[2006] FamCA 207

FAMILY LAW ACT 1975

IN THE FAMILY COURT OF AUSTRALIA

AT SYDNEY

No. SYF. 3449 of 2003

IN THE MATTER OF:

T

Applicant

- and -

T

Respondent

[Pension splitting]

REASONS FOR JUDGMENT

BEFORE: The Honourable Justice Watts
HEARD: 30/1/2006 – 1/2/2006
JUDGMENT: 17/3/2006

APPEARANCES: Mr Gould of counsel, instructed by Redmond Hale Simpson (DX 11104 Kogarah), appeared on behalf of the Applicant Wife.

Mr Schonell of counsel, instructed by Beilby Poulden Costello (DX 872 Sydney), appeared on behalf of the Respondent Husband.

Catchwords

FAMILY LAW – PROPERTY – Superannuation – in the payment phase – hurt on duty pension – partially commutable – nature, form and characteristics of the superannuation interest – two different categories of superannuation interests – contributions to each category – the "West and Green" formula – when in the analysis can splitting orders be proposed – the use of Section 90MT(1)(b) FLA – status of the payments in the first two years – mandatory injunction requiring husband to commute – considering 79(4)(d) – (g) factors when there are separate pools of property and assets

Legislation considered

Sections 75; 79; 90MT; 114 *Family Law Act*

Part VIII *Family Law Act*

Family Law (Superannuation) Regulations 2001

Section 143 *Evidence Act*

Police Regulation (Superannuation) Act 1906

Section 15AB(2)(e) and (f) *Acts Interpretation Act 1901*

Cases considered

Coghlan and Coghlan (2005) FLC 93-220

Biltoff and Biltoff (1995) FLC 92-614

HRDW and HSJL [2005] FamCA 676

Bailey and Bailey (1978) FLC 90-424

Clauson and Clauson (1995) FLC 92-595

Bremner and Bremner (1995) FLC 92-560

Pierce and Pierce (1999) FLC 92-844

Webber and Webber (1985) FLC 90-648

West and Green (1993) FLC 92-395

Crawford and Crawford (1979) FLC 90-647

BAR and JMR (2005) FLC 93-231

Thomas and Thomas (1981) FLC 91-018

Jenner and Jenner (1984) FLC 91-544

Hauff and Hauff (1986) FLC 91-747

Harrison and Harrison (1996) FLC 92-682

Bartlett and Bartlett (1996) FLC 92-721

Tomasetti and Tomasetti (2000) FLC 93-023

O and O [2000] FamCA 1432

Cahill and Cahill [2003] FamCA 172

JEG and PDG [2003] FMCA Fam 404

C and C [2004] FamCA 819

McKinnon and McKinnon (2005) FLC 93-242

Mallet and Mallett (1984) FLC 91-507

Norbis and Norbis (1986) FLC 91-712

K (formerly V) and V [2005] FamCA 1207

M and M & Ors [2005] FamCA 276

T and H [2005] FamCA 1121

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

C and C (1996) (unreported decision 21 March 1996) (Ellis, Finn & Morgan JJ)

Zyk and Zyk (1995) FLC 92-644

McMahon and McMahon (1995) FLC 92-606

M and M (Moore J) [2005] FamCA 554

Bartlett and Bartlett (1996) FLC 92-721

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

JEL & DEF (2001) FLC 93-075

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INTRODUCTION

1. This case is about what alteration should be made between Mr & Mrs T in relation to their property, assets and liabilities.

2. The husband in his early 40s reached a very senior position in the NSW Police Force. In February 2004 the husband tripped and fell in the process of carrying a very heavy load of paperwork back into his office. He sustained injuries which eventually saw him medically discharged from the NSW Police Force. As a result his entitlements to his superannuation and other benefits crystalised. Their current value under the Family Law (Superannuation) Regulations 2001 is in the sum of $1,865,356.50. The superannuation interest is currently being paid by way of a periodic amount. The wife has sought a percentage splitting order in relation to that periodic payment. There is an issue between the parties as to what adjustment should be made in relation to the husband's superannuation interest.

3. The other two main issues for determination are:-

   3.1. What effect on the overall adjustment does the history of the husband's family's involvement in the development of 2 Cross Street and 4 Cross Street have on how the property of the parties should be adjusted between them; and

   3.2. Is the amount of $26,000 owed by the parties to the husband's brother and if so how should that liability be treated.

4. There are other less significant issues in relation to the value of individual items in the list of assets and liabilities.

SHORT HISTORY

5. The husband was born in 1963 and is 42 years of age.

6. The wife was born in 1966 and is 39 years of age.

7. The parties did not live together before the marriage and the marriage took place in 1992.

8. There are two children of the marriage, BT aged 11 and LT aqed 8.

9. The parties separated in 2002.

THE APPLICATIONS

Wife

10. The wife by way of an amended application for final orders filed in Court in January 2006 sought orders in the following terms:-

    1. That the husband and wife do all things necessary to forthwith join in to sell the jointly owned property known as 4B Cross Street ("the property") at the earliest possible date and:

        (a) the parties agree on the real estate agent to be appointed for the sale of the properties and, failing agreement within seven (7) days of the date of order either party be at liberty to appoint a real estate agent conducting his business in the approximate locality of the former properties of both parties; and

        (b) the price for sale (by either private treaty or public auction) be that mutually agreed between the parties, or failing agreement, the price to be the value ascertained by a registered valuer appointed by the President of the Australian Institute of Valuers and Land Administrators (Inc.) New South Wales Division and the parties jointly pay the cost of that valuation; and

        (c) the properties firstly be offered for sale by private treaty and if not sold within two (2) months of the date of first being listed for sale with the real estate agent, or such extension therefore as is mutually agreed between the parties, then they be offered for sale by public auction to be held within six weeks of the expiration of the said two months or agreed extension thereof; and

        (d) in the event the properties fail to sell at public auction, the properties be re-offered for sale by public auction each ten weeks thereafter until it is sold; and

        (e) upon sale of the properties the proceeds of sale be distributed in the following order, manner and priority:-

            i. in payment of real estate agent's commission and auction expenses (if any) and the legal costs and disbursements of the sale;

            ii. in payment to the wife an amount being 75% of the balance proceeds of sale;

            iii. in payment to the husband of the remainder of the balance proceeds of sale.

    2. Pending sale of the properties pursuant to Order 1 above:-

        (a) the parties shall account to each other in respect of any rental income received from 4B and 4C Cross Street, and the net rental income presently held in the parties' Police Credit Union account be divided 75% to the wife and 25% to the husband;

(b) *neither party shall redraw any part of the repaid housing mortgage loans from Aussie Home Loans or encumber the properties referred to in Order 1 above without the consent in writing of the other party; and*

(c) *the parties hold their respective interests in the properties referred to in order 1 above on trust pursuant to these Orders.*

3. *The amount held in trust for the parties by AJM & Associates, being the balance proceeds of sale of the property owned formerly by the parties, namely 4C Cross Street, be divided 75% to the wife and 25% to the husband.*

4. *A declaration that the wife be entitled to 75% of any amount owed to the parties by the husband's brother, WT.*

5. *A declaration that the wife be entitled to 50% of the amount received by the husband, upon the husband's termination of employment from the NSW Police Service (excluding superannuation entitlements) and that the husband pay to the wife within 14 days of the date of the orders, the amount of the wife's entitlement pursuant to this order.*

6. *That the base amount allocated to the wife out of the interest held by the husband, payable under the Police Regulation (Superannuation) Act 1906 is the amount of $2976.91 per fortnight.*

7. *That whenever the trustees of the SAS Trustee Corporation Pooled Fund makes a splittable payment under the Police Regulation (Superannuation) Act 1906 to the husband, the trustees shall pay to the wife, the entitlement calculated in accordance with Part 6 Family Law (Superannuation) Regulations 2001 and may make a corresponding reduction to the entitlement the husband would have had but for these orders.*

8. *That order 7 has effect from the operative time.*

9. *That the operative time is the date of the Court order.*

10. *This order binds the trustee of the SAS Trustee Corporation Pooled Fund.*

11. *That having been accorded procedural fairness in the making of these orders, this order binds the Police Superannuation Scheme.*

12. *That the wife be declared to be the sole beneficial owner of the superannuation entitlements in which she is named as the superannuant.*

13. *That each party be solely entitled to the exclusion of the other to all other property and chattels of whatsoever nature and kind in the possession of such party as at the date of the making of these orders and for that purpose bank accounts are deemed to be in the possession of the person whose name appears on the bank records thereof, insurance policies are deemed to be in the possession of the beneficiary thereof, any motor vehicles are deemed to be in the possession of the registered owner thereof.*

14. *That in the event either party refuses or neglects to execute any deed or instrument, the Registrar of the Court be appointed pursuant to Section 106A to execute such deed or instrument of the name of such party and to*

do all acts and things necessary to give the liberty to the operation to the deed or instrument.

15. *That either party have liberty to restore on seven days notice in respect of the implementation of these orders.*

11. In opening, Counsel for the wife indicated that order 6 was not sought by way of a base amount (which represents 100% of the husband's current fortnightly pension) but rather the application is being made under Section 90MT(1)(b) as a percentage split as to 50% of the fortnightly payment.

