE MATTER OF:

C

Appellant Wife

- and -

C

Respondent Husband

REASONS FOR JUDGMENT OF THE FULL COURT

BEFORE:	**Bryant CJ, Finn, Coleman, Warnick and O'Ryan JJ**
DATE OF HEARING:	**14 December 2004**
DATE OF JUDGMENT:	**2 June 2005**

APPEARANCES: Mr Simpson of Counsel (instructed by Turner Whelan Solicitors) appeared on behalf of the appellant wife.

Mr Twigg, solicitor (Adrian Twigg & Co Solicitors), appeared on behalf of the respondent husband.

APPEAL SUMMARY

MATTER:	**C and C**
APPEAL NUMBER:	EA 92 of 2004 (SYF 4174 of 2002)
CORAM:	Bryant CJ, Finn, Coleman, Warnick and O'Ryan JJ
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CATCHWORDS:

FAMILY LAW – APPEALS – PROPERTY – SUPERANNUATION – Trial Judge made orders to the effect of dividing the parties' property, excluding their superannuation entitlements, 60 to 40 per cent in the wife's favour on the basis of an assessment of contributions and with no adjustment on account of the matters contained in s 75(2) of the *Family Law Act* 1975 ("the Act") – Parties' superannuation entitlements as found by the trial Judge were of a substantial amount relative to the pool of property – No splitting order made or sought at trial in relation to the superannuation interests of the parties – Whether the trial Judge erred in failing to take into account the superannuation entitlements of the parties in determining the pool of property and whether the trial Judge failed to give proper weight to those entitlements – Whether the result under the trial Judge's orders consequently plainly wrong and manifestly unjust – Discussion of the interpretation of the relevant provisions of Part VIIIB in proceedings under s 79 involving superannuation interests, including proceedings where no splitting order in relation to superannuation interests is sought by either party.

Caselaw cited:

Hickey and Hickey and AG for the Commonwealth of Australia (Intervenor) (2003) FLC 93-143

Russell v Russell (1976) 134 CLR 495

Cahill v Cahill (unreported, Family Court of Australia, 7 March 2003)

Wunderwald & Wunderwald (1992) FLC 92-315

Ilett and Ilett (unreported, Family Court of Australia, 2 June 2005)

Nguyen and Nguyen (1989-90) 169 CLR 245

Law-Smith and Seinor (1989) FLC 92-050

Wilson and Field - Dean [2001] FamCA 1397

CIC Insurance Ltd v Bankstown Football Club Ltd (1997) 187 CLR 384

Mullane v Mullane (1983) 45 ALR 291

Kelly and Kelly (No. 2) (1981) FLC 91-108

Coulter and Coulter (1990) FLC 92-104

Ascot Investments Pty Ltd v Harper and Harper (1981) FLC 91-000

Norbis and Norbis (1986) 161 CLR 513

Lenehan and Lenehan (1987) FLC 91-814

A and GS & Ors (2004) FLC 93-199

Telstra Corporation Ltd v Treloar (2000) 102 FCR 595

Appeal allowed and matter remitted for re-hearing (Bryant CJ, Finn, Coleman, Warnick and O'Ryan JJ).

Separate reasons for judgment by Warnick J and by O'Ryan J.

Cost certificates granted in relation to the appeal and the re-hearing.

BRYANT CJ, FINN and COLEMAN JJ:

Introduction

1. This is an appeal by the wife against an order for property settlement made by Rose J on 6 August 2004. The effect of his Honour's order was to divide the net value of the parties' property **excluding their superannuation entitlements** in the proportions of 60-40% in favour of the wife.

2. The net value of the parties' property, excluding their superannuation entitlements, was found by his Honour to be $590,208. The 60-40% division of that net value was arrived at on the basis of the parties' contributions and with no adjustment being made on account of the matters contained in s 75(2) of the *Family Law Act* 1975 ("the Act").

3. The parties' superannuation entitlements or interests were found by his Honour to have a combined value of $364,342 comprising:

    - the wife's future superannuation entitlements under a defined benefit and also under an accumulation scheme which, according to valuations in accordance with the Family Law (Superannuation) Regulations 2001 ("the Regulations") had a combined value of $65,482;

    - a superannuation lump sum of $66,954.59 (net) received by the husband in late 2001; and

    - a superannuation pension being received by the husband at a current rate of $432 per fortnight which was valued in accordance with the Regulations at $231,906.

4. No order was made by his Honour under Part VIIIB of the Act in relation to any of these superannuation interests, nor apparently had any such order been sought.

5. The essence of the wife's appeal is that the trial Judge erred in principle in his treatment of the parties' superannuation entitlements (particularly the husband's pension), and that in so doing he failed to give proper weight to those entitlements thus arriving at a result which was "plainly wrong and manifestly unjust."

The judgment of the trial Judge with particular reference to his treatment of the parties' superannuation entitlements

6. His Honour commenced his judgment by setting out his findings in relation to the historical background. For present purposes it need only be recorded that his Honour concluded that the parties had lived together for a six month period in late 1987 to early 1988 and then from their marriage in March 1991 until separation in late 2002. His Honour also found that:

- there were no children of the marriage;
- the parties were at the time of the hearing before him both aged 48;
- the husband had worked at a Commonwealth instrumentality but was now unemployed and in receipt of his pension under the Public Sector Superannuation Scheme; and
- the wife was still employed by a Commonwealth instrumentality.

7. After referring to what he considered to be the relevant principles, his Honour set out (at paragraph 37) a schedule of items under the three headings of "Assets", "Liabilities" and "Superannuation".

8. It is unnecessary for our purposes to specify the items which were included under the headings "Assets" and "Liabilities". It need only be said that the principal asset was the former matrimonial home and that his Honour found the items under the heading "Assets" to total $624,466 and those under "Liabilities" to total $34,258.

9. Under the heading "Superannuation", his Honour listed the parties' entitlements as we have listed them in paragraph 3, above.

10. His Honour thus found (paragraph 38) that the net property of the parties excluding their superannuation entitlements amounted to $590,208. He then made the following observations regarding the husband's superannuation pension:

> 39. With regard to the husband's superannuation pension valued at $231,906, it was agreed that the valuation was carried out in accordance with the Regulations but reflected a notional lump sum not available to the husband now or in the future. It is a valuation of his pension entitlement of $432.00 per fortnight by correction of a slightly different figure in his Financial Statement sworn 4 February 2003. I will provide my reasons for the manner in which I will treat that valuation for the purpose of making orders that are just and equitable in accordance with s79(2).

11. When considering the parties' contributions (paragraphs 40 to 77), his Honour made reference (paragraphs 58 and 67) to the husband's receipt of superannuation entitlements amounting to $66,954 (net) received in late 2001. He ultimately concluded that he would not include that amount in "the net property of the parties for the purposes of their contribution-based entitlements" apparently because the amount no longer existed and he was not prepared to include it as "a notional asset" (see paragraphs 70 to 74).

12. Similarly, his Honour concluded that neither the husband's fortnightly pension nor the wife's prospective superannuation entitlements should be included in "the net property of the parties for the purposes of their contribution-based entitlements" saying:

> 75. So far as the valuation of the husband's fortnightly pension, it was of course a proper exercise of valuation having regard to the relevant Regulations. However, it has such an air of artificiality about it that in my view it would be unjust to apply that valuation for the purpose of the calculation of the parties' net property. I respectfully follow the reasons for judgment given by Coleman J in *Cahill and Cahill* (unreported – 7 March 2003).

> 76. I have also determined that the wife's superannuation should be excluded. To do otherwise would be to perpetrate an injustice as it also represents a valuation of her prospective entitlements, which will only arise many years into the future.

13. Accordingly, his Honour concluded (paragraph 77) that "the net property of the parties is $590,208.00 for the purpose of calculation of their contribution-based entitlement." He also concluded that the parties' contributions should be assessed at 60-40% in the wife's favour. As we understand his Honour's reasoning, that percentage assessment was arrived at without regard to either party's contributions to their superannuation interests.

14. In his consideration of the matters contained in s 75(2) of the Act his Honour found (amongst other things) that:

- each party was aged 48 and in good health (paragraph 79);
- the wife has a net income of about $760 per week (paragraph 80) and the physical and mental capacity to carry out her current employment (paragraph 82);
- the husband had disclosed his sole source of income to be $432 per fortnight from his pension (paragraph 84);
- that the husband is likely to be gainfully employed in unskilled work supplemented by the earning of modest income from time to time from cabinet making (paragraph 90); and
- each of the parties has superannuation entitlements (paragraph 92).

15. His Honour then concluded (paragraph 96) "that there should not be an adjustment of entitlements in relation to the net property of the parties in favour of either of them". His reasons for this conclusion were as follows:

> 97. Undoubtedly, the wife's current income and capacity to earn income exceeds that of the husband.

98. However, I have accepted the husband's evidence as earlier referred to, regarding his confidence in obtaining employment. On that basis there is a likelihood that the husband's income will significantly improve and with it his capacity to earn income. In addition, he is able to earn income from cabinet-making. Whilst my findings reflected small amounts of income earned by him, I was unable to make a finding of the full extent of either income earned or likely to be earned due to the lack of a full and frank financial disclosure made by him. Indeed, this subject matter in terms of evidence was only provided in the course of cross-examination. Whilst it is not submitted that the husband has a huge income earning capacity in that regard, which I accept, nonetheless I take into account that I have been unable to make a finding of the appropriate limit of his likely income from that source.

99. I do not give any weight to the exclusive occupancy of the former matrimonial home by the husband since the wife has ceased to reside there as it seems to have been well-maintained and the wife has not suffered any significant loss albeit that she did not have the benefit of living in the former matrimonial home.

100. The husband has some financial security represented by his fortnightly pension.

101. The wife has a superannuation entitlement that has been valued as earlier referred to.

102. The amounts in each instance are not large.

16. His Honour then went on to explain the orders which he proposed to make to give effect to his decision to divide the net value of the parties' property ($590,208) in the proportions of 60-40% in favour of the wife, while leaving each party to retain his or her superannuation interests.

The trial Judge's error of principle as asserted by the wife

17. By ground 1.1 it is asserted that his Honour:

> erred in principle in acting contrary to the mandate in Part VIIIB of the Family Law Act … in that [he] failed to take into account the value of the superannuation interests of the parties in determining the net property of the parties for division pursuant to s 79 of the Act.