Husband

12. The husband by way of minute of order tendered during submissions sought the following orders:

1. *That within twenty eight (28) days of the date of these orders:-*
   - *(i) The husband transfer to the wife all his interest in the joint account controlled by AJM & Associates and the rent account which both total $81,420.00;*
   - *(ii) The husband pay to the wife $81,579.00;*
   - *(iii) Simultaneously with (i) and (ii) above, the wife transfer to the husband all right, title and interest in 4B Cross Street.*
2. *That each party be declared as between the other, to be the sole legal and beneficial owner of all items of personalty, chattels, monies, shares, investments, life insurance policies and superannuation policies presently in their possession or control or vesting in the name of each of them respectively at the date of the making of these orders unless otherwise provided for in these orders.*
3. *That the wife return to the husband the following items:-*
   - *(i) Gold bracelet;*
   - *(ii) Barbeque;*
   - *(iii) Air conditioner;*
   - *(iv) Noritake dinner sets;*
   - *(v) Copy of all the family videos;*
   - *(vi) Half the family photographs.*
4. *That the wife pay the husband's costs of and incidental to these proceedings.*

PROPERTY

13. I set out below the schedule of property and liabilities submitted by Counsel for the husband except for those figures which appear in bold. The figures which appear in bold are the subject of further comment below and are the figures which I have found to be appropriate:

	Property	
1.	4B Cross Street (J)	$290,000.00
2.	Balance of proceeds of sale of 4C Cross Street (J)	61,084.00
3.	Partial property settlement (H)	40,000.00
4.	Partial property settlement (W)	40,000.00
5.	Bank account balances (W)	Nil
6.	Bank account balances (H)	Nil
7.	Motor vehicle (H)	**7,000.00**
8.	Nissan motor vehicle (W)	**13,000.00**
9.	Household contents (H)	4,000.00
10.	Household contents (W)	1,500.00
11.	Colonial First State Superannuation (W)	19,680.00
12.	Funds in rent account (J)	20,336.00
13.	Moneys payable on husband's father's death (J)	38,000.00
14.	NRMA shares (284 x 5.62) (W)	1,596.00
15.	Employment contract payout (H) (net after payment of superannuation surcharge)	44,108.00
	Total property	580,304.00
	Liabilities	
16.	Superannuation surcharge (paid out from employment contract payout)	Nil
17.	Car lease (H)	**15,200.00**
18.	Loan from WT	25,936.00
	Total liabilities	$41,136.00
	NET PROPERTY	$539,168.00

14. Counsel for the wife conceded the figures asserted by Counsel for the husband except for the matters set out below. Also, the parties agreed that the wife's Colonial First State superannuation entitlement would be treated as property and given the amount of the wife's superannuation in the context of this case, that would have been an appropriate course in any event (see paragraph 61 ***Coghlan and Coghlan*** (2005) FLC 93-220).

Husband's motor vehicle and lease figure

15. In relation to the amount for the husband's motor vehicle ($7,000) and the car lease in relation to the husband's motor vehicle ($15,200), Counsel for the wife

submitted that this is a motor vehicle which is leased by the husband. Whilst it is accepted that the current outstanding liability on the lease exceeds the value of the motor vehicle it was submitted that the lease payments will be paid by the husband over time and out of his income stream. He will obtain the advantage of the use of the motor vehicle over that time. It was suggested that the schedule of property and liabilities be amended so that both the husband's motor vehicle and the car lease are removed from it. The value of the husband's motor vehicle is evidenced by annexure D to his affidavit sworn in September 2005 (being what appears to be a market appraisal dated April 2005). The figure of $15,220 is evidenced by annexure E to the affidavit of the husband sworn in September 2005. This is a letter from Macquarie Leasing Pty Ltd advising that as at July 2005 the payout figure of the loan was $15,220.79.

16. There is no evidence before me as to what the term of the lease is, what the residual under the lease is or any other information that would allow me to make any meaningful estimate as to the number of lease payments that are still owing under the lease. It is clear that the husband would have made lease payments since the middle of last year. It is also probable that the value of the motor vehicle has also decreased since that time. The best evidence I have available to me however are the figures in the middle of 2005 and I will adopt those figures. As at July last year however the evidence I have indicates the husband had a motor vehicle worth $7,000 and a liability in relation to that motor vehicle of $15,220 and I don't see any reason why that asset and liability should be removed from the joint balance sheet.

<u>The wife's motor vehicle</u>

17. Counsel for the husband submitted that the wife's estimated value of her motor vehicle should be accepted. Counsel for the husband relies on the fact that in her financial statement sworn in April 2004 the wife estimates her Nissan Q 2003 motor vehicle is worth $22,000. For the purpose of the hearing she updated her estimate of that figure to $13,000. Counsel for the husband submits she cannot rely on that further estimate and he seeks to press the admission that she had first made. In cross examination Counsel for the husband asked the wife upon what basis had she changed her estimate. Her reply was that she had gone to an internet site called "mycar.com.au". It was by

looking at that site that she had reached the conclusion that the current value of her motor vehicle was $13,000. She was asked whether or not she had any document that would support her contention. She said she had. She produced a document. Counsel for the husband looked at it and asked no further questions on the matter.

18. In the circumstances I accept the wife's evidence that she has made an internet inquiry at the site she mentions. I take judicial notice of the fact that there are now a number of well know internet sites that track the information about the recent sale prices of used motor vehicles and that it is common practice for persons who sell motor vehicles privately to rely upon information published on the internet as to the recent history of re-sale price of particular makes, models and years of motor vehicles. I accept that the figure of the wife's motor vehicle should be revised to $13,000.

19. Counsel for the husband warned that the husband still had savings in the bank of $12,000 but that those savings had come from the $44,000 which had been accounted for on the balance sheet. The husband's savings of $12,000 therefore should not be brought to account as that would be double dipping

20. Counsel for the wife conceded that bank accounts should not be taken into account. Counsel for the wife also conceded that the husband's employment contract payout should be accepted at $44,108 on the basis that the husband has paid out his superannuation surcharge in the sum of $36,166 from the figure of $80,274 which he received on his retirement.

21. The wife's evidence was that at separation her credit cards were virtually nil. Counsel for the wife did not submit that the wife's current credit card balance should be included in the category of property and liabilities to be considered.

Chattels

22. In relation to the husband's application for the return of chattels, the wife in her primary affidavit gave evidence that on the day of separation "I saw a Pantec type truck in the driveway which was loaded with our household goods". She gave the impression that the husband took a Pantec truck of goods away. In oral evidence, however, she conceded that much was left in the home.

23. The husband (at paragraph 112 and 113 of his primary affidavit) sets out what he took and what was left. I accept his evidence.

24. In his application the husband seeks the following items:

    (i) Gold bracelet;
    (ii) Barbeque;
    (iii) Air conditioner;
    (iv) Noritake dinner sets;
    (v) Copy of all the family videos;
    (vi) Half the family photographs.

25. The evidence that he gives in relation to the gold bracelet is as follows:

    "117. There was also a gold bracelet which was purchased by my parents as a present to me. My wife took the gold bracelet and during the course of the marriage melted it down and re-modelled it into a new bracelet. I would like the return of that gold bracelet so I can remodel it back into its original form. This was the wish of my mother before she died and I would like to carry out those wishes."

26. It was agreed that the bracelet now was in the form of a woman's bracelet. There was a dispute between the parties as to the circumstances in which the melting down and re-modelling had occurred.

27. Had the bracelet been in its original form I would have been inclined to ask the wife to return it to the husband because of its sentimental value. In my view however any sentimental value of the bracelet must have been lost when it was melted down. I am not inclined to order the return to the husband of what is now a woman's bracelet.

28. It is unclear to me from the evidence as to what "air conditioner" the husband refers to. It doesn't appear to be in the husband's list of what was left in the matrimonial home.

29. Given what appears to be a disproportionate division of chattels on the evidence that I have before me, I will make an order that the wife deliver to the husband the barbeque and the Noritake dinner sets.

30. In relation to order 3 sought by the husband it has now been agreed that in relation to the videos and photographs that the wife will provide those to the husband. The husband will at his cost copy any of that material. He will return the original material to the wife within a 14 day period.

CONTRIBUTIONS

Initial contributions

31. The parties met in 1991.

32. The wife brought to the marriage some savings. The wife's evidence was it was $13,000, but the wife's evidence on it was so unsatisfactory that it was difficult to place any weight on it. The husband thought the wife had about $5,000. She had a Mazda 323 motor vehicle which was sold after the marriage for $8,500. The wife also said that she had some cash from wedding gifts but conceded that that was joint property.

33. The husband at paragraph 7 of his affidavit sets out what he says his assets were at the commencement of the cohabitation. That evidence is as follows:-

    8. At the commencement of our marriage I had the following assets:-
        a. Gold bracelet and diamond ring
        b. Furniture and chattels
        c. 2 Cross Street (25%)
        d. Nissan Gazelle motor vehicle
        e. Cash
        f. Superannuation
    9. At the commencement of marriage I had the following liabilities:
        a. Credit cards E $500.00
        b. Loan to brother for 2 Cross Street, E $19,125.00

34. In October 1996 the wife received $29,357 as a payment in relation to her redundancy. In December 1996 the wife received $10,000 as payment of superannuation. These monies were applied by the parties towards mortgages on the development properties.

The development of 2 and 4 Cross Street

35. In 1991 the husband's parents lived at 4 Cross Street and owned that property. There had been discussions primarily between the husband's brother and Mrs JM who was the owner of the property at 2 Cross Street.

36. In May 1992 the parties, the husband's parents and the husband's brother WT agreed to purchase 2 Cross Street from PM who was JM's nephew and was

then handling JM's affairs. An agreement for the sale of the land in 1992 is part of annexure A to the affidavit of WT sworn May 2004. It shows the purchasers as the husband and wife in half share as joint tenants and the husband's brother in half share as tenants in common. The purchase price was $75,000 (the overall acquisition costs were $76,389). The whole of those funds were provided by the husband's brother from cash he had as a result of selling another property. That is, WT lent the parties $38,194.50.

37. WT charged 6% interest in relation to the original loan of $38,194.50 used to acquire the half interest in 2 Cross Street. Annexure K to the husband's affidavit sworn May 2004 sets out spread sheets that were generated at the time of the development. These were not subject to any specific cross examination by Counsel for the wife.

38. In 1993/94 there were several meetings between the husband, his father and his brother. In order for the development to take place it was fundamental that the husband's parents agree to allow their land at 4 Cross Street to be used. 4 Cross Street was a bigger parcel of land than 2 Cross Street.

39. The wife accepted in her oral evidence that the transfer of 4 Cross Street was integral to the re-development of 2 and 4 Cross Streets.

40. In or about 1994 the husband's parents transferred at no cost their property at 4 Cross Street, to the husband and wife as to 50% and into the husband's brother's name as to the other 50%. Thereafter six duplex homes were constructed on 2 and 4 Cross Street. The two titles were converted into three separate titles.

41. There was an agreement between the parties that the value of the whole of 4 Cross Street at the time of the transfer from the husband's parents, namely May 1994, was in the sum of $130,000.

42. The house at 2 Cross Street was demolished. The parties built units 2A and 2B.

43. The husband and his family members made a contribution to the acquisition, conservation and improvement of the development sites by actively working on the sites, attending to the development proposals and otherwise project managing the development. The wife made a small contribution. She and her

family assisted in the demolition of JM's brick cottage on 2 Cross Street,. Her relatives however were partly motivated by the fact that they salvaged from that property the bricks and tiles; took them away and used them for their own purposes.

44. The home at 4 Cross Street was then demolished and units 4A, 4B, 4C and 4D were built upon them.

45. In 1994 the parties and the husband's brother applied for a construction loan with St George. They were advanced the sum of $201,406.

46. In 1995 that facility was refinanced with Citibank for an amount of $160,000 for units 4A and 4B and $148,000 for units 4C and 4D.

47. The husband's parents did not participate in any of the loan facilities or make any loan repayments in relation to those facilities.

48. Around mid 1995 the husband's mother and father moved into unit 2A. That is the unit in which the husband's father still lives.

49. It was always the understanding that the gift by the husband's parents of 4 Cross Street would have attached to it the condition that the husband's parents would have available to them one of the duplex's to live in for their life. The husband's father gave evidence that he was currently living in one of the duplexes (2A) and he intended to remain there in the foreseeable future. The husband's father is 81 years of age. He gave evidence that the duplex in which he lived was to be transferred back into the name of he and his deceased wife but they didn't ever bother to get around doing that because it was always going to end up being an inheritance of both the husband and his brother.

50. In late December 1995 units 4A, 4B, 4C and 4D were all completed.

51. Until approximately 1996 all the loans on the properties were cross collateralised. In 1996 the loans were separated out as between the parties on the one hand and the husband's brother on the other. At that time the husband's father indicated that as long as they got a life interest in 2A the remaining interest in 2A and the interest in the remaining properties, subject to the debt, could be divided between the brothers.

52. The husband says that a conversation took place at which the wife was present where it was agreed that the parties would keep 4B and 4C. WT would take 4A and 4D.

53. The parties and WT then had a discussion as to what would happen in relation to units 2A and 2B. It was always the intention that WT would live in 2B and retain it. An agreement was also reached that WT would retain unit 2A and that the properties would be refinanced.

54. Consequently WT became the registered owner of units 2A, 2B, 4A and 4D. The parties became the registered proprietors of units 4B and 4C. All the refinancing was completed with Aussie Home Loans in approximately August 1996. Market appraisals were obtained at that time. WT paid the parties $32,000. At the same time it was agreed that a further $38,000 was owed to the parties by WT. This would be paid to the parties when the husband's mother and father had died (and their life tenancy in unit 2A had ceased).

55. I accept WT was giving his brother a generous deal, in order to cash him up for a deposit to purchase a home in the S area. Subsequently, because of the husband's transfer to G and then to the H District that purchase of a home in the S area never took place.

56. The sum of $32,000 received by the parties from WT at this time was used by the parties to purchase a Ford Fairmont motor vehicle for approximately the same sum.

57. As a result of this arrangement the parties ended up with a debt to Aussie Home Loans on units 4B and 4C in the sum of $200,000 as at August 1996.

58. WT ended up with a debt to Aussie Home Loans of about $400,000.

<u>The husband's work history</u>

59. The husband was a police officer at S doing shift work at the commencement of the marriage (paragraph 3 of the wife's affidavit sworn October 2004).

60. At the end of 1993/94 the husband was posted to L (paragraph 4 of the wife's affidavit of October 2004).

61. The husband's move to L was to the L regional office (until he was moved to G in August 1996) (paragraph 50 of the wife's affidavit sworn April 2004).

62. In 1996 the wife expressed a firm view that she wanted to live at S (paragraph 31 of the husband's affidavit). During 1996 the parties looked at many properties in the S area but none was found prior to the husband's posting to G (paragraph 39 of the husband's affidavit). The husband was appointed as Inspector of G, Local Area Command at WM (see paragraph 60 of wife's affidavit sworn April 2004)

63. Originally the wife did not move to G with the husband. The husband travelled to G Monday to Friday and returned home on the weekends. The wife was working while the husband was in G and the husband's parents assisted in the care of BT while she was at work. The wife was offered a redundancy in 1996 and took it. When she took the redundancy in 1996 she moved to G (paragraph 50 of the wife's affidavit).

64. The family remained living in G until late June 1997 (paragraph 45 of the husband's affidavit).

65. The wife gives the following evidence in her primary affidavit which I accept:

> *"54. JT's duties as Inspector meant that he was frequently away attending meetings in C and doing tours of stations in the G region. This was a common occurrence and was not restricted to when we were at G. When he was based at L regional office he was industrial relations officer there and was required to attend various police stations, conduct course, be involved in courses and he spent a lot of time away. This continued after G until our separation.*
>
> ….
>
> *55. In about March, April or May 1997, JT attended S following the appointment of Peter Ryan as Commissioner of police. JT's purpose in going to S was for an assessment for promotion. He received that promotion in June 1997 and became the youngest ever [rank deleted]. He was appointed to W local area command base in N.*
>
> *56. By June 1997 I was about eight months pregnant with LT. JT was required to start at W local area command in July 1997."*

66. So, in late June 1997, shortly before the birth of LT the husband, wife and BT relocated to WB in the Hunter area (paragraph 45 of the husband's affidavit). They remained in the Hunter area from 1997 to August 2002 until they finally separated.

67. The wife's evidence continues:

"59. We remained at WB until the year 2002. The area command which JT was in charge of was a [lower] grade region. JT and I had many discussions about returning to S. He said "if I am going to get transferred as a [particular rank] to S, all the commands there are [at a higher] grade. It would be best if I could get promoted to a [higher] grade up here and that will make the transfer easier". In 2000 he applied for and was promoted to the [higher] grade local area command of M.

….

62. M was a much bigger area than his previous command which meant that his travelling increased. On average in the early part of his command at M he was away two to three days per week, being overnight stays. He was generally home on weekends."

68. It can be seen that the wife gave up her employment and wish for a home in the S area, so that the husband could pursue his meteoric rise in the police force.

69. At the time the husband swore his affidavit in May 2004 (even though it was a few months after his accident) the husband said that he was in good health currently working full time and earning $126,913 per annum (see paragraph 118, 119 of his primary affidavit). That situation was updated in an affidavit sworn April 2005 where the extent of his medical problems were set out.

Unreliability of some of the wife's evidence

70. The wife early in her oral evidence asserted that it may have been that the husband had received about $50,000 and that was still in an account held by the Super Board. There was no basis upon which she could make that allegation.

71. The wife alleged that the $38,000 that was owing to the parties was payable on demand but in cross examination conceded that she was never party to any conversation saying that that was so and that the husband's assertion that it was payable upon his father's death may well have been true.

72. The wife agreed that when she asserted that the husband took everything out of the house that that was an exaggerated statement.

73. The wife also accepted that she had been incorrect in relation to some of her evidence in respect of the timing of the finances.

74. The wife asserted that her parents had contributed $4,000 towards repayment of joint debt. She had not mentioned this in any affidavit previously. When

asked whether or not she had had any document that might corroborate her assertion she said she did. She produced a receipt dated 1995 from Aussie Home Loans which evidenced a deposit of $4,000. She said that her parents had given her a bank cheque drawn on their bank and that she had deposited it against the Aussie Home Loan mortgage. When she was asked to more closely look at the receipt she conceded that what had been deposited had been a cheque from the Police Credit Union. It was clear the wife had reconstructed a memory of something that had not happened by her misreading a document.

The husband's debt to WT

75. In paragraph 90 the husband asserts that as at the present day WT is owed $25,936.

76. The evidence in relation to the funds owed to WT are contained in paragraphs 23 of the husband's affidavit sworn September 2005 and can be summarised in the following way:-

Initial funds for purchase of 2 Cross Street (para 79)	$38,194.50
Interest (para 87)	$4,620.92
Loan account (para 88)	$10,900.00
WT's expenses (para 86)	$10,676.75
	$64,392.17
LESS	
Instalments paid (para 82)	$7,080.27
Items purchased (para 85)	$22,375.59
Half of $18,000 (para 90)	$9,000.00
	$38,455.86
Amount owed to WT	$25,936.31

77. I am satisfied that the husband has set out the basis upon which the amount that is owing to his brother is calculated. The wife's evidence did not seriously challenge the existence of that debt. Her evidence was to the effect that she simply was not aware that any money was outstanding. There was no cross examination of the husband in relation to the existence of this debt. I am satisfied on all the evidence that the debt exists.

78. Counsel for the wife referred to the authority of ***Biltoff and Biltoft*** (1995) FLC 92-614.

79. In that case the Full Court recognised that generally unsecured liabilities would be deducted from the value of assets when ascertaining the value of a property pursuant to the provisions of Section 79 Family Law Act.

80. The Court goes on to say that notwithstanding that general practice there is a discretion not to take into account or to discount the value of an unsecured liability in certain circumstances. Circumstances in which the liability would not be taken into account is if it was vague or uncertain, if it is unlikely to be enforced or if it was unreasonably incurred.

81. In this case I am satisfied that the evidence establishes the quantum of the debt owed to WT. It is not a debt that has been unreasonably incurred. It was a debt that was a product of the joint endeavour in which the parties became involved with the husband's family. Counsel for the wife submitted that it was unlikely to be enforced.