18. The proposition that Part VIIIB of the Act mandates that the value of superannuation interests of parties be taken into account in determining their net property for purposes of proceedings under s 79 of the Act appears to have its source in paragraphs 30 and 75 of the judgment of the Full Court in *Hickey and Hickey and AG for the Commonwealth of Australia (Intervenor)* (2003) FLC 93-143.

19. In paragraph 30 after having set out the terms of s 90MC of the Act (which we will later set out), the Full Court immediately went on to say:

> 30. A superannuation interest is therefore to be treated as property for the purposes of proceedings between the parties to a marriage with respect to the property of the parties or either of them, being proceedings arising out of the marital relationship.

20. Then later in paragraph 75 the Full Court said (emphasis added):

> 75. Although, for obvious reasons, the definition of property in s.4 was not amended to include a superannuation interest or deem such an interest to be property, **the effect of s.90MC is that in proceedings in relation to property under s.79 a superannuation interest is to be treated as property irrespective of whether or not a splitting or flagging order is sought or proposed to be made**. As was submitted on behalf of the husband, the expression "treated as property" should be understood as meaning "treated as if it were property even though it is not" and that it should be so treated for the purposes of s.79. It was further submitted that the intention of the Parliament is clear from Note 1 to s.90MS. …

21. The Full Court then went on in paragraph 75 to explain what was meant by the expression "treated as property", and it will be of assistance to include that explanation at this point in our discussion (again emphasis added):

> 75. … Because a superannuation interest is to be treated as property in s. 79 proceedings it follows that it will be included in the list of property and valued at what is step one of **the preferred four step approach to the determination of an application pursuant to s. 79**. At step three the superannuation interest may be taken into account, as are other items of property and financial

> resources, pursuant to the provisions of s. 75(2) if the interest is relevant. The superannuation legislation introduced reforms which are directed to how a court will deal with a superannuation interest at steps one and four of the preferred four step approach in the determination of an application under s. 79. The legislation did not amend s. 79 or s. 75.

22. For the sake of completeness we will also here include the explanation which the Full Court had provided of the "preferred four step approach" earlier in its judgment at paragraph 39:

> 39. The case law reveals that there is a preferred approach to the determination of an application brought pursuant to the provisions of s. 79. That approach involves four inter-related steps. Firstly, the Court should make findings as to the identity and value of the property, liabilities and financial resources of the parties at the date of the hearing. Secondly, the Court should identify and assess the contributions of the parties within the meaning of ss. 79(4)(a), (b) and (c) and determine the contribution based entitlements of the parties expressed as a percentage of the net value of the property of the parties. Thirdly, the Court should identify and assess the relevant matters referred to in ss. 79(4)(d), (e), (f) and (g), (``the other factors'') including, because of s. 79(4)(e), the matters referred to in s. 75(2) so far as they are relevant and determine the adjustment (if any) that should be made to the contribution based entitlements of the parties established at step two. Fourthly, the Court should consider the effect of those findings and determination and resolve what order is just and equitable in all the circumstances of the case: *Lee Steere and Lee Steere* (1985) FLC 91-626; *Ferraro and Ferraro* (1993) FLC 92-335; *Davut and Raif* (1994) FLC 92-503; *Prpic and Prpic* (1995) FLC 92-574; *Clauson and Clauson* (1995) FLC 92-595; *Townsend and Townsend* (1995) FLC 92-569; *Biltoft and Biltoft* (1995) FLC 92-614; *McLay and McLay* (1996) FLC 92-667; *JEL and DDF* (2001) FLC 93-075 and *Phillips and Phillips* (2002) FLC 93-104. (p 78,386).

23. In order to determine whether there is – as is asserted by ground 1.1 – "a mandate" in Part VIIIB to include the value of the superannuation interests of the parties to proceedings under s 79 in the calculation of the so called pool of

property available for division in such proceedings, it is necessary to consider the scope and effect of the provisions in Part VIIIB, in particular in the present context s 90MA (the objects provision), s 90MC and s 90MS.

24. Before turning to consider the provisions of Part VIIIB we think it necessary to also refer to the following statement made by the Full Court in *Hickey* immediately following their observations in paragraph 75 (emphasis added):

> 76. For this reason, in our view, it is not necessary for us to resolve the issue raised by the submissions that **a superannuation interest is property as defined in s. 4(1)** apart from the provisions of Part VIIIB…

25. We understand the reference in paragraph 76 of *Hickey* to "the submissions" to be a reference to the submissions of Senior Counsel for the husband and the Solicitor General in that case. The Full Court had earlier recorded those submissions in the following terms:

> 68. …Senior Counsel for the husband, and … the Solicitor General … further submitted that prior to the commencement of Part VIIIB there was a misapprehension in relation to the manner in which superannuation was treated, namely it was treated as a financial resource and not as property. They further submitted that the reason why the Court normally dealt with superannuation as a financial resource was because of its peculiar nature, namely that it was inconvenient or usually unfair to deal with it on the same basis as other items of property and it was "difficult, if not impossible", until the introduction of Part VIIIB, to value certain superannuation interests and "make orders effectively dividing superannuation interests".
>
> 69. Further, they submitted that the rights of a member of a superannuation fund under the superannuation trust deed (or legislation) are a chose in action which is property, and to that extent superannuation interests have always been property within the definition of property in s.4(1) of the Act and thus amenable to the exercise of power pursuant to s.78 and s.79: *Harris and Harris* (1991) FLC 92-254; *Evans and Public Trustee for the State of Western Australia as Legal Representative of Evans* (1991) FLC 92-223; *Wunderwald and Wunderwald* (1992) FLC 92-315 and *Stay v Stay* (1997) FLC 92-751.

> 70. Senior Counsel for the husband submitted that, as was recognised in Harris and Evans, this approach derives considerable support from the analogy of the interests of a beneficiary in an unadministered estate dealt with by the *Privy Council in Commissioner of Stamp Duties (Queensland) v Livingston* (1965) AC 694 and the High Court in *Official Receiver in Bankruptcy v Schultz* (1990) 170 CLR 306. It was submitted that each of those cases recognised that a beneficiary under a will before the estate is fully administered has no beneficial interest in the underlying assets but has certain rights against the trustee to have the estate fully administered which is a chose in action and which is thus property. As Nygh J pointed out in Evans at 78,552, by analogy, it could be argued that 'proceedings with respect to property of the parties' includes a claim with respect to the interest of a member of a superannuation fund even though the value of the interest is not determined until after death. It was also submitted that the approach is analogous to the approach taken by the Full Court in *Best and Best* (1993) FLC 92-418 where the interest of a partner in a law firm was treated as property notwithstanding that the partnership was one which effectively made it a non-transferable interest. Again, as Nygh J said in Evans at 78,553, an interest is not necessarily deprived of the character of 'property' merely because it cannot be assigned. It was submitted that all of the cases support the proposition that the rights of a beneficiary under a superannuation trust deed (or legislation) are property apart from Part VIIIB but traditionally they have been very difficult to deal with…

26. As already mentioned, the Full Court in paragraph 76 of its judgment in *Hickey* concluded that it was unnecessary for it to determine the issue raised by Counsel as to whether a superannuation interest comes within the definition of property in s 4(1). For reasons which we will later explain (in paragraph 53 of this judgment), it is also unnecessary that we resolve that issue. However before leaving this topic we will for the sake of completeness set out the definition of "property" which appears in s 4(1) of the Act:

> **property**, in relation to the parties to a marriage or either of them, means property to which those parties are, or that party is, as the case may be, entitled, whether in possession or reversion;

The relevant provisions of Part VIIIB

27. It was generally accepted prior to the introduction of Part VIIIB that courts exercising jurisdiction under the Act lacked the jurisdiction or power to make orders which would divide, or otherwise directly affect interests in most superannuation schemes in this country. (See in this regard the discussion in the opening paragraphs of the Revised Explanatory Memorandum to the Family Law Legislation (Superannuation) Bill 2001 ("the Explanatory Memorandum"). That Bill proposed the insertion of Part VIIIB into the Act.)

28. The object of Part VIIIB is expressed in the first section (s 90MA) of that Part to be:

> …to allow certain payments (splittable payments) in respect of a superannuation interest to be allocated between the parties to a marriage either by agreement or Court order.

29. Although the Explanatory Memorandum (Notes on Clauses, paragraph 32) considered this object section to be "self-explanatory", for present purposes it needs to be said that the section makes it clear that the sole purpose or object of Part VIIIB is to permit agreements or Court orders to be made which would provide for certain payments in respect of superannuation interests to be allocated between spouses. There is no other purpose or object stated.

30. In order to give effect to this sole object, jurisdiction had to be conferred on the courts (which otherwise exercise jurisdiction under the Act) to make orders of the type referred to in the object provision (s 90MA) of Part VIIIB. (The only orders that are then provided for under Part VIIIB are "splitting orders" in s 90MT and "flagging orders" in s 90MU.)

31. In order to confer such jurisdiction, resort was had to the definition of "matrimonial cause" in s 4(1) and thus to the operation of s 39. This is the mechanism by which jurisdiction was originally conferred and is still largely conferred in respect of most proceedings under the Act – but with the notable exception of the express conferral of jurisdiction for children's matters in Part

VII. In *Russell v Russell* (1976) 134 CLR 495 at 521 Gibbs J described the definition of "matrimonial cause" and s 39 as together forming "the keystone of the jurisdictional structure which the Act erects."

32. Thus s 90MC provided:

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

33. Paragraph (ca) of the definition of "matrimonial cause" is as follows:

> (ca) proceedings between the parties to a marriage with respect to the property of the parties to the marriage or either of them, being proceedings:
>
> (i) arising out of the marital relationship;
>
> (ii) in relation to concurrent, pending or completed proceedings between those parties for principal relief; or
>
> (iii) in relation to the dissolution or annulment of that marriage or the legal separation of the parties to that marriage, being a dissolution, annulment or legal separation effected in accordance with the law of an overseas jurisdiction, where that dissolution, annulment or legal separation is recognized as valid in Australia under section 104;

34. In *Hickey*, the Full Court explained (in paragraphs 17 to 23) the use of the definition of "matrimonial cause" as a jurisdiction conferring mechanism. Then a little later, having set out the terms of s 90MC in paragraph 29, the Full Court, as we have previously mentioned, went on immediately to say:

> 30. A superannuation interest is therefore to be treated as property for the purposes of proceedings between the parties to a marriage with respect to the property of the parties or either of them, being proceedings arising out of the marital relationship.

35. The Full Court referred again later to s 90MC saying in paragraph 75 (which we have already quoted in full):

> 75. …the effect of s.90MC is that in proceedings in relation to property under s.79 a superannuation interest is to be treated as property irrespective of whether or not a splitting or flagging order is sought or proposed to be made.

36. There appears to be no explanation in the judgment in *Hickey* for these interpretations of s 90MC in paragraph 30 and, more significantly, in paragraph 75 of that judgment. These interpretations of s 90MC appear, with respect, to overlook the words in s 90MC "for the purposes of paragraph (ca) of the definition of matrimonial cause in section 4." There is no explanation in *Hickey* as to why the Full Court held in that case that despite those concluding words of s 90MC, that section has an operation beyond conferring jurisdiction to make orders with respect to superannuation interests.

37. Moreover, the statement contained in paragraph 75 of *Hickey* that the effect of s 90MC is that a superannuation interest is to be treated as property "whether or not a splitting or flagging order is sought or proposed to be made" appears to us to be, again with respect, a "gloss" on the section, particularly when it is remembered that s 90MC is to be found in Part VIIIB and not Part VIII. We will return in due course to the lack of guidance in the legislation in relation to cases where no order under Part VIIIB is sought.

38. In our opinion, s 90MC does no more than operate to extend the definition of "matrimonial cause" by extending the jurisdiction, which the various courts which exercise the jurisdiction under the Act, have in proceedings between parties to a marriage with respect to their property, to include a jurisdiction to make orders with respect to the superannuation interests of the parties to property settlement proceedings.

39. The interpretation of s 90MC for which we have contended in the last paragraph is supported by the later provision, s 90MS(1), which appears in the division of Part VIIIB which is concerned with the two types of orders which the Court may make. Section 90MS provides (emphasis added):

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

Note 1: Although the orders are made in accordance with this Division, they will be made under section 79. Therefore they will be generally subject to all the same provisions as other section 79 orders.

Note 2: Sections 71A and 90MO limit the scope of section 79.

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

40. We acknowledge that were it not for s 90MS(1), it might perhaps be possible to take the view that because of the provisions of s 90MC, superannuation interests should be regarded as synonymous with property for the purposes of proceedings under s 79. However we are of the view that the use of the word "also" prevents such an interpretation. We interpret the use of the word "also" in s 90MS(1) to mean that superannuation interests are another species of asset which is different from property as defined in s 4(1), and in relation to which orders can also be made in proceedings for property settlement under s 79. There is nothing in our view in s 90MS(1) which indicates that superannuation interests are to be treated as property in proceedings under s 79 (irrespective of whether or not an order under Part VIIIB is sought in those proceedings). Indeed, the only stated purpose anywhere in Part VIIIB for superannuation interests being "treated as property" is for the purposes of the definition of "matrimonial cause" which, as earlier explained, is the jurisdiction conferring provision.

41. The Full Court in *Hickey* appeared to place some reliance on the first note to s 90MS(1) but we do not see that that note advances the argument for the proposition that by virtue of s 90MC (or s 90MS(1)) superannuation interests are to be "treated as property" in proceedings under s 79 (even if a splitting or flagging order is sought). Rather, we read s 90MS(1) as providing that:

- in proceedings under s 79

- with respect to the property of spouses (the definition of which does not include superannuation interests)
- the court may in accordance with Division 3 of Part VIIIB
- also make orders in relation to superannuation interests of the spouses.

42. If we are wrong as to the second dot point and the section intended the property of spouses to include superannuation interests, then the words in the fourth dot point would not be required and the section would perhaps be drafted in a different way so that the section might then say:

> in proceedings under section 79 with respect to the property of spouses **(and it might say "which includes superannuation interests")**, if the court intends to make orders in relation to superannuation interests it must do so in accordance with this division.

43. Thus, the way in which s 90MS is drafted leads us to the view that 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.

44. However s 90MS(1) does have the effect, in our view of requiring that in a case where the Court intends to make orders in relation to superannuation interests of the spouses, it must do so "under" s 79 (although s 90MS(2) makes it clear that the Court cannot make an order in relation to a superannuation interest except in accordance with Part VIIIB). In other words, the Court must apply to superannuation interests the matters to be taken into account under s 79.

45. The starting point in any determination of any proceedings under s 79 (whether or not the parties have superannuation interests) must remain s 79(1) which provides:

> In proceedings with the respect to the property of the parties to a marriage or either of them, the court may make such order as it considers appropriate altering the interests of the parties in the property, including an order for a settlement of property in substitution for any interest in the property and including an order

> requiring either of both of the parties to make, for the benefit of either or both of the parties or of a child of the marriage, such settlement or transfer of property as the court determines.

46. Against the background that the word "property" in s 79(1) means property as defined in s 4(1) and therefore will not or may not in many cases include superannuation interests, it seems to us that s 90MS complements s 79(1). In other words, s 79(1) provides that in proceedings with respect to property as defined in s 4(1), the Court may make such orders as it considers appropriate dealing with the interests of the parties in that property, and s 90MS(1) provides that, in such proceedings, the Court may **also** make orders in relation to superannuation interests of the spouses. If the Court intends to make such orders, it must do so in accordance with Part VIIIB. Thus meaning is given to both sections when read in this way.

47. The court in dealing with property proceedings and with proceedings where the parties have superannuation interests must then turn to s 79(2), which requires that any order, including an order that relates to superannuation interests, must be just and equitable.

48. The court is then required under s 79(4) in considering what order should be made with respect to the property of the parties (and/or any superannuation interests), to take into account in the following matters:

> (a) financial contributions;
> (b) non- financial contributions;
> (c) contributions to the welfare of the family;
> (d) the effect of any proposed order upon the earning capacity of either party;
> (e) the matters referred to in subsection 75(2) so far as they are relevant;
> (f) any other order made under the Act affecting a party to the marriage or a child of the marriage;
> (g) any child support that a party has provided, is to provide or might be liable to provide in the future for a child of the marriage.

The Explanatory Memorandum

49. The views we have expressed above would seem to be supported by reference to the Explanatory Memorandum, to which we consider it is permissible to have regard pursuant to s 15AB of the *Acts Interpretation Act* 1901, given that there has to date been some division of opinion within the Court concerning the operation particularly of s 90MC; for example Coleman J said in his decision in *Cahill v Cahill* (unreported, Family Court of Australia, 7 March 2003):

> 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, another altogether to suggest that superannuation must thereby be treated the same way as existing or tangible assets when entitlements of parties are determined pursuant to s 79 of the Act.

50. The relevant paragraphs (and their headings) from the Notes on Clauses in the Explanatory Memorandum are as follows:

> Section 90MC - Extended meaning of "matrimonial cause"
>
> 37. Existing section 4 of the Family Law Act defines "matrimonial cause" to be, relevantly in paragraph (ca), "proceedings between the parties to a marriage with respect to the property of the parties to the marriage...". Existing Part V of the Family Law Act provides for the jurisdiction in matrimonial causes.
>
> 38. Section 90MC of new Part VIIIB will provide that a superannuation interest is to be treated as property for the purposes of this definition. This means that proceedings dealing with a superannuation interest will be able to be instituted in those courts that have jurisdiction to deal with matrimonial causes, as provided for in Part V of the Family Law Act. However, creating the jurisdiction in this way means that superannuation interests, where they are to be divided, will have to be divided in accordance with new Part VIIIB. They will not be able to be treated as property generally for the purposes of Part VIII.
>
> …
>
> **Division 3 - Payment splitting or flagging by court order**
>
> Section 90MS - Order under section 79 may include orders in relation to superannuation interests

154. An order dealing with a superannuation interest will be made in the context of a property settlement order, pursuant to section 79 of the Family Law Act. However, a court will only be able to make an order about a superannuation interest in accordance with the provisions of new Part VIIIB, which deals specifically with superannuation interests.

155. Subsection 90MS(1) of new Part VIIIB will provide that in proceedings under section 79 with respect to the property of spouses, the court may, in accordance with new Division 3 of new Part VIIIB, also make orders in relation to superannuation interests of the spouses.

156. Subsection 90MS(2) of new Part VIIIB will provide that a court cannot make an order under section 79 in relation to a superannuation interest except in accordance with new Part VIIIB.

157. During consultations on the Superannuation Bill, some confusion was expressed, including in submissions to the Senate Select Committee on Superannuation and Financial Services, as to the relationship between new Part VIIIB and section 79. Note 1 to subsection 90MS(1) will clarify the relationship between section 79 and Division 3 of new Part VIIIB, explaining that although orders are made *in accordance* with Division 3 of Part VIIIB, they will be made *under* section 79 and will, therefore, generally be subject to the same provisions as other section 79 orders.

51. Nothing in the Explanatory Memorandum would seem to suggest that superannuation interests are "to be treated as property" in proceedings in relation to property under s 79. Indeed, the last sentence of paragraph 38 in the Notes on Clauses (referred to in paragraph 50, above) suggests the contrary. Moreover, the earlier sentences of that paragraph serve as a reminder as to the purpose of the definition of "matrimonial cause", that is, as a jurisdiction conferring device.

Conclusion in relation to the operation of s 90MC and s 90MS

52. The interpretation of s 90MC and s 90MS which we have suggested above would therefore appear to be consistent with the intended interpretation as expressed in the Explanatory Memorandum. That is, that s 90MC does no more than confer jurisdiction on the relevant courts to make orders in relation to superannuation

interests in proceedings with respect to the property of parties to a marriage (or indeed in proceedings between such parties where the only asset of any significance is a superannuation interest) and that s 90MS does no more than provide that superannuation interests are but another species of asset (in addition to property as defined in s 4(1)) in relation to which orders can be made in proceedings between parties to a marriage.

53. Importantly, the conclusion, that by virtue of s 90MS superannuation interests are to be regarded as another species of asset in relation to which orders can be made, will mean that the Court will be relieved from having to determine in any particular case the question of whether "a superannuation interest", which comes within the definition of that term contained in s 90MD, may in fact also come within the definition of "property" in s 4(1) (as was suggested in the submissions made in *Hickey* to which we earlier referred in paragraphs 24 to 26), or whether it is only a financial resource. It is interesting to note in this regard that, from its inception, s 75(2) has contained reference in paragraph 75(2)(b) to "property and financial resources" and then in paragraph 75(2)(f) has contained reference to "a... benefit... under any superannuation fund or scheme". Thus, the treatment by the legislation of a superannuation benefit or entitlement as a concept separate from property and financial resources is not new.