82. He said that the debt should be looked at in light of the following circumstances:

    82.1. The amount of time that the money had been outstanding and not called for.

    82.2. That the parties had sold one of the two duplexes and at the time of sale no call was made by the husband's brother for the repayment of the debt.

83. Having heard WT's evidence I am comfortably satisfied that he wants his money repaid as part of the overall finalisation of alteration of property between his brother and his sister-in-law. This is not a case where I could find that the debt is unlikely to be enforced. It was a debt that remained at call. I am satisfied that that call has now genuinely been made by the husband's brother.

Contributions made on behalf of husband

84. The husband's parents made a significant contribution to the development by way of gift of the property at number 4 Cross Street which at the time of its transfer had an agreed value of $130,000. The interest transferred to the husband and wife was worth $65,000. This was an integral part of the whole

development, The gift was subject to the condition that the husband's parents get a life interest in one of the duplexes.

The benefits received by the parties as a result of their involvement in the Cross Street development

85. Wife's Counsel submits that it is impossible to do an accounting exercise in relation to the duplex development. He says there is no evidence about construction costs and there is no evidence about what rentals have been received.

86. In cross examination the wife conceded that the parties received about $500,000 out of their involvement in the Cross Street development. The detail of that is as follows:-

Current property owned by the parties being unit 4B Cross Street	$290,000.00
Balance of the sale of 4C Cross Street held in trust by AJM & Associates	61,000.00
Partial property settlement received by the husband	40,000.00
Partial property settlement received by the wife	40,000.00
Monies paid by WT to the parties	32,000.00
Monies to be received by the parties on the death of the husband's father	38,000.00
Total	$501,000.00

87. As I have found there is a debt outstanding to WT in the sum of $26,000. The benefit that the parties received from their involvement in the Cross Street development was therefore in the sum of $475,000.

Contributions as homemaker and parent

88. It was an agreed fact that during the course of the relationship the wife was the primary carer of the children and was the person whom primarily fulfilled the role of homemaker.

89. I am satisfied that the husband during the course of the relationship made contributions both as parent and homemaker but to a far lesser extent than the wife.

Conclusion on contributions to property

90. Taking into account all the matters discussed above, my assessment of contribution to the net property of the parties (excluding superannuation) is 62.5% to the husband and 37.5% to the wife.

SUPERANNUATION – "ANOTHER SPECIES OF ASSET"

Introduction

91. The husband has an interest in the SAS Trustee Corporation Pooled Fund under the Police Regulation (Superannuation) Act 1906 ("PRSA") which is in the payment phase.[i]

92. The interest is payable as a CPI indexed pension for life[ii]. The pension is currently $91,414.51 gross per annum.

93. The PRSA gives the husband an opportunity to commute part or all of his pension to a lump sum at age 60 at a rate of 10.92 times the annual rate of pension. The husband may request to have an opportunity to commute part of the pension at age 55.[iii]

94. The husband's superannuation interest can be categorised as having two elements to it:-

    Category 1

    An non commutable indexed pension to age 60 (that is, normal retirement age) with a partial right to commute at age 55; and

    Category 2

    A commutable indexed life pension after the age of 60.

    "Commutable" means being able to convert the pension into a lump sum.

95. In my view, this distinction between these two categories is important when analysing the "real nature" of the husband's superannuation interest. The real nature of these two categories and the contributions that have been made to these two categories are different (see ***Coghlan*** paragraph 67).

What is the value of the husband's superannuation interest?

96. The Family Law (Superannuation) Regulations 2001 ("FLSR") provide in Regulation 42(2) that:-

> *"If the pension is payable for the life of the member spouse, the gross value of superannuation interests at the relevant date is determined using…the method set out in Schedule 4".*

97. FLSR Schedule 4 sets out the method for valuing an interest payable as a pension only.

98. Mr B (a superannuation valuer) using the methodology provided for in Schedule 4 FLSR has valued the husband's superannuation interest in the sum of $1,865,356.50.

99. FLSR does not contain a method for valuing a pension interest in the payment phase that may be commuted to a lump sum at a later date.[iv]

100. Nor does the statutory formula differentiate between the value of the husband's superannuation interest before and after he reaches normal retirement age.

101. Section 90MT(2)(b) of the Family Law Act ("FLA") stated that where FLSR does not provide a methodology for determining the value of an interest:-

> *"the court must determine the value by such method as it considers appropriate"*[v]

102. Mr B has carried out a valuation which is not in accordance with the Regulations on the assumption that the pension is commuted to a lump sum at age 60 by the husband. The assumptions and methodology that he applied is set out on page 4 of his report of January 2006 where he says amongst other things:-

> *"However, we are faced with a superannuation interest that does not have a prescribed method that will take account of the commutation option. There are some methods that are close but none that fits exactly. In my opinion, the guiding principle for determining a method to be adopted by the Court should approximate the methods prescribed in the regulations as closely as possible with the necessary changes being made to accommodate the unusual nature of the superannuation interest. The court should not embark on a wide search for alternative methods, especially in the light of the application by the SAS Trustee Corporation for a scheme specific method and factors.*
>
> *What is the most appropriate method?*

The most appropriate method is to segment the superannuation into two. The first is a valuation of the superannuation payable until the commutation option at age 60 becomes available. The method for this is the method in Schedule 5 for valuing a fixed term pension. The second is to value the superannuation from age 60 assuming that it is taken as a 50% pension and a 50% lump sum. The method for this is provided for in Schedule 6 but using factors from Schedule 4 for growth of the interest until age 60.

The application of that method (Attachment B and Attachment C) delivers the following value:

Pension to age 60	*$1,389,163.34*
Pension and lump sum from age 60	*419,443.87*
Total	*$1,808,607.21"*

103. Whilst both Counsel for the wife and Counsel for the husband adopted the figure of $1,808,607 as being the appropriate figure to consider in respect of valuation of the husband's superannuation interests it is important to note the value of each category.

104. The values are:-

Category 1: $1,389,163.34
Category 2: $419,443.87

105. The majority in ***Coghlan and Coghlan*** (2005) FLC 93-220 (Bryant CJ, Finn & Coleman JJ), declined to determine whether or not a superannuation interest, paid as a pension, was property saying that the approach of treating superannuation as "another species of assets" means *"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 Section 90MD, may in fact also come within the definition of "property" in Section 4(1) (as was suggested in the submissions made in Hickey to which we earlier referred in paragraphs 24 – 26), or whether it is only a financial resource*".

106. O'Ryan J (in the minority) in ***Coghlan*** found that this type of interest was property as defined in Section 4(1) (see paragraph 136 of judgment). Warnick J refers to O'Ryan's observation and says that as it was not argued before the trial judge nor before the Full Court he did not consider that it should be determined (see paragraph 119).

107. Writing ex judicially, Coleman J referring to ***Coghlan*** has said:

"On the majority's approach, a superannuation interest which is in the payment phase would be likely to be "property within the meaning of the definition of property contained in s.4(1)" (see *A Distinction without a Difference?* Paragraph 13 of the paper presented by Coleman J, Central Queensland Law Conference, Rockhampton 26 August 2005).

108. In a post ***Coghlan*** decision, ***HRDW and HSJL*** [2005] FamCA 676, Warnick J sitting on an appeal from a Federal Magistrate dealt amongst other things with a ground of appeal based on the fact the Federal Magistrate had treated the husband's pension as an asset (in one asset pool). Whilst his Honour again didn't say whether or not he thought superannuation pensions were property as defined in Section 4(1), he did make the following comment:

> *"In this regard, counsel for the husband suggested that the value of the husband's entitlement had been "plucked from the air" and he referred to terms such as "an air of artificiality", used by his Honour Justice Coleman in Cahill v Cahill [2003] FamCA 172. These terms seem to involve the assumption that a lump sum is inherently a more valuable form of property than an entitlement to a pension. I would not make such an assumption…"*

109. I also would not make the assumption that the calculation as to the value of the income streams to which the husband is entitled has a "air of artificiality". The lump sum values are reached after applying an actuarial formula which capitalises the income streams. That is, it would be reasonable to conclude that any company prepared to sell an annuity which gave the income streams to which the husband is entitled, would require a payment of about $1,800,000. Just because this large figure is paid overtime and not as a lump sum, does not mean its value has an air of artificiality. Any discounting for the fact that the husband will not immediately receive the whole of the value of the amount in one lump sum is taken into account in the formula used to calculate the amount in the first place. Income streams of this nature are a valuable asset. The introduction of Part VIIIB into the Family Law Act was, in part, motivated by the notion that overall, it was likely that the value of a spouse's superannuation had been undervalued by the Court, by practitioners and by the parties.

110. In his second reading speech, the Hon. Daryl Williams, Attorney-General said:

> "Valuation is a particularly important issue for defined benefit schemes where there is a vested benefit and an unvested value. The unvested value is generally not accessible until the fund member satisfies certain requirements

specified by the fund. The value of an interest in such a plan is typically based upon years of service with an employer and salary levels prior to retirement, as well as contributions and investment earnings. As the final benefit is dependent on future events, the full value of the retirement benefit cannot be predicted with certainty at the time of marriage breakdown.

The value of an accumulation plan is generally more easily ascertained. For this reason, the bill will provide for different methods of valuing a superannuation interest, depending on the type of interest. The details of how the value is to be calculated, including actuarial information, will be set out in the regulations. This will ensure that people are aware of the value of the interest they are dealing with in the agreement, and will also ensure that there can be no dispute about how the value is to be calculated."

(Hansard, Thursday 13 April 2000, p 15892 and see Section 15AB(2)(f) Acts Interpretation Act 1901)

111. The legislative intent for prescribing methods of valuation can also be found in the Explanatory Memorandum to the Family Law Legislation Amendment (Superannuation) Bill 2000 (see Section 15AB(2)(e) Acts Interpretation Act 1901). Under "General Outline" on page 1 the Explanatory Memorandum states:-

"The Superannuation Bill will provide for different methods of valuing a superannuation interest depending on whether the interest is a lump sum or a pension interest. The details of the information needed, and the calculations necessary, to value a superannuation interest and to split it will be contained in the Family Law Regulations. The application of the regulations will yield a single valuation that will be particularly important for the actuarial method, as it will require complex calculations in order to establish the present day value of a contingent superannuation interest. This will ensure that parties are aware of the value of a superannuation interest that they are dealing with in the agreement, and will also minimise the opportunity for dispute about the value of a superannuation interest."

112. At page 5 of the Explanatory Memorandum under the heading "Problems with the current approach", there is this passage:-

"Valuation: there are difficulties in determining the value of superannuation interests, especially in defined benefit schemes because the final benefit will depend upon events (eg retirement age, vesting rules, resignation, death, or changes in personal circumstances including remarriage and/or parenthood) that will not be known at the time of the settlement of the parties financial affairs. While it is relatively simple to value an accrued interest in an accumulation plan, valuing an interest in a defined benefit plan is significantly more complicated."

113. At page 7 under the heading "Consistent, transparent and fair value should be recognised" the Explanatory Memorandum states:-

"While noting the difference between superannuation and other assets, the fair value of a superannuation interest should, like any other asset of the marriage, be taken into account in the division of assets on breakdown of a marriage especially as superannuation is becoming an increasingly significant asset in many marriages. Considerations of fairness dictate that its full value should be recognised.

It is important that parties should be able to ascertain an accurate valuation of superannuation interests and have the ability to divide those interests with regard to their own particular circumstances. The benefit in a defined benefit scheme has two components: a vested benefit and an unvested value. The vested benefit must be at least the minimum resignation benefit. The unvested value notionally accrues to the employee but may not be realised until the member satisfies certain requirements, as determined by the rules of the fund. For example, the employee may not fully qualify for additional benefits unless he or she remains employed by the company for a certain number of years. This raises questions about transparency and consistency of the methods used to fully value superannuation benefits, which must be addressed by the various options."

114. At page 10 there is the following passage in the Explanatory Memorandum:

"<u>Valuing interests in defined benefit plans:</u> Unlike accumulation plans, valuing an interest in a defined benefit plan is problematic.

Interests in defined benefit plans are typically based upon years of service with an employer and salary levels prior to retirement, as well as contributions and investment earnings. As the final benefit is dependent on future events, the full value of the retirement benefit cannot be known with certainty at the time of marriage breakdown. It is not possible, therefore, to place a definite figure on the value of an interest in a defined benefit plan at any point in time except when the benefit becomes payable. Valuing such interests normally requires actuarial expertise to identify the vested amount and the value of the benefit that has not yet vested.

This option (the option proposed by the Government), therefore, proposes to prescribe, in the Family Law Regulations a set of factors, developed by the Australian Government Actuary, that take these considerations into account. Parties and their advisers will be required to use these factors. The factors will also be used by the Family Court in determining the value of a superannuation interest when the parties approach the Court for assistance.

People would use the factors, in conjunction with additional information provided by the trustees, and their personal details, to calculate the present-day value of an interest in a defined benefit plan. The Family Law Regulations will also prescribe the method of calculation to be used."

115. There are other statements in the Explanatory Memorandum which emphasise a similar theme.

116. Paragraph 133 (page 38) of the Explanatory Memorandum, when referring to Section 90MT(2), says:

> *"133. The Regulations will provide for the valuation of superannuation interests both in the accumulation and the payment phases. In the accumulation phase, the valuation will be able to be obtained for a superannuation interest that will be paid as a lump sum or as a pension or both. In the payment phase, the value of the lump sum will be clear, and the value of a pension income stream will be able to be obtained."*

117. The introduction of Section 90MT(2) was designed, at least, to provide some reality check in relation to the types of adjustment the Court was making in respect of superannuation. This is particularly so, in respect of income streams, that might appear at first blush to have a relatively low value as a periodic payment. In my view the valuation calculated by using the formulae in the Regulations is not an artificial and arbitrary exercise.

Nature, form and characteristics of the husband's Category 1 superannuation interest

118. The husband presently receives a superannuation interest by way of a fortnightly pension.

119. The reason he receives it now (rather than at normal retirement age) is because he was hurt on duty.

120. Counsel for the husband argued that the payments the husband receives between now and normal retirement age should not be categorised as the husband receiving a superannuation interest but rather being the equivalent of a payment under an income protection policy from an insurance company.

121. That is an inaccurate categorisation.

122. The husband's entitlement both before he was hurt on duty and now are in accordance with the Police Regulation (Superannuation) Act 1906 ("PRSA"). An understanding of JT's superannuation interest can be obtained from reading the Police Regulation (Superannuation) Act 1906 which I do (relying on Section 143 Evidence Act). Section 16 of the PRSA provides that JT may be required at a future time to submit to medical examination. If it is found that his incapacity has ceased the Police service may offer JT the opportunity of returning to some position in which it would be reasonable for JT to serve but not at a lower rank than he previously held. If that happened the superannuation interest that he currently receives and will receive until normal

retirement age, will be cancelled (see Section 16(3) PRSA) but he will again receive his former salary.

123. On the current evidence (a finding of permanent incapacity for that job) that is an unlikely event.

124. Given the terms of Section 16 PRSA, the husband can retain entirely the payment of the superannuation interest until his normal retirement age and at the same time seek other gainful employment without losing any of the payment of the superannuation interest to normal retirement age. This is not a feature of most income protection insurance products.

125. The Police Regulation (Superannuation) Act 1906 gives the husband the right to request the trustee to partially commute the pension when he has reached 55 years of age. Forty percent of the pension can be commuted for five years (Section 10C(1A)(6) PRSA).

Nature, form and characteristics of the husband's Category 2 superannuation interest

126. The husband's superannuation interests change once he is 60.

127. Prior to the husband being hurt on duty the husband was entitled to a "superannuation allowance" pursuant to the provisions of Section 7 Police Regulation (Superannuation) Act 1906 ("PRSA"). JT's annual superannuation allowance became an entitlement to him once he had served 20 years in the police force. Upon retirement or discharge the annual superannuation allowance is calculated by multiplying the member's salary of office at the date of the member's retirement or discharge with a service ratio calculated upon completed years of both full time and part time service of the member. The amount is payable when the member attains the age of 60 years or upon earlier discharge because of infirmity (see Section 7 PRSA).

128. Mr B in a report dated March 2004 (verified by affidavit sworn April 2004) valued the husband's interest under Section 7 of the PRSA at $264,346.48. He did this using the method provided in Regulation 29 of the Family Law (Superannuation) Regulations 2001 for valuing a defined benefit interest in the growth phase. That method uses a discount factor to age 65. Mr B gave oral evidence that scheme specific factors in relation to an entitlement under the PRSA are not yet operational.

129. When the husband was hurt on duty his entitlements under Section 7 of the PRSA ceased (see Section 7(2) PRSA).

130. Once he was hurt on duty his superannuation allowance became payable under Section 10 of the PRSA.

131. That legislative provision gave the husband the entitlement which I have called category 1 superannuation until he reached the age of 60. It also gave him an entitlement to category 2 superannuation after the age of 60.

132. After the husband had been hurt on duty the superannuation allowance to which the husband was entitled after the age of 60 changed from a defined benefit in the growth phase to a defined benefit in the payment phase. Also, rather than it being calculated by way of applying a multiple based on completed years of service to the attributed **salary** of office at the date of the member's retirement or discharge, it was calculated by way of applying a multiple of 10.92 times the indexed **pension** as at age 60 (see Section 14K(4) PRSA).

133. Mr B's calculation in relation to the value of the category 2 superannuation was $419,443.87 as set out above; this is to be compared to the previous valuation of $264,346.48.

134. A reason for the difference in the valuation according to Mr B's oral evidence was that the discount factor as being applied to age 65 in the first calculation and to age 60 in the second calculation.

135. The husband's superannuation interest after normal retirement age is similar in nature to the interest he would have had had he not been hurt on duty. It is a commutable income stream.

136. The husband is able to commute the whole of the pension at aged 60. There is no option to commute only part of it (see Section 14J(2) PRSA).

<u>Contributions to Category 1 superannuation interest</u>

137. The amount of the husband's current superannuation interest is not primarily based upon the amount of time that the husband was in the SAS Trustee Corporation Pooled Fund.

138. It is based on:-

1. The husband being hurt on duty;
2. The circumstances in which the husband was hurt on duty;
3. The amount of the husband's salary at the time that he was hurt on duty (which indirectly has some connection to the amount of time the husband was with the police service but primarily relates to the level to which he had been promoted in the police service).

139. Police officers who are hurt when being exposed to a risk to which members of the general work force would not normally be exposed in the course of their employment receive a superannuation interest equivalent to 100% of their salary (Section 10(1A)(c) PRSA).

140. JT was not hurt whilst being exposed to such a risk. The superannuation interest that he is being paid is at a rate of 72.75% of his salary at the date of the husband's discharge from the Police service (as provided for in Section 10(1A)(a) PRSA).

141. The wife cannot claim any direct contribution following the husband being hurt on duty. As Counsel for the husband pointed out the parties were not together at the time. The wife has not nursed or attended to the husband in any way as a result of his injuries.

142. The wife has made contributions after separation in the role as parent to the two children of the marriage. The husband is a good father but I find the wife's role as parent would have increased to some degree because of the husband's injuries.

143. More importantly the wife can point to contributions that she made that are relevant to the **amount** of the husband's salary at the date of discharge.

144. There is no evidence as to what rank the husband was at the commencement of the marriage nor is there any evidence as to what his salary was at that time. The husband's work history is set out earlier in these Reasons (paragraphs 59 – 69). It is clear that the wife during the course of the marriage supported the husband in applying for promotions and relocating herself and BT on two occasions to facilitate the husband's promotions. When moving to G the wife left her employment in S and accepted a redundancy package.