The position where no order is sought under Part VIIIB

54. It has to be recognised in light of what we have said so far, that the requirement to apply the provisions of s 79 (particularly s 79(4)(a) to (g)) to superannuation interests would, strictly speaking, only arise under s 90MS in circumstances where an order is actually sought under Part VIIIB. It also has to be recognised that the legislation appears to be otherwise silent as to what are the obligations on, and the powers of, the Court where the parties have superannuation interests but no order is sought under Part VIIIB. This in our view is a significant omission in the legislation.

55. The reasoning in *Hickey* would seem to overcome this legislative omission in that if the words in paragraph (ca) of the definition of "matrimonial cause" in s 4(1) are read not, as we hold, as merely enlivening the jurisdiction to make orders concerning superannuation interests, but rather as meaning that in all proceedings under s 79 (irrespective of whether or not a splitting order is sought), superannuation interests are to be treated as property.

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.

57. We recognise, in connection with the approach just suggested, that paragraphs 79(4)(a) and (b) refer to the contributions to "property" and that the expression "property" as used in those paragraphs must be taken to mean property as defined in s 4(1). Accordingly, it might be argued that there is no requirement for the Court to consider the parties' contributions to their respective superannuation interests in a case where no splitting order is sought. But if this view is correct the contributions to superannuation interests would still remain to be considered under s 75(2)(j). (See in this regard the observations of the Full Court in *Wunderwald & Wunderwald* (1992) FLC 92-315 at 79,361-2, which we consider have general application despite the nature of the particular superannuation fund

under consideration in that case. See also the discussion in *B and B (No 2)* (2000) FLC 93-031, paragraphs 59 to 70).

58. Thus, we consider that because of the obligation under s 79(2) to make a just and equitable order, then in order to ensure such a result the Court should wherever there is a superannuation interest apply the provisions of s 79(4)(a) to (g) (which will include the matters contained in s 75(2)) to that superannuation interest **whether or not a splitting order is sought**.

59. It may well be that if a superannuation interest is considered having regard to the matters in s 79(4) in a case where a splitting order has not been sought by either party, it will become clear to the Court on such consideration that the only just and equitable order which can be made in the particular case is a splitting order. The Court can then afford the parties an opportunity to be heard in relation to such an order with the requisite notice being given to any trustees of the superannuation fund and a formal valuation according to the Regulations, if necessary, obtained.

60. It is relevant to say at this point that we agree with the views expressed by the Full Court in paragraph 89 of its decision in *Hickey*, to the effect that there is no requirement on parties to obtain a valuation in accordance with the Regulations (at least if no splitting order is sought at the outset of the trial). However, as we have indicated in the last paragraph, if in the course of hearing the matter, the Court reached the conclusion that a splitting order was required for the purpose of achieving a just and equitable order, then a valuation under the Regulations would have to be obtained.

Practical implications

61. Nothing we have said in this judgment would prevent a Court in the exercise of its discretion from including a superannuation interest as an item of property in the list of property which is drawn as "the first step" in the determination of proceedings under s 79, whether or not a splitting order is sought in those

proceedings. This approach could be adopted where the parties agree that it should be adopted, or where the Court is satisfied that the superannuation interest is indeed property within the meaning of the definition of property contained in s 4(1), or if the interest is not within that definition, but is of relatively small value in the context of the value of the other assets in the case, or there are features about the interest which leads the Court to conclude that this would be an appropriate approach.

62. The parties' contributions to all items on that list (including the superannuation interest) would then be assessed on either a global or an asset by asset basis. It might then be necessary in the s 75(2) context to have regard to the parties' future superannuation entitlements (having regard of course to any division proposed on the basis of their contributions), with consideration then being given to the overall justice and equity of any proposed award or order (including any proposed splitting order). Indeed, this is the approach which the Full court has used on its re-exercise of the trial Judge's discretion in *Ilett and Ilett* (which will be delivered contemporaneously with the decision in this case).

63. However, given the conclusions we have reached above, we consider that the preferred approach to the determination of property settlement cases must be to prepare in addition to the list of items of property (which would clearly fall within the definition of that term in s 4(1)), a separate list containing any superannuation interest or interests (valued according to the Regulations if a splitting order is sought in any application before the Court, or if no such order is sought, valued either according to the Regulations or otherwise). This of course is the approach which the trial Judge adopted in this case.

64. Then for the reasons we earlier gave, whether or not a splitting order is sought on either party's application, the parties' contributions to both the property (as defined in s 4(1)) and also to the superannuation interests should be assessed. The other factors in s 79(4)(d), (e), (f) and (g) would then need to be considered. Specifically in the context of s 79(4)(e), that is the s 75(2) factors, any division of

the property (as defined in s 4(1)) and any "division" of any superannuation interest (in the sense of an allocation of the base amount) based respectively on the assessments of the parties' contributions to the property and to any superannuation interest, would then be considered. Similarly, the parties' future superannuation prospects (be they in capital or income form) would also need to be considered. The overall justice and equity of the ultimate award (including any proposed splitting order or the need for such an order) would then be considered.

65. In summary, then, the trial Judge has a discretion as to how superannuation interests will be treated in a particular case. If superannuation is not included in the list of property but rather made the subject of a separate pool, it will be necessary where a splitting order is sought, or extremely prudent where no such splitting order is sought (in order to ensure that justice and equity is achieved) to:

(a) value the superannuation interest (according to the Regulations if an order under Part VIIIB is sought or according to the Regulations or otherwise if no order is sought);

(b) consider and make findings about the types of contributions referred to in s 79(4)(a), (b) and (c) which have been made by the parties to the superannuation interests on either a global approach or an asset by asset approach depending on the circumstances;

(c) consider the other factors in s 79(4) being the matters in s 79(4)(d), (e), (f) and (g); and

(d) ensure that pursuant to s 79(2) the orders in relation to the parties' property, and any order under Part VIIIB in relation to superannuation interests are just and equitable.

66. In the context of a consideration of the matters referred to in sub-paragraphs (b) and (c) of the last paragraph, 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.

67. If this approach is adopted, whereby superannuation interests are dealt with separately from property as defined in s 4(1), but are subject to the considerations in s 79(4), then not only will any contributions, both direct and indirect, by either party to such superannuation interests be more likely to be given proper recognition, but the real nature of the superannuation interests in question can also be taken into account, both in consideration of the s 75(2) matters and in the final assessment of whether the ultimate order is just and equitable.

68. When we refer to "the real nature" of the relevant superannuation interest, we are referring to the fact that notwithstanding that its value according to the Regulations may well be calculated to be a very significant amount, that superannuation 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.

Conclusion in relation to the present case

69. In the present case, therefore, we see no error in the trial Judge's approach whereby he did not include the parties' superannuation interests in the same list or pool as the parties' other assets. However, we do consider that he fell into error by not applying the provisions of s 79(4)(a) to (g), particularly the requirements to assess the parties' contributions to their superannuation interests (either under s 79(4)(a) and (b) or s 75(2)(j)), and to consider the impact of their present and future superannuation entitlements in determining if any adjustment should be made on account of any of the other matters in s 75(2) given the value of those interests relative to the other property of the parties.

70. The failure of his Honour to consider and assess the contributions of the parties to their superannuation entitlements (which were of such relative significance in this case) and the impact of those entitlements on the need for any s 75(2) adjustment

must in our view amount to an appealable error on his part. Without findings in relation to the parties' respective contributions to all their superannuation interests and then an assessment of those contributions, it is impossible for us to assess whether or not the ultimate award was just and equitable. **In these circumstances therefore the appeal must be allowed, and we consider that there is no option other than to remit this case for a re-trial according to the principles which we have set out in this judgment.** This course will also permit issues concerning the increased value of the parties' former home and the operation of s 66 of the *Property, Stock and Business Agents Act* 2002 (NSW) to be addressed.

71. In these circumstances, it is unnecessary that we address the remaining grounds of appeal.

72. To the extent that anything said in this judgment is in conflict with anything that might form part of the *ratio decidendi* in *Hickey* which was a case stated, we consider that such a course is open to us having regard to our conclusion (particularly as expressed in paragraphs 38 and 52 above) concerning the correct interpretation and operation of s 90MC, and to the comments of the High Court in *Nguyen and Nguyen* (1989-90) 169 CLR 245 (especially at 268-270).

73. It will be observed that the actual result in this appeal demonstrates that the practical consequences of our interpretation of the relevant legislation are little different from those which flow from the application by Warnick and O'Ryan JJ of the interpretation contained in *Hickey*. Nevertheless, we are concerned not to perpetuate what we regard as error in the interpretation of the relevant legislation although we readily acknowledge the unfortunate lack of clarity in that legislation.

Costs of the appeal

74. In light of the submissions made at the conclusion of the hearing of this appeal, we propose to award certificates under the relevant provisions of the *Federal Proceedings (Costs) Act* 1981 both in respect of the appeal and the new trial.

WARNICK J:

75. I agree with the majority that the appeal must be allowed and also agree with the balance of orders proposed. However, my reasons differ from those of the majority, primarily in that, not only do I consider, as does the majority, that the trial Judge was in error in not applying the provisions of s 79(4) of the *Family Law Act* 1975, as amended ("the Act") to assess contributions to the parties' superannuation interests, and in failing to give proper consideration to the impact of superannuation entitlements when considering adjustment under s 75(2), but also that he was in error in failing to treat the superannuation interests of the parties as if they were property. Contrary to the majority view, this, I consider, he was obliged to do.

76. The proposition that in this particular case, he should have determined that the pension entitlement of the husband was actual property is referred to later.