145. The increased responsibilities that the husband had as a result of his promotions placed additional burdens on the wife during the marriage and particularly at a time when the children were very young.

Conclusion in relation to Category 1 superannuation

146. Before the husband's medical discharge the husband's salary had reached $126,913 per annum (paragraph 119 of his primary affidavit). The level of salary which the husband received at the time he was hurt on duty is directly relevant to and provides the basis for the calculation of the amount he now receives each fortnight.

147. The wife can point to contributions that are relevant to the **amount** that the husband is currently receiving by way of a superannuation interest in the payment phase.

148. I assess the wife's contribution to category 1 of the husband's superannuation interest at 15%.

Contributions to Category 2 superannuation interest

149. In ***Bailey and Bailey*** (1978) FLC 90-424 the Full Court said *"contribution by one spouse to superannuation usually means the loss of moneys available for the current support of the family in order to provide security for both spouses on the retirement of the contributing spouse. Loss of the right to share in the superannuation by a divorced non-superannuated spouse is an important financial consequence of the dissolution of the marriage"*.

150. The husband continued to make contributions to the fund from his salary after the separation and prior to his medical discharge. During this time the wife continued in her role as parent and made a contribution within the terms of Section 79(4)(c) FLA.

151. The husband became a member of the superannuation scheme in October 1982 (see annexure C to the husband's further supplementary affidavit of September 2005). The parties married in November 1992 and the parties separated in August 2002. The husband left the police service in June 2005.

152. Consequently the husband was in the fund to the date of retirement for almost 23 years. The parties were married for 10 years of that period.

153. There is no evidence before me as to the value of the husband's interest in the superannuation fund as at the date of marriage. ***Coghlan*** (at paragraph 66) says that evidence should ordinarily be before the Court. Counsel for the husband submitted that such evidence would be of little value because typically superannuation interests in a defined benefit fund escalates exponentially over time. This arises from a combination of two things. Firstly a member's salary continues to rise and secondly the defined benefit multiple continues to increase over time. Once the husband was discharged because he was hurt on duty his superannuation interest changed from being a defined benefit in the growth phase to a defined benefit in the payment phase.

How are contributions to superannuation made prior to and after cohabitation to be treated?

154. There are a number of things to consider:

    1. The importance of the imbalance of initial contribution will lessen as the period of cohabitation increases

    2. Even though it is neither practical or desirable to approach cases in a pseudo mathematical way, a calculation of initial contribution does provide a "rough initial point of reference" (***Clauson and Clauson*** (1995) FLC 92-595)

    3. There need not be an imbalance of contribution during the cohabitation in favour of one party to offset the initial contribution of the other party. The importance of the initial contribution can be eroded over time in circumstances where there is equality of contribution during the course of the cohabitation. (***Bremner and Bremner*** (1995) FLC 92-560)

    4. Finally regard needs to be had for what the Full Court said in ***Pierce and Pierce*** (1999) FLC 92-844 where the Full Court said that it was "*not so much a matter of erosion of contribution but a question of what weight is to be attached, in all the circumstances to the initial contribution*".

What place does "W*ebber and Webber*" ((1985) FLC 90-648) or "W*est and Green*" ((1993) FLC 92-395) formula still have?

155. The ***Webber/West and Green*** formula had commonly been used by legal practitioners in negotiations from 1985 to the introduction of Part VIIIB when superannuation had to be treated as a financial resource.

156. Prior to super splitting laws, the following formula was often used to quantify the amount of adjustment that needed to be made in respect of a superannuation entitlement:

$$\text{Net realisable value of immediate retirement benefit} \times \frac{\text{Number of years in fund during cohabitation}}{\text{Number of years in fund}} \div 2$$

157. The amount of the calculation was then used as some indication of the amount of assets that needed to be transferred to the non member, who would not have the long term benefit of the superannuation (a financial resource), in order to create a just balance between the parties.

158. After the introduction of Part VIIIB FLA, the debate about applying "time served" formulae to assessing contributions to a species of asset has re-emerged. In a well known passage in ***Crawford and Crawford*** (1979) FLC 90-647 the Full Court commented on the danger of a mathematical approach to contributions saying at page 78,412:-

> "It becomes, in our view, increasingly difficult as the period of cohabitation lengthens, to justify placing a special value on a single item such as an initial cash contribution made many years before and treating it mathematically, when indeed there are so many other facets of marital contribution which become equally, if not more, deserving of attention."

159. A detailed analysis of the cases that have discussed the ***West and Green*** approach is contained at paragraphs 262 through to 279 of the judgment of Justice Young in ***BAR and JMR*** (2005) FLC 93-231. His Honour refers to the cases of ***West and Green***; ***Thomas and Thomas*** (1981) FLC 91-018; ***Jenner and Jenner*** (1984) FLC 91-544; ***Hauff and Hauff*** (1986) FLC 91-747; ***Harrison and Harrison*** (1996) FLC 92-682; ***Bartlett and Bartlett*** (1996) FLC 92-721; ***Tomasetti and Tomasetti*** (2000) FLC 93-023; ***O and O*** [2000] FamCA

1432; ***Cahill and Cahill*** [2003] FamCA 172; ***JEG and PDG*** [2003] FMCA Fam 404 and ***C and C*** [2004] FamCA 819.

160. In ***C and C*** the Full Court stated:-

> *"73. On behalf of the wife, it was urged upon the Court, in some measure turning the Court's own words back on it, in reliance upon the decision of Cahill (supra), but in addition upon heavier and more weighty authority such as Harrison (supra), Bartlett (supra) and Tomasseti (supra) that the Court should not apply a formulaic approach for a variety of reasons including the absence of actual figures in that regard and the unfairness, it was asserted, of so doing having regard to the real value of money at that time.*
>
> *76. The Court must do justice in equity, and it is according to law that it must do so. In the circumstances, to take into account the whole of the sum (of $86,000) as a contribution for and on behalf of the wife would ignore fundamental realities and be unjust to the husband. On the other hand, to apportion on a strictly formulaic basis, to the extent that West and Green survives and countenances such as approach that would be potentially unfair to the wife.*
>
> *77. Realistically, the most the Court can fairly do is to take into account the circumstances to which reference has been made and look at the contribution in the way that Pierce and Pierce (1999) FLC 92-844 would suggest to be done, that is, in conjunction with all other contributions."*

161. In ***BAR and JMR*** Young J (at paragraph 279) said in respect of an interest in a defined benefit fund "in specifically rejecting the **West and Green** or a like arithmetical formula approach I have concluded that it is likely to be both inaccurate and inappropriate in a consideration of splitting superannuation interests under Part VIIIB of the Act".

162. Coleman J has said this approach is "not entirely acceptable. The appropriateness of formulaic approaches in general remains to be conclusively considered by the Full Court" (Coleman J in ***Cahill*** [2003] FamCA 172).

163. But more recently, Coleman J in ***McKinnon and McKinnon*** [2005] FLC 93-242, hearing on appeal from a Federal Magistrate, appears to have embraced a ***West and Green*** approach to contributions. His Honour considered "the husband's Australia Post superannuation" interest of $211,174.00. The husband had retired and the sum was immediately available:

> *"It is evident that, of the thirteen years during which the husband worked for Australia Post he cohabited with the wife for approximately four years. Without suggesting any precise apportionment, to regard the wife's*

entitlement in the superannuation fund as approximately one sixth and that of the husband as five sixths would tend to reflect, if only on a "timed served" basis, the years of Australia Post service prior to and subsequent to commencement of cohabitation. Recent decisions of the Full Court suggest such an approach to be less heretical than in earlier times….The husband's Australia Post superannuation was worth $211,174.00, the contributions to the acquisition and conservation of which could be seen as five sixths to the husband and one sixth to the wife ($35,195.67 the wife and $175,978.33 to the husband)…"

164. His Honour, when considering contributions to other assets in this matter, as well as contributions to the husband's Australia Post superannuation, added:

"Whilst the determination of contribution entitlements involves the exercise of a wide discretion, and does not readily permit mathematical precision, the figures indicated above are useful for present purposes."

165. The Full Court in ***C and C*** (2004) FamCA 819 suggested that something of ***West and Green*** might still survive, but said that contributions had to be looked at "in conjunction with all other contributions".

166. In ***Coghlan*** the majority specifically said (at paragraph 66) that in the context of considering contributions (as well as the other factors in Section 79(4)) the following matters may well be relevant:

1. The relationship between years of fund membership and cohabitation;
2. The actual contributions made by the fund member at the commencement of cohabitation (if applicable), at separation and at the date of hearing;
3. Preserved and non preserved resignation entitlements at those times.

167. The first matter mentioned by the Full Court seems to suggest that there may be life in a ***West and Green*** formulaic approach as a starting point for the consideration of what the initial contributions or post separation contributions were by the member to the fund. In my view, however, it would still be a matter to assess the weight and effect of "time served" contributions in the context of a history of all other contributions made by each party. The second and third matters mentioned in paragraph 66 of ***Coghlan*** might be more important depending on the nature of the fund. For example, it might be important, in a particular case, to know the amount that is in an accumulation fund at commencement of cohabitation.

Conclusions in relation to contributions to the husband's category 2 superannuation

168. In this case, if a pseudo mathematical "time served" approach was taken using the ***West and Green*** formula, the wife would be entitled to 21.7% of the husband's superannuation interest (see paragraph 152 above: 10/23 x ½).

169. I am mindful that Coleman J was sitting as a Full Court in ***McKinnon***. I do not read his Honour's comments to yet be elevating a "time served" formulae to the status of "preferred approach". Probably the ***West and Green*** debate will be revisited by a future Full Court.

170. The superannuation in this case is now, at least, to be considered a species of asset. It is also likely to be property within the meaning of the definition of property contained in Section 4(1) Family Law Act (see paragraphs 105 – 107 above). Subject to what I say at paragraph 234 below, it is no longer treated as a "financial resource". Superannuation can now be split. In my view the "***West and Green***" approach does not fit comfortably with how the Court assesses contributions in relation to other property and assets. The husband's initial contribution to the superannuation (and there is no evidence as to what it was) is eroded over time by contributions made by each party during the course of cohabitation. The wife's contributions as parent after the separation have to be taken into account.