77. My view that the trial Judge was required to treat the superannuation interest of each party as if it was property, involves consideration of:

(i) The effect of s 90MC of the Act;

(ii) Difficulties in the approach of the majority;

(iii) The appropriateness of departure from the decision of the Full Court in *Hickey and Hickey and Attorney-General for the Commonwealth of Australia (Intervenor)* (2003) FCC 93-143 ("*Hickey*");

1. The effect of section 90MC

78. By virtue of s 31 and s 39 of the Act, the Family Court of Australia has jurisdiction in "matrimonial causes". As seen "matrimonial cause" is defined in s 4(1) and, immediately prior to the insertion of Part VIIIB into the Act, by virtue of paragraph (ca) included "proceedings between the parties to a marriage with respect to the property of the parties to the marriage or either of them…". Examination of the Act to ascertain what provision was made in the Act for such causes of action disclosed, among other provisions, s 79, subsection (1) of which commences with the word "In", followed by the exact words just quoted from paragraph (ca). In other words, in s 79(1) one found the exact cause of action which, as a result of paragraph (ca) constituted a "matrimonial cause".

79. A cause of action is "the whole set of facts that give rise to an enforceable claim". (Butterworths Encycolpaedic Australian Legal Dictionary – September – 9 of 2004). The apparent purpose of paragraph (ca) is to identify causes of action that constitute "matrimonial causes".

80. Section 90MC certainly did not amend paragraph (ca) in a traditional way, although the meaning of the paragraph has undoubtedly been altered by s 90MC. As seen in the majority judgment, s 90MC provided:

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

81. It may well be that the purpose of identifying "matrimonial causes" is to invest the Family Court with jurisdiction with respect to them, but the purpose of paragraph (ca), which is only part of a structure by which the Family Court might acquire jurisdiction is, in my view, as stated.

82. In my view, the "cause of action" referred to in paragraph (ca) is now described as proceedings "…with respect to the property (which includes superannuation, treated as property…)". One again looks to the provisions of the Act to locate the cause of action referred to in paragraph (ca). If one returns to s 79, but does not

read the description of proceedings in subsection (1), and in particular the word "property" as including superannuation treated as property, then that is not the cause of action referred to in the present paragraph (ca). In my view, it is a necessary implication of the insertion of Part VIIIB and in particular, s 90MC that one reads subsection (1) of s 79 as relating to proceedings with respect to the property of the parties, which property includes a superannuation interest treated as property. That then is a cause of action which matches the cause of action constituting a matrimonial cause by virtue of paragraph (ca).

83. The majority view is that s 90MC has no impact on the application of s 79. (see paragraph 38) I am respectfully of the view that that approach leads to a conclusion which is at least surprising, if not inconsistent; namely that the legislature has created a cause of action, based on a particular "premise", but in that cause, it is not necessary to maintain that "premise".

84. The example of a proceeding between parties in which the only interests held were superannuation interests, in other words, there was no property, may exemplify the surprising result. By virtue of paragraph (ca) the court would have jurisdiction, though there was no actual property. However, on the interpretation of the majority, the words "property", where they appear in paragraph 79, do not even include superannuation interests, treated as property. In my view, on the majority interpretation, it should follow, (though in the majority view it does not), that if only a superannuation interest exists, there can be no orders made in proceedings under s 79, for on that interpretation, there is neither property nor any interest which is to be treated as property. (see also *Law-Smith and Seinor* (1989) FLC 92-050 and *Wilson and Field - Dean* [2001] FamCA 1397)

85. Though s 90MS(1), gives the Court power to also make orders in relation to superannuation interests, it may only do so "In proceedings under section 79 with respect to the property of spouses."

86. Their Honours in the majority have examined parts of the "Explanatory Memorandum" and said:

> 51. Nothing in the explanatory memorandum would seem to suggest that superannuation interests are 'to be treated as property' in proceedings in relation to property under s 79. Indeed, the last sentence of paragraph 38 in the Notes on Clauses (referred to in paragraph 50, above) suggests the contrary. Moreover, the earlier sentences of that paragraph serve as a reminder as to the purpose of the definition of 'matrimonial cause', that is, as a jurisdiction conferring device.

87. I opine, firstly, that legislative amendment for the purpose of conferring jurisdiction does not mean that the particular path chosen for amendment will not and is not intended, to have other consequences. I note that in paragraph 48, the majority say:

> The court is then required under s 79(4) in considering what orders should be made with respect to the property of the parties (and/or any superannuation interests), to take into account…

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.

89. Secondly, in my view, the comments in the Explanatory Memorandum in paragraph 157 are at least as supportive of the proposition that superannuation is to be treated as property in s 79 proceedings (albeit the orders made in respect of superannuation will be made pursuant to Part VIIIB), as they are supportive of the view that, though not property or treated as property, superannuation is to be divided according to the provisions of s 79 relating to property. In paragraph 157 it was said:

> …Note 1 to subsection 90MS(1) will clarify the relationship between section 79 and Division 3 of new Part VIIIB, explaining that although orders are made *in accordance* with Division 3 of Part VIIIB, they will be made *under* section 79 and will, therefore, generally be subject to the same provisions as other section 79 orders.

90. My view of what was said in paragraph 38 of the Explanatory Memorandum, namely that under the scheme of Part VIIIB, including s 90MC, superannuation interests "…where they are to be divided, will have to be divided in accordance with new Part VIIIB. They will not be able to be treated as property generally for the purposes of Part VIII" is that, read in context, the last sentence should be taken as to the effect that superannuation interests will not be able to be divided as is property generally, for the purposes of Part VIII.

91. In their approach to the interpretation of s 90MC, their Honours in the majority have placed reliance on the terms of s 90MS and in particular the use of the word "also" in s 90MS(1).

92. As has been pointed out by the majority, the definition of "property" itself has not been amended by Part VIIIB. The term "property" appears throughout s 79.

93. The effect of the relevant amendments, particularly s 90MC has been to give a duality to the term "property" so that superannuation is, for the purposes of identification and conduct of a "matrimonial cause" such as a s 79 proceeding, treated as if it is property. However, it is not actually property, as defined.

94. As pointed out by the majority, s 90MS must be seen in the context of Part VIIIB, the object of which is to enable the court to do something which it previously lacked power to do, namely, allow payments in respect of a superannuation interest to be allocated between the parties. In my view, it is in that sense of increasing the power of the court to make orders, which among other things, bind third parties, that the word "also" in subsection (1) of s 90MS should be seen.

95. This view I think consistent with what the majority themselves have concluded in the final point of paragraph 41, namely that their Honours read s 90MS as providing that:

- in proceedings under s 79;

- with respect to the property of spouses (the definition of which does not include superannuation interests);
- the court may in accordance with Division 3 of Part VIIIB;
- also make orders in relation to superannuation interests of the spouses.

96. However, I accept that the legislature might have, if the interpretation which I consider correct is so, used the words referred to in paragraph 42 of the reasons of the majority, rather than "also".

97. That the legislature did not do so, where the usage of "also" can be otherwise explained, should in my view deprive its usage of the force which the majority assigns to it, in addressing the meaning of s 90MC.

98. As was said by Brennan CJ, Dawson, Toohey, Gummow JJ in *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408:

> …Moreover, the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses "context" in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy.…
>
> …Further, inconvenience or improbability of result may assist the court in preferring to the literal meaning an alternative construction which, by the steps identified above, is reasonably open and more closely conforms to the legislative intent"

99. 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.

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

101. As will be later seen, both those in the majority and I share the view that, at least when an order under Part VIIIB is sought, the effect of Part VIIIB is to invoke all the terms of s 79, in proceedings with respect to such orders. However, while pursuant to the approach that I have taken there is a legislative dictate that that occur, this (as also later discussed) is, in my view, not so in respect of the approach taken by the majority. If my view about the lack of legislative support is correct, there should be, I suggest, a preference for the interpretation of s 90MC which ultimately leads to legislative support for the application of s 79 in proceedings for orders in respect of superannuation interests.

2. Difficulties in the approach of the majority

102. As indicated, it seems to me that the majority has accepted that, where an order under Part VIIIB is sought, superannuation is to be dealt with under s 79 in the same way as property, notwithstanding that their Honours concluded that it is neither property, nor to be treated as property.

103. I draw this conclusion from the content of paragraphs 43 (in particular the reference to "another species of asset which is different from property") and paragraphs 44, 47 and 48 set out below:

> 44. However s 90MS(1) does have the effect, in our view of requiring that in a case where the Court intends to make orders in relation to superannuation interests of the spouses, it must do so 'under' s 79 (although s 90MS(2) makes it clear that the Court cannot make an order in relation to a

> superannuation interest except in accordance with Part VIIIB). In other words, the Court must apply to superannuation interests the matters in s 79.
>
> …
>
> 47. The court in dealing with property proceedings and with proceedings where the parties have superannuation interests must then turn to s 79(2), which requires that any order, including an order that relates to superannuation interests, must be just and equitable.
>
> 48. The court is then required under s 79(4) in considering what order should be made with respect to the property of the parties (and/or any superannuation interests), to take into account the matters in the following matters:
>
> (a) financial contributions;
>
> (b) non- financial contributions;
>
> (c) contributions to the welfare of the family;
>
> (d) the effect of any proposed order upon the earning capacity of either party;
>
> (e) the matters referred to in subsection 75(2) so far as they are relevant;
>
> (f) any other order made under the Act affecting a party to the marriage or a child of the marriage;
>
> (g) any child support that a party has provided, is to provide or might be liable to provide in the future for a child of the marriage.

104. However, in my view, if superannuation is not to be treated as property for the purposes of the application of s 79, then there is no legislative foundation for the requirement that division of it be in accordance with the provisions of s 79(4)(a) and/or (b), which relate only to the division of property. In my view, the note in s 90MS is insufficient to achieve that result.

105. At its highest the note means that the provisions of s 79 are to be applied in the determination of orders in relation to superannuation interests. But s 79 is directed to orders dividing "property". There is no jurisprudence about how the terms of, or which of the terms of, s 79 are to be applied to "another species of asset which is different from property".

106. Unless superannuation in treated as property then Part VIIIB has introduced a novel situation, not just, as is clear, in relation to superannuation splitting, but in the determination of that split.

107. I do not consider the terms of the amendments point to such a result.

108. In paragraph 58 of the reasons of the majority, their Honours say:

> 58. Thus, we consider that because of the obligation under s 79(2) to make a just and equitable order, then in order to ensure such a result the Court should wherever there is a superannuation interest apply the provisions of s 79(4)(a) to (g) (which will include the matters contained in s 75(2)) to that superannuation interest **whether or not a splitting order is sought**.

note

109. With great respect, even if the majority view as to why superannuation interests are to be divided according to the application of s 79 principles relevant to property, is correct, if no order is sought in relation to a superannuation interest, there is no legislative provision, not even the note to s 90MS (as the majority recognises), to invoke the application of s 79(4)(a) and/or (b) to the court's dealing with the superannuation interest.

110. True is it that under s 75(2)(j) a matter to be taken into account in s 79 proceedings is:

> the extent to which the party whose maintenance is under consideration has contributed to the income, earning capacity, property and financial resources of the other party.

but while the practical application of this subsection may possibly match that of paragraphs 4(a) and (b) of s 79, that is not to say that those paragraphs apply to consideration of an order about superannuation interests.

111. Moreover, the one set of considerations (s 79(4)(a) and (b)) is well-established by jurisprudence as a factor to be considered at the "second step" and with other factors, to result in a percentage assessment of contributions to property; the other, s 75(2)(j), is a "third step" factor.

112. Current jurisprudence is contrary to any suggestion that it matters not by which means or at which stage one considers contributions.

113. I note also that s 75(2)(j) does not refer to "superannuation" and that the majority has referred to differential treatment within s 75 between "superannuation" and financial resources.

NOTE

114. In these circumstances, the views expressed by the majority in relation to the application of s 79 to the treatment of superannuation interests, at least in cases where no order pursuant to Part VIIIB is sought, can only amount to guidelines for a preferred approach. This is a less than optimal result of the majority's interpretation of the amendments.

note

115. There seems in the view of the majority to be a concern that treatment of superannuation interests as property introduces an undesirable rigidity into s 79 proceedings. If this is the view of the majority, I disagree with it. It has always been the case that the court was required to acknowledge and reflect tensions between market value, value to the owner and lack of marketability of particular types of property and interests, such as minority shares in a private corporation and, of particular pertinence when considering superannuation interests, property such as annuities. The terms of s 79 have proved adequate for that task, whether use is made of an "asset by asset", "two pools" approach, or "global" approach.

4. The appropriateness of departure from *Hickey*

116. In *Nguyen v Nguyen* (1989-90) 169 CLR 245 at 269 Dawson, Toohey & McHugh JJ said:

> Where a court of appeal holds itself free to depart from an earlier decision it should do so cautiously and only when compelled to the conclusion that the earlier decision is wrong. The occasions upon which the departure from previous authority is warranted are infrequent and exceptional…

117. In my view, the instant case presents difficult issues of interpretation and the majority approach produces at least one result less desirable than can be reached by consistency with *Hickey*.

118. Having regard to what was said in *Nguyen*, in these circumstances, I do not consider it proper to depart from the conclusions in paragraphs 30 and 75 of the decision in *Hickey,* namely:

> 30. The superannuation interest is therefore to be treated as property for the purposes of proceedings between the parties to a marriage with respect to the property of the parties or either of them, being proceedings arising out of the marital relationship.
>
> …
>
> 75. …the effect of s 90MC is that in proceedings in relation to property under s 79 the superannuation interest is to be treated as property irrespective of whether or not a splitting or flagging order is sought or proposed to be made.

The character of the husband's pension entitlements in this case

119. As was pointed out by O'Ryan J during the course of argument in this appeal, the husband's superannuation entitlement was in the payment phase, albeit his entitlement was to a pension, and it was at least arguable that that entitlement was property as defined in the Act. However, as this point was not argued below nor before us, I do not consider that it should be here determined.

O'RYAN J:

Introduction

120. I have had the opportunity to read the judgment of the majority and also that of Warnick J. I agree that the appeal must be allowed and I agree with the orders proposed. However, my reasons differ from those of the majority. The trial Judge was in error in failing to treat the superannuation interests of the parties as if they were property, in not applying the provisions of s 79(4)(a), (b) and (c) of

the *Family Law Act 1975* (Cth) to assess contributions to the superannuation interests, and in failing 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).

121. The majority are of the opinion that superannuation interests are "another species of asset" which is different from property as defined in s 4(1) and that in s 79 proceedings such interests may not be treated as property irrespective of whether or not an order is sought under Part VIIIB of the Act. I agree with what Warnick J. has said as to why the majority are wrong about the treatment of superannuation interests and his Honour's consideration of s 90MC.

122. In *Hickey and Hickey and Attorney-General for the Commonwealth of Australia (Intervenor)* (2003) FLC 93-143 the Full Court was of the opinion that in proceedings in relation to property under s 79 a superannuation interest is to be treated as property irrespective of whether or not a splitting or flagging order under Div 3 of Pt VIIIB of the Act is sought or proposed to be made.

123. The majority are of the opinion that what the Full Court said in *Hickey* as to how to deal with superannuation interests in s 79 proceedings is wrong. I disagree and am of the view that this Court should not depart from the Full Court precedent of *Hickey*. I am also not satisfied that the issues the majority discusses were adequately argued before us.

note

124. The majority have also considered how superannuation interests are to be dealt with in s 79 proceedings and again I disagree. It is my view that the majority decision is confusing and likely to promote uncertainty.

Judgment of the trial Judge and Ground 1.1

125. In the case on appeal the parties each had superannuation interests which had been valued in accordance with the *Family Law (Superannuation) Regulations*

2001 (Cth). The wife's interest was primarily an entitlement in a defined benefit scheme in the growth phase, worth $65,482. The husband's interest was a pension in the payment phase valued at $231,906. However, neither party sought an order pursuant to Div 3 of Pt VIIIB in respect of the superannuation interest of the other. Apart from their superannuation interests, the most significant asset of the parties was the former matrimonial home valued at $590,000.

126. The trial Judge determined the net property of the parties had a value of $590,208 (which excluded superannuation interests) and that the wife should receive 60% of that net property. The orders made essentially provided for the sale of the matrimonial home and division of the proceeds to give effect to the percentages as determined.

127. The wife sought that the orders of Rose J. be set aside and that she be declared solely entitled to the former matrimonial home, upon payment to the husband of $87,000 approximately, which represented about a 60% division of an asset pool which, however, included superannuation.

128. Given that the appeal will succeed, for present purposes I need only refer to Ground 1.1 of the grounds of appeal that reads:

> 1. That His Honour's discretionary decision miscarried in that:
>
> 1.1 His Honour erred in principle in acting contrary to the mandate in Part VIIIB Family Law act ("the Act") in that His Honour failed to take into account the value of the superannuation interests of the parties in determining the net property of the parties for division pursuant to s.79 of the Act;

129. The trial Judge said:

> 70. There then remains the question of the identification of the net property of the parties for the purpose of their contribution-based entitlement.
>
> 71. The controversy in that regard is represented by the superannuation received by the husband and the valuation of his fortnightly pension to which earlier reference has

been made, as well as the wife's superannuation entitlements.

72. …I have determined to exclude the superannuation calculations in respect of each of the parties for the following reasons.

…

75. So far as the valuation of the husband's fortnightly pension, it was of course a proper exercise of valuation having regard to the relevant Regulations. However, it has such an air of artificiality about it that in my view it would be unjust to apply that valuation for the purpose of the calculation of the parties' net property. I respectfully follow the reasons for judgment given by Coleman J in *Cahill (unreported-7 March 2003).*

76. I have also determined that the wife's superannuation should be excluded. To do otherwise would be to perpetrate an injustice as it also represents a valuation of her prospective entitlements, which will only arise many years into the future.

130. 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).

131. 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. In G. Watts, S. Bourke and M. Taussig QC,

Super Splitting on Marriage Breakdown, (2002) CCH Australia Limited, at 3-180 the learned authors state "Overall, it is likely that the value of superannuation to a member has been undervalued by the court and by practitioners…" I agree.

132. 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.

133. 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. Another example is where there is a current value of a remainder interest which takes into account that the interest is not realisable until the death of the person who holds the life interest. A current value of the remainder interest can be achieved and there is no "air of artificiality" about the valuation. These ideas or concepts were well established prior to the introduction of Pt VIIIB. 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.

note

134. If however, the valuation failed to properly reflect either that the amount was payable in a periodic form or could not be realised until some time in the future then this would be a matter of evidence and taken into account in determining what value to place on the interest or taken into account when considering the matters in s 75(2) or at step four when consideration is given to what order should be made. The trial Judge failed to do any of this and simply excluded the interests from the list of property because of the unexplained "air of artificiality". He then failed to consider any contributions to the interests and in so doing did not properly consider the impact when considering the matters in s 79(4)(d) to (g).

135. The trial Judge said that he proposed to follow the reasons given in *Cahill.* Given what I have already said it follows that in my view the trial Judge in that case made the same errors as the trial Judge in this case and the decision is wrong.

136. I have difficulty with the passage from *Cahill* quoted by the majority (pa 49) given, amongst other things, that one of the superannuation interests in that case being a pension paid under the *Defence Force Retirement and Death Benefits Act 1973* (Cth) was property as defined in s 4(1) and with what is meant by the phrase "existing or tangible assets" in this context. However, it may give a hint to the source of the concept of "another species of asset." The suggestion may be that there is a difference between superannuation and other property as defined in s 4(1) even if the superannuation interest is property as defined in s 4(1).

Property proceedings

137. In order to highlight the implications of the majority decision a brief return to the approach to the determination of a property settlement application under s 79 of the *Family Law Act* is desirable. The principles to be applied are relatively simple and most difficulties that arise are factual depending on the circumstances of the case.

138. As a court of limited jurisdiction, before making orders the Family Court must be satisfied that it has jurisdiction to make the orders sought. By a combination of s 31 and s 39 of the *Family Law Act* the Family Court has jurisdiction in "matrimonial causes". Only proceedings which fall within the definition of "matrimonial cause" may be instituted under the Act: see s 8(1)(a).

139. Section 4 is the definition section and s 4(1) defines matrimonial cause to include in para (ca) "proceedings between the parties to a marriage with respect to the property of the parties to the marriage or either of them…" This definition of matrimonial cause supports the power to make an order under s 79 for settlement of property.

140. Under s 79, the court has power to make orders redistributing the property of the parties to the marriage. The proceedings must be between parties to a marriage and must also be with respect to the property of the parties or either of them. Section 4(1) defines property to mean "…property to which those parties are, or that party is, as the case may be, entitled whether in possession or reversion." The definition is relevant to determining what rights of property can be the subject of orders under ss 78 and 79 of the Act. The definition has been considered in various authorities including of the High Court: *Mullane v Mullane* (1983) 45 ALR 291.