171. One High Court has said that Mrs T's "home maker and parenting" contributions should be taken into account "not in a token way, but in a substantial way" (***Mallett and Mallett*** (1984) FLC 91-507). Another High Court has said that there should not be an "over-zealous attention to the ascertainment of the parties' contributions" (Mason, Dean JJ in ***Norbis and Norbis*** (1986) FLC 91-712 at p 75,168).

172. Having due regard to what the Full Court said in ***Bremner and Bremner*** and ***Pierce and Pierce*** I assess the wife's contributions to the husband's category 2 superannuation at 40%.

Can I state at this point (step 2) whether I will make a splitting order and if so what it will be?

173. There has been little discussion about this question at an appellate level which assists me.

174. The sequence in paragraph 65 of ***Coghlan*** would suggest that the decision about making a splitting order should be made as a fourth step.

175. When referring to "steps" I recognise there is no reference to "steps" in Section 79 Family Law Act. Steps are a gloss created by case law in order to give some logical and predictable order to the consideration of matters under Section 79 Family Law Act. The Full Court earlier referred to three steps (see for example ***Clauson*** (1995) FLC 92-595). Recent Full Courts have referred to four "steps" (see ***JEL v DEF*** (2000); ***Hickey*** (2003). ***Coghlan*** did not explicitly adopt the language of "steps", although when setting out the preferred approach in paragraph 65, without using the word "steps" there are four steps set out in a sequence.

176. In ***K (formerly V) and V*** [2005] FamCA 1207, Boland J determined the splitting order she intended to make prior to her considerations of s.75(2) factors (step 3) and "the just and equitable requirement" (step 4) (see para 146-184 of her Honour's judgment).

177. I shall not be so bold.

178. It is, however, at least important to know at the end of step 2 what splitting order (if any) is **proposed** given that in step 3:

    1. Section 79(4)(d) Family Law Act requires the Court to take into account the effect of any proposed order upon the earning capacity of the party.

    2. Section 79(4)(e) Family Law Act and Section 75(2)(f) require the Court to take into account the eligibility of either party to a pension under any superannuation fund or scheme.

179. Whether the proposed splitting orders fit an overall adjustment of property and assets will be revisited when considering whether the order to be made under Section 79 FLA is just and equitable ("step 4").

Superannuation – proposed orders

180. Counsel for the husband submitted that I should treat the $1,806,607 as one superannuation interest and give the wife 10% of it by way of adjustment against other assets. That is, he would be suggesting an adjustment in the order of $180,000.

181. Counsel for the wife on the other hand referred to ***West and Green*** and submitted that on a ***West and Green*** approach mathematically the wife should be entitled to "25% of it". As set out at paragraph 168 above, the correct mathematical calculation is 21.7%. In final submissions he said that the range of results of the wife's entitlement to the superannuation would be between "25-50%". Again, Counsel for the wife was referring to the whole of the $1,806,607, without differentiating between the two categories of superannuation.

Section 90MT(1)(b) FLA

182. The wife's application for a percentage split of the husband's periodic payments is made pursuant to the provisions of Section 90MT(1)(b) FLA. That provision allows for the court to make a splitting order as a percentage of a splittable payment when it becomes payable in relation to the husband's superannuation interests. An order under this subsection would not normally be considered when a superannuation interest was in the growth phase. The more appropriate order to contemplate in those circumstances would be an order under Section 90MT(1)(a) FLA.

183. Here however the husband's superannuation interest has crystallised and is in the payment phase. Section 90MT(1)(b) was inserted into the Family Law Act for use in exactly the current circumstances. Up until the current time not many cases have taken advantage of the utility offered by Section 90MT(1)(b) FLA.

184. Paragraph 100 of the supplement explanatory memorandum to the Family Law Legislation Amendment (Superannuation) Bill 2000 when referring to Section 90MT(1)(b) FLA notes:-

> *"It is envisaged that this type of order would be most likely to be used when the superannuation interest is in the payment phase when the order is made".*

185. There is a clear advantage in utilising 90MT(1)(b) FLA in this case. The husband's counsel submitted notwithstanding that evidence, one possibility was that the husband may make a recovery in the future that would lead to a loss in his pension. That is total speculation and not in accordance with the current evidence. If it were to happen however and the husband lost his category 1 superannuation (Section 16 PRSA) then a percentage splitting order would

have the effect that the wife also would lose any entitlement under a splitting order of category 1 superannuation.

M and M

186. During submissions reference was made to ***M and M and Ors*** [2005] FamCA 276. This case also involved a police officer in the NSW Police Service who was discharged 'hurt on duty'. This matter was decided by Coleman J in April 2005 and is subject to an appeal to the Full Court which has been argued and is awaiting determination. ***M and M*** was decided prior to ***Coghlan***.

187. In ***M and M*** Coleman J:-

    1. Found that the value produced by the formula under the Regulations was "a quite artificial and largely arbitrary exercise" (paragraph 81).

    2. Declined to make any findings in relation to the contributions made by both parties to the acquisition of the superannuation interests (paragraph 84).

    3. Dealt with the superannuation interest in the context of Section 75(2) and/or Section 79(2) FLA (paragraphs 84 and 97).

    4. Whilst acknowledging that the superannuation interest had two components ("pension to age 60… and… lump sum from age 60") made no order based upon the distinction between those components (paragraph 98).

    5. Rejected the wife's application for an order under Section 90MT(1)(b) as being less attractive than adjusting the wife's entitlement to the husband's pension payments out of the existing assets (paragraph 99).

    6. Found that such a course allowed the parties to be "free to get on with their lives without their finances remaining ameshed for decades" (paragraph 100).

188. I will discuss each of these propositions.

189. With respect to Coleman J, I disagree with proposition 1 for reasons set out in paragraphs 108 – 117 above.

190. As to propositions 2 and 3, the majority in ***Coghlan*** has said this is not the preferred approach. Their Honours said that a trial judge should assess

contributions not only to the property (as defined in Section 4(1) Family Law Act) but also to the superannuation interests (see ***Coghlan*** paragraph 63 and 65). The Full Court in ***Coghlan*** said that when considering and making findings about the types of contributions referred to in Section 79(4)(a), (b) and (c) which have been made by the parties to the superannuation interest the following matters may well be relevant:

190.1. The relationship between the years of fund membership and the cohabitation.

190.2. Actual contributions made by the fund member at the commencement of the cohabitation (if applicable).

190.3. Actual contributions made by the fund member at separation.

190.4. Actual contributions made by the fund member at the date of hearing.

190.5. Preserved and non-preserved resignation entitlements at those times.

190.6. Any factors peculiar to the fund or to the spouse's present and/or future entitlements under the fund (see ***Coghlan*** paragraph 66).

191. But it seems paragraph 65 of ***Coghlan*** is only a discretionary guideline. In ***T and H*** [2005] FamCA 1121 Coleman J, post ***Coghlan***, has departed from the preferred approach. Whilst putting superannuation in that case in a separate pool his Honour chose not to make any contribution findings in relation to it. Superannuation was considered in that case under step 3 (ie as a 75(2) factor) in the same way as the court would have done prior to the introduction of Part VIIIB Family Law Act.

192. On the other hand in ***McKinnon*** (2005) FLC 93-242 Coleman J looked at separate pools of assets and in that case made a finding that the wife had made no contribution to the husband's receipt of a military pension (DFRDB) and had made a 1/6th contribution to the husband's lump sum superannuation with Australia Post superannuation. As indicated earlier, his Honour adopted a ***West and Green*** approach to that calculation (see paragraphs 163 – 164 above).

193. In relation to proposition 4 ***Coghlan*** said it was important to give "proper recognition" to the "real nature" of the superannuation interests in question

(paragraphs 67 and 68). As discussed earlier, in my view, it is important to not only to recognise the distinction in the two components (which I have called category 1 superannuation interest and category 2 superannuation interest), but to treat them differently. In contrast, Coleman J at paragraph 98 says:

> *"even having regard to the two components of the figure ($750,664.62 being the value of the husband's pension to age 60 and $331,061.50 being the lump sum from age 60) any apportionment of the sum would be largely artificial given that the former component cannot be received as a lump sum and the later could not be receivable until 60 years of age."*

194. In relation to proposition 5 whether to make a 90MT(1)(b) order will depend on the facts in a particular case. JT's pension is higher than Mr M's pension. I refer to the effect of the proposed splitting order in this case at paragraphs 213 - 214 below.

195. Coleman J referred to a shortfall between Mr M's fortnightly pension and his stated expenses (paragraph 93 of ***M and M***) but also declined to make a 90MT(2)(b) order in relation to what he called the "lump sum from age 60" component.

196. Proposition 6 is not a matter I give great weight. Any splitting order will almost exclusively require the wife to deal with the trustee not her former husband. Because of the order I intend to make in relation to commutation, there is one occasion where the wife may need to give a written notice to the husband (see paragraph 205 below).

Proposed splitting order under 90MT(1)(b) FLA

197. Much of the debate as to whether or not valuation methodology leads to "a quite artificial and largely arbitrary exercise" is eliminated, if the facts of an individual case allow the utility of Section 90MT(1)(b) to be used. I find that in this case it can be. Based upon contributions, I propose as part of the Section 79 order, to make a percentage splitting order of 15% in the wife's favour in relation to the category 1 superannuation interest and a percentage splitting order of 40% in the wife's favour in relation to the category 2 superannuation interest. I will consider at the fourth step whether that proposed order is just and equitable.