141. The discretionary power in s 79 is wide but not uncontrolled and the section contains provisions that guide the court in exercising the discretion. Section 79(2) provides that the court shall not make an order under the section unless it is satisfied that, in all the circumstances, it is just and equitable to make the order. Section 79(4) sets out the matters that the court should take into account and they fall into the two categories. Section 79(4) (a), (b) and (c) deal with the contributions that parties have made and s 79(4) (d), (e), (f) and (g) deal with matters relevant to the parties' future circumstances.

142. In *Hickey* the Full Court described the preferred approach to the determination of a s 79 application as follows:

> 39. The case law reveals that there is a preferred approach to the determination of an application brought pursuant to the provisions of s.79. That approach involves four inter-related steps. Firstly, the Court should make findings as to the identity and value of the property, liabilities and financial resources of the parties at the date of the hearing. Secondly, the Court should identify and assess the contributions of the parties within the meaning of ss.79(4)(a), (b) and (c) and determine the contribution based entitlements of the parties expressed as a percentage of the net value of the property of the parties. Thirdly, the Court should identify and assess the relevant matters referred to in ss.79(4)(d), (e), (f) and (g), ("the other factors") including, because of s.79(4)(e), the matters referred to in s.75(2) so far as they are relevant and determine the adjustment (if any) that should be made to

> the contribution based entitlements of the parties established at step two. Fourthly, the Court should consider the effect of those findings and determination and resolve what order is just and equitable in all the circumstances of the case: *Lee Steere and Lee Steere* (1985) FLC 91-626; *Ferraro and Ferraro* (1993) FLC 92-335; *Davut and Raif* (1994) FLC 92-503; *Prpic and Prpic* (1995) FLC 92-574; *Clauson and Clauson* (1995) FLC 92-595; *Townsend and Townsend* (1995) FLC 92-569; *Biltoft and Biltoft* (1995) FLC 92-614; *McLay and McLay* (1996) FLC 92-667; *JEJ and DDF* (2001) FLC 93-075 and *Phillips and Phillips* (2002) FLC 93-104.

143. By reason of s 79(4)(e), in dealing with an application under s 79 the matters in s 75(2) have to be considered. Section 75(2) is a provision that is also to be considered when dealing with an application for spousal maintenance under ss 72 and 74 and consideration of the 16 matters in paras (a) to (p) of s 75(2) leads to the conclusion that some of the matters are more appropriately to be considered depending on whether it is a property application or a spousal maintenance application. It may be necessary, because of what the majority have said, to consider amending the Act to put beyond doubt which of the matters in s 75(2) are to be considered when dealing with a s 79 application and which of the matters are more relevant to a spousal maintenance application. I am of this view because as will be seen shortly the majority opinion (pa 67) is that in this case the trial Judge was in error in not applying the requirements to assess the parties contributions to their superannuation interests either under s 79(4)(a) and (b) or s 75(2)(j). Section 75(2)(j) is a provision to be considered in spousal maintenance proceedings with account to be taken of "the extent to which the party whose maintenance is under consideration has contributed to the income, earning capacity, property and financial resources of the other party". This creates an immediate problem as on its terms s 75(2)(j) has no application to proceedings under s 79.

75(2) explained

144. In any event, s 75(2)(b) requires consideration of "the income, property and financial resources of each of the parties…" This is an important provision because in the context of a s 79 application if the preferred approach to the

determination of such an application is adopted then the third step requires consideration of the property of the parties based on the finding as to the contribution based entitlements of the parties more usually expressed as a percentage of the property of the parties.

145. Section 75(2)(b) is also important because it enables consideration to be given to what are called "financial resources" and this occurs again at the third step. The phrase "financial resource" is not defined in the *Family Law Act*, however it means something other than property as defined in s 4(1) and income: *Kelly and Kelly (No. 2)* (1981) FLC 91-108 and *Coulter and Coulter* (1990) FLC 92-104. It is something from which a party receives or may receive some direct or indirect financial advantage or gain but which is not property of the party as defined in s 4(1) or income. I observe that the phrase "financial resources" is defined in s 3 of the *Property (Relationships) Act 1984* (NSW) and the definition includes "a prospective claim or entitlement in respect of a scheme, fund or arrangement under which superannuation, retirement or similar benefits are provided".

146. Because of the definition in s 4(1) of "matrimonial cause", s 79(1) only confers power to make an order for the alteration of interests in property or settlement of property. This means that there is no jurisdiction and power to make an order in relation to something which is not property as defined in s 4(1), such as a financial resource. Consistently, s 79(4)(a) and (b) only recognise contributions to property.

147. There are also issues in relation to the jurisdiction and power of the Court to make orders under the *Family Law Act* against or that affect the interests of third parties: *Ascot Investments Pty Ltd v Harper and Harper* (1981) FLC 91-000. Because of the terms of para (ca) in s 4(1), the power in s 79 can only be exercised in proceedings with respect to the property of the parties to a marriage.

Property applications and superannuation interests prior to Part VIIIB

148. Prior to the introduction of Pt VIIIB of the *Family Law Act* the treatment of superannuation under the *Family Law Act* was a matter of constant concern and courts exercising jurisdiction under the Act were restricted in what they could do. The restrictions that existed were largely because if the superannuation interest was in the growth phase it was not property as defined in s 4(1), the Court could not make an order binding on a third party such as the trustee of a superannuation fund or scheme, and there were difficulties with the valuation of a superannuation interest. The Foreword to *Super Splitting on Marriage Breakdown* states:

> Judges sought to adopt innovative ways of dealing with superannuation with a view to achieving more just and equitable outcomes. In the end, however, courts were faced with the choice of simply adjusting other assets for the value of any superannuation or adjourning proceedings until the superannuation vested.

149. The latter course was given recognition in s 79(5) and s 79(7) of the *Family Law Act*. However, the most often used method was to treat the superannuation interest as a financial resource and take it into account at the third step when considering the matters in s 75(2). An example of an erroneous approach prior to the introduction of Pt VIIIB is *Coulter and Coulter* (supra) where the trial Judge had included in the list of property at step one the present value of the husband's entitlement to superannuation, referable to the period of cohabitation during which the husband was a member of a fund, which the trial Judge described as a "notional asset" and included in the total value of the property. On appeal the Full Court said that the first critical issue it had to determine was whether the trial Judge was entitled to regard the husband's superannuation entitlement as a notional asset which could be treated and dealt with as if it were actual property. Strauss and Baker JJ. said at 77,687:

> In our opinion that view correctly states the law as it now stands in relation to the manner in which trial Judges should treat entitlements to superannuation in the majority of cases. In other words, in this case, as in most instances a contingent entitlement to superannuation should not be regarded as "property" to which

> sec.79 applies, but should be taken into account as a resource within the meaning of sec.75(2)(b).
>
> …
>
> Turning then to the present appeal, in our opinion it was not appropriate for her Honour to regard the husband's superannuation entitlement as a notional asset and deal with it as if it were the actual property of the parties or one of them. In the normal course of events the husband is unlikely to retire for another six years. If he were to retire before the age of 55 years, his entitlement to superannuation would be dependent upon company approval.

Mullane J. in a separate judgment agreed (at 77,689) that the husband's superannuation could not be regarded as "property" within the meaning of s 79(4) but that it should be taken into account under s 75(2).

The effect of Part VIIIB

150. Part VIIIB was inserted into the Act by the *Family Law Legislation Amendment (Superannuation) Act* 2001 (Cth) and came into force on 28 December 2002. As the Full Court said in *Hickey* it enables courts exercising jurisdiction under the Act, in appropriate circumstances, to make an order in relation to the superannuation interests of the parties to a marriage and in addition, contains provisions enabling the courts to make orders binding on the trustees of superannuation plans.

151. Importantly, for present purposes, in *Hickey* the Full Court said at 78,392-393:

> 75. Although, for obvious reasons, the definition of property in s.4 was not amended to include a superannuation interest or deem such an interest to be property, the effect of s.90MC is that in proceedings in relation to property under s.79 a superannuation interest is to be treated as property irrespective of whether or not a splitting or flagging order is sought or proposed to be made. As was submitted on behalf of the husband, the expression "treated as property" should be understood as meaning "treated as if it were property even though it is not" and that it should be so treated for the purposes of s.79. It was further submitted that the intention of the Parliament is clear from Note 1 to s.90MS. Because a superannuation interest is to be treated

> as property in s.79 proceedings it follows that it will be included in the list of property and valued at what is step one of the preferred four step approach to the determination of an application pursuant to s.79. At step three the superannuation interest may be taken into account, as are other items of property and financial resources, pursuant to the provisions of s.75(2) if the interest is relevant. The superannuation legislation introduced reforms which are directed to how a court will deal with a superannuation interest at steps one and four of the preferred four step approach in the determination of an application under s.79. The legislation did not amend s.79 or s.75.
>
> 76. For this reason, in our view, it is not necessary for us to resolve the issue raised by the submissions that a superannuation interest is property as defined in s.4(1) apart from the provisions of Part VIIIB. In our view, a provision such as paragraph 5 of the Terms of Settlement in an order made pursuant to s.79 may now include a superannuation interest.

152. The majority are of the opinion that the Full Court in *Hickey* was wrong in finding that in proceedings under s 79 a superannuation interest which is not property as defined in s 4(1) is to be treated as property irrespective of whether a splitting order is sought or proposed to be made under Div 3 of Pt VIIIB.

The effect of section 90MC

153. I repeat that I agree with what Warnick J. has said in relation to the effect of s 90MC.

154. Section 90MC is in "Subdivision A – Scope of this Part", being "Part VIIIB – Superannuation Interests". The effect of s 90MC is to enlarge the definition of "matrimonial cause" in (ca) to include a "superannuation interest" which is defined in s 90MD as "an interest that a person has as a member of an eligible superannuation plan, but does not include a reversionary interest", (which in turn is defined in s 90MF as occurring when a person's entitlement "is conditional on the death of another person who is still living").

155. Paragraph (ca) relates to proceedings with respect to property and one of the sections of the Act which specifically concerns property is s 79. Therefore for the purposes of the operation of s 90MS which is concerned with the type of orders which may be made in proceedings under s 79, s 90MC has already imported "superannuation interest" into the definition of "matrimonial cause" in (ca) which is in turn reflected in s 79. The rationale for including a superannuation interest in this manner is to ensure that if a superannuation interest is to be divided then it is to be in accordance with Div 3 of Pt VIIIB.

156. I am also of the opinion, that the use of "also" in s 90MS(1) is meant to emphasise that the Court has power to make orders under Div 3 of Pt VIIIB in addition to applying the extended meaning of "matrimonial cause" pursuant to s 90MC and is not emphasising that a general power to make orders additionally extends to superannuation interests as "another species of assets".

157. I am of the view that when the whole of Pt VIIIB is considered and in particular Div 3, the words in para (ca) of the definition of "matrimonial cause" in s 4(1) are to be read as meaning that in all proceedings under s 79 where there is a superannuation interest which is not property as defined in s 4(1) it is to be treated as property for the purposes of s 79 irrespective of whether a splitting order is sought or proposed to be made. Division 3 does no more that set out the type of order that may be made.

Approach of the majority

158. I am concerned about the consequences of the majority decision that the Full Court in *Hickey* was wrong. Warnick J. has expressed similar concerns.

159. The majority are of the opinion that in proceedings under s 79 if there is a superannuation interest which is not property as defined in s 4(1) then irrespective of whether a splitting order is sought or proposed to be made pursuant to Div 3 of Pt VIIIB the superannuation interest is not to be treated as property but as "another species of asset". Although he did not say it, in effect this is what the

trial Judge did in that he did not include the superannuation interests in the list of property at step one at any value and in the result did not consider contributions at step two and as a flow on effect failed to consider the impact of such interests at step three. On one view, if the majority are correct then what the trial Judge did was correct and such interests are only to be considered as a financial resource at step three. It is to be remembered that s 79(4)(a) and (b) only recognise contributions to property and if the interest is not property as defined in s 4(1) or is not to be treated as property for the purposes of s 79 then it follows that the contributions identified in these provisions are not considered. However, this is not what the majority say should happen.

160. As the majority said (pa 54) it has to be recognised that the requirement to apply the provisions of s 79(4)(a) and (b) to superannuation interests strictly speaking would only arise where an order is sought under Div 3 of Pt VIIIB. Presumably this is because in these circumstances if the superannuation interest is not property as defined in s 4(1) it is to be treated as property. If however, no order is sought under Div 3 of Pt VIIIB then it follows that if the superannuation interest is not property as defined in s 4(1) it is to be treated in the way it was prior to the introduction of Pt VIIIB. However, the majority then go on to discuss why this is not correct. In my view, in so doing they reintroduce the preferred approach by reference to the just and equitable requirement of s 79(2) and the provisions of s 75(2)(j).

161. The majority first said (pa 58) that wherever there is a superannuation interest the Court should apply the provisions of s 79(4)(a) to (g) to that interest whether or not a splitting order is sought. I have difficulty reconciling this approach with what was earlier found by the majority in relation to a superannuation interest which is not property as defined in s 4(1) and no splitting order is sought or proposed to be made. However, it suggests that steps one, two and three have to be applied and, if so, I am uncertain as to why it is contended that what the Full Court said in *Hickey* was wrong unless the point is simply to get to the same result by a different way. It must follow that in order to make sense of the application

of the provisions of s 79(4)(a) to (g) the interest which is not property and not to be treated as property would have to be valued and that this should happen before consideration of steps two and three. Perhaps it should be identified as step one A. However, if no splitting order is sought or proposed to be made the superannuation interest does not have to be valued in accordance with the methods of valuation provided for in the Regulations and this is what was also said in *Hickey*. I observe that it is later said (pa 65(a)) that the interest may be valued according to the Regulations.

162. Under the heading "Practical implications" there is either further expansion on what the Court should do or perhaps some qualification. It is suggested (pa 61) that in a proceeding pursuant to s 79 in which there is a superannuation interest the Court may include the superannuation interest in the list of property as defined in s 4(1) at step one of the preferred approach irrespective of whether a splitting order is sought or proposed to be made. This is consistent with what was earlier said as to the requirement to apply the preferred approach (pa 58). However, it is then qualified and examples are given of where it "could be adopted" (pa 61) namely if:

note above conditions

- It is agreed.
- The interest is property as defined in s 4(1).
- The interest is not property as defined in s 4(1) "but is of relatively small value".
- There are other "features".

163. In my view, if the superannuation interest is property as defined in s 4(1) then s 79 applies in all respects, whatever the value, and Pt VIIIB does not apply unless an order is sought that would be binding on a third party and thus, has to be made pursuant to Div 3. I also do not understand what is meant by the phrase "relatively small value" and the phrase "features about the interest".

164. The majority then go on to deal with what is described as the "preferred approach" (pa 63) and appear to contend that if there is a superannuation interest, whether or not a splitting order is sought and whether or not it is property as defined in s 4(1), it should be included in "a separate list" or "separate pool" and the preferred approach to the determination of a s 79 application adopted (pa 63, pa 64 and pa 65).

165. The only explanation given by the majority for the separate list or separate pool for superannuation interests seems to be (pa 67 and pa 68) that if this approach is adopted then not only will contributions be more likely to be given proper recognition but the "real nature" of the interest in question can be taken into account. I am of the view that this is an approach that always has been taken and should be taken to all property when dealing with an application under s 79. The advantages identified by the majority which are said to stem from the adoption of an approach which includes the construction of a separate list simply repeat what is already required by s 79 regardless of the type of property.

note

166. The idea of a separate list is not unknown particularly when considering whether to adopt an asset by asset or global approach to the assessment of contributions: *Norbis and Norbis* (1986) 161 CLR 513; *Lenehan and Lenehan* (1987) FLC 91-814. However, I would understand that the majority are suggesting that it is not only for the purpose of step two but also but also for steps one, three and four. For my part I do not accept that as a general proposition a superannuation interest should be treated in any different way to other types of property such as a remainder interest in an estate that has a current value which reflects that it will not be received until some time in the future depending on the age of the person who has the life interest or a minority shareholding interest. I have no doubt that numerous examples could be given of where it may be appropriate to treat a particular type of property differently from other property. The reasoning of the majority suggests, in the examples I have given, there is a discretion as to whether it is included in the list of property and so on. The discrete characteristics of a particular item of property have always been considered either at step one in the

context of valuation, at step two when considering contributions, at step three if there is evidence of a relevant matter and at step four when considering what order to make. For example at step four it may be relevant in exercising the powers in s 80 that an item of property is a pension in the payment phase. Adopting the reasoning of the majority one could envisage a case where there are a number of separate pools. In the context of considering an income stream as a capitalised amount and comparing that with readily realisable assets one commentator has stated, "However, it has long been the law that the difficulty in arriving at a result provides no licence for either failing to do so or acting otherwise than as the Act requires.", P. Murphy, 'Superannuation – Recent Unreported Decisions', *Conference Handbook: 11th National Family Law Conference*, Gold Coast, September 2004 145-166 at 152.

note

167. It is difficult to summarise; however, I believe that the majority are contending that a superannuation interest should be treated as "another species of asset" even if it is property as defined in s 4(1). Next, irrespective of whether an order is sought or proposed to be made under Div 3 of Pt VIIIB the interest may be included in a list of the other assets which are property as defined in s 4(1) or in a separate list. Next, in whatever list the interest may be put the preferred approach must apply if an order is sought under Div 3 of Pt VIIIB or "extremely prudent" if no such order is sought (pa 65).

note

168. In conclusion, I am of the view that the reasoning of the majority may create difficulties and could introduce unintended consequences for how applications are dealt with under s 79. The outcome of this case is agreed and the majority have attempted to apply the preferred approach to what is called "another species of asset."

The appropriateness of departure from Hickey

169. I observe that in the written submissions on behalf of the appellant it was argued that the trial Judge was in error in that he had excluded the superannuation interests of the parties and had thus treated the interests differently to the manner

in which he ought to have dealt with the interests. The written submissions on behalf of the respondent largely dealt with the issue of value and did not deal with the matters addressed by the majority.

170. I agree with Warnick J. for reasons he has given that in the circumstances it is not proper to depart from the conclusions in paragraphs 30 and 75 of the decision in *Hickey*: See also *A and GS & Ors* (2004) FLC 93-199 at 79,289-290.

171. In *Telstra Corporation Ltd v Treloar* (2000) 102 FCR 595 at 602-601 in the joint judgment of Branson and Finkelstein JJ. there is a useful discussion of the doctrine of *stare decisis*. Their Honours concluded that a decision of a Full Court concerning the construction of a statute should stand, unless an error in construction is patent, or has produced unintended and perhaps irrational consequences not foreseen by the court that created the precedent.

Note

172. In this case I do not accept that there was a patent error of construction by the Full Court in *Hickey* or that the decision produced unintended or irrational consequences. My concern is that the decision of the majority may promote uncertainty and not provide a clear guide as to how superannuation interests are to be treated in determining applications for an order under s 79. I am not sure what the practical consequences are of the majority view that *Hickey* was in error.

ORDERS OF THE COURT:

173. The orders of the Court will therefore be:

(1) That the appeal be allowed.

(2) That the orders of the Honourable Justice Rose made 6 August 2004 be set aside.

(3) That the cross applications of the parties for property settlement be remitted to a single Judge other than the Honourable Justice Rose for re-hearing.

(4) That the Court grants to the appellant wife a costs certificate pursuant to the provisions of section 9 of the *Federal Proceedings (Costs) Act* 1981 being a certificate that, in the opinion of the Court, it would be appropriate for the Attorney-General to authorise a payment under that Act to the appellant wife in respect of the costs incurred by the appellant wife in relation to the appeal.

(5) That the Court grants to the respondent husband a costs certificate pursuant to the provisions of section 6 of the *Federal Proceedings (Costs) Act* 1981 being a certificate that, in the opinion of the Court, it would be appropriate for the Attorney-General to authorise a payment under that Act to the respondent husband in respect of the costs incurred by the respondent husband in relation to the appeal.

(6) That the Court grants to each of the appellant wife and the respondent husband costs certificates pursuant to the provisions of section 8 of the *Federal Proceedings (Costs) Act* 1981 being certificates that, in the opinion of the Court, it would be appropriate for the Attorney-General to authorise payments under that Act to each of the appellant wife and the respondent husband in respect of the costs incurred by each in relation to the new trial.

I certify that the preceding 173 paragraphs are a true copy of the reasons for judgment of this Honourable Full Court

Associate