Procedural fairness to the trustee

198. Counsel for the wife assured the Court that the Trustee was aware of the wife's application for a percentage splitting order. Exhibit A contains a letter by solicitors for the wife providing the trustee of the husband's superannuation fund with a copy of the wife's amended application. The trustee's attention was drawn to "order number 12" as sought. Although the amended application as filed has a different numbering, order 12 in the original application filed in May 2003 sought an order for a 50% split of the husband's superannuation entitlement. I am satisfied that procedural fairness has been given to the trustee and the trustee was aware of what the wife's current application is before the court.

The trustee's position in relation to the first two years of periodic payments

199. The trustee in a letter dated 30 January 2006 to the wife's solicitors (exhibit A) says the following:

> *"Invalidity pensions are regarded as splittable payments, only if they have been in the payment phase for more than two years. This is because they fall into the category of workers' compensation or income protection type payments for the initial two years which are not splittable.*
>
> *As JT has been in receipt of an invalidity pension for a period of less than 2 years this interest is not a splittable payment. What this means is that if we were to receive Court orders instructing us to split interests in line with the Family Law Act requirements post 28 December 2002 and an invalidity pension had been paid for less than 2 years, the Fund would record the payment split information as part of the member's record and once the 2 years is up any pension that was payable from then on would be split."*

200. Mr B in his second report makes the following comment in relation to the trustee's position:-

> *"The SAS Trustee Corporation takes the view that the first two years of pension payments for a hurt on duty pension are not splittable. This is based on an interpretation of r.13 of the Family Law (Superannuation) Regulations 2001. This interpretation has not been tested in any reported case.*
>
> *The trustee asserts that the pension is not splittable in the first two years of payment. The trustee does not cite any authority for that proposition but it is probably relying on r.12 of the Family Law (Superannuation) Regulations 2001. The relevant paragraph provides:*
>
> > *"12(1) [Payment not splittable] For subsection 90ME(2) of the Act, each of the following payments in respect of a superannuation interest of a member spouse is not a splittable payment:*

(a) …

(b) …

(c) a pension payment (other than a pension payment to which paragraph (ea) applies) to the member spouse that is made as a result of the member spouse's ill health (whether physical or mental, but not including ill health that would constitute a permanent incapacity within the meaning given by sub-regulation 6.01(2) of the SIS Regulations), unless the payment:

(i) is one of a series of payments of that kind that have been made to the member spouse for a period of at least 2 years; and

(ii) is made more than 2 years after the first payment of that kind was made to the member spouse;

This tortuously worded regulation has the following propositions (but note that paragraph (ea) is not relevant in this matter):

The pension payment is not splittable:

WHEN

1. *the pension payment is made because of member's ill health*

BUT NOT UNTIL

2. *the payment has been made for a period of two years;*

AND

3. *the payment is made more than two years after the first payment;*

BUT

4. *it does not include permanent incapacity payments.*

The pension payments made to JT would meet the first three limbs of the test and the question is whether it is excluded because of the fourth limb. This exclusion is contained in the parenthetical words in r.12(1)(c) and the test is whether the payment satisfies the definition of permanent incapacity in r.6.01(2) of the Superannuation Industry (Supervision) Regulations 1994. That regulation provides:

permanent incapacity, in relation to a member who has ceased to be gainfully employed, means ill-health (whether physical or mental), where the trustee is reasonably satisfied that the member is unlikely, because of the ill-health, ever again to engage in gainful employment for which the member is reasonably qualified by education, training or experience.

If the evidence shows that JT satisfies that definition, then the exclusion applies and the pension payment is splittable."

201. Neither Counsel for the wife or the husband made any specific submission as to whether or not the position of the trustee is correct. The two year period referred to commences in June 2005 and ends in June 2007. The Regulation that the trustee is apparently relying upon has no effect if the person to whom

the pension payment is being made is the subject of a "permanent incapacity". On the evidence before me, JT satisfies the definition of somebody suffering from a "permanent incapacity". He was medically discharged from the police force on that basis.

202. By way of letter to the trustee dated January 2006 the trustee was informed that the matter was listed for hearing in January 2006. The trustee did not seek to intervene in the proceedings as a party. On the evidence before me the trustee's assertion in their letter January 2006, that payments in the first two years are not splittable, cannot be sustained.

203. Counsel for the wife submitted that in any event an "in personam" order against the husband to make a payment from monies he receives from the trustee would be as equally effective. I intend to make that order in the alternative but I expect the trustee to comply with any order the Court may make requiring the trustee to make payment to the wife prior to June 2007. I will suspend the operation of those clauses until 28 days after service of these orders and reasons for judgment upon the trustee. During that 28 day period the trustee may apply to discharge the part of the Section 79 order contained in clauses 5.2 and 5.3 so far as it operates between now and June 2007. The suspension of clauses 5.2 and 5.3 will not effect the operation of clause 6 which requires the husband to make payments to the wife if the trustee declines to make them between now and June 2007.

Commutation

204. As mentioned previously there is the capacity of the husband to request the trustee to partially commute his pension to a lump sum at the age of 55. As set out above (paragraph 125 above) the husband can commune forty percent (40%) of his pension for five years. I do not intend to interfere with the husband's right to do this. If he does, the wife would receive 15% of that lump sum and 15% of the remaining pension until the husband was aged 60.

205. It is my view that the wife should be entitled to a lump sum payment when the husband reaches the age of 60 should she choose that option. If the wife makes that choice and gives written notice to the husband, the husband will be required to commute his whole pension in order to make 40% of the resulting

lump sum available to the wife (see paragraph 136 above). In ***Law-Smith and Seinor*** (1989) FLC 92-050 the husband was a 59 year old NSW Police Officer. The Full Court held that there was power under Section 114(1) FLA to order the husband to instruct the trustee to exercise their discretion to pay the husband a lump sum. In ***C and C (1996)*** (Ellis, Finn and Morgan JJ; unreported delivered 21 March 1996) the Court referred to ***Law-Smith and Senior*** without disagreeing with the observations made in that case.

206. If the wife doesn't choose commutation of the husband's superannuation interest to a lump sum when he reaches 60, then the husband himself can still choose to do so (and the wife would receive 40% of the resulting lump sum).

79(4)(d) – (g) MATTERS

207. I now have to consider how to approach the third step in the circumstances of this case.

208. There is still some debate about the preferred approach when considering 79(4)(d) – (g) matters in the context of an asset by asset approach or a "number of pools" approach to contributions. In this case there are three pools and the contributions to them have been assessed in different proportions.

209. Although contributions under "step 2" might be looked at either on a global basis (one pool of property and superannuation together) or on an asset by asset basis (separate pools), the preferred approach for assessment of any adjustment under Section 79(4)(d) – (g) has still not been defined at an appellate level. A reading of ***Zyk and Zyk*** (1995) FLC 92-644 at page 82, 509 – 510, and the methodology adopted by the Full Court in ***McMahon and McMahon*** (1995) FLC 92-606, would lead to the view that the **whole** of the property and superannuation interests should be the subject of the one adjustment in Section 79(4)(d) – (g). At first instance, in a post ***Coghlan*** case, Justice Moore has followed this approach in ***M and M (Moore J)*** [2005] FamCA 554. Justice Steele in the re-hearing of ***Coghlan*** seems to have also followed this approach.

210. However, Justice Boland in ***K (formerly V) and V*** emphasised that two different approaches were possible and it is the quantum of the adjustment which is

important. Her Honour having assessed contributions on a two pooled approach, said the following under the heading "Conclusions 75(2)":-

> *176. In Coghlan the majority were not dealing with (sic) case where a splitting order was sought. It appears to me from the wide discretion the majority found available to a trial Judge that the way a s 75 (2) adjustment could be made is the same way such adjustments were calculated prior to the introduction of Part VIII as a percentage of the property only, or in an appropriate case as a percentage of, and/or adjustment from the s 4 (1) property and the superannuation whilst having regard to the whole of the financial background of the parties (see Norbis per Wilson and Dawson JJ at 531). What is relevant is not so much the actual percentage but the quantum of the adjustment against the background of the contribution based findings, the effect of the splitting order, and significantly whether the overall findings result in an order which is just and equitable (see Phillips v Phillips (2002) FLC93-104 at para 67).*
>
> *177. Counsel for the wife submitted an adjustment of 5 per cent (which was not quantified as to whether 5 per cent of the s 4 (1) property, or s 4 (1) property and superannuation but impliedly the latter) should be made in her favour. I do not find the factors enumerated above justify such a percentage adjustment, but I do find some adjustment should be made in the wife's favour. I find the wife should receive an additional sum of $30,230. This represents approximately 2.5 per cent of the s 4 (1) property.*

211. Whilst I agree that ***Coghlan*** allows either approach, I am of the view, at least in this case, that the adjustments for 79(4)(d) – (g) factors can more conveniently be made by looking at all of the net property and superannuation together.

212. In doing that, regard needs to be had to the findings in relation to contribution in relation to superannuation and the proposed splitting orders (if any).

The effect of any proposed order on the husband's earning capacity (s.79(4)(d))

213. The husband's current "earning capacity" is his ability to receive his superannuation interest fortnightly. Any proposed order which would give the wife 15% of the husband's current income stream has the effect of reducing the amounts received by the husband by $526 gross and $447 net per fortnight (on the figures as at October 2005).

214. There will be a reduction in child support paid by the husband to the wife of $142 per fortnight ($526 x 27%). The effect in net terms is to reduce the husband's income by $305 per fortnightly and increase the wife's gross income by a similar amount ($447 - $142).

The age and state of health of each of the parties (s.75(2)(a))

215. The husband is presently 42 years of age. The wife is 39 years of age.

216. The wife is in good health.

217. The husband has a disability. At the date of the hearing he had no immediate earning capacity. His future prognosis is unknown. Dr SB on page 5 of his report expresses the opinion that JT is permanently incapable of discharging his duties as a police officer. The condition in his left hip has potential to deteriorate reasonably rapidly and there is a possibility that he may require to proceed to further surgical treatment on his left hip in the near future. The worst scenario would be that he has to have a total hip replacement procedure. He will continue to require permanent ongoing care of his back.

218. The husband has been informed by his specialist Dr W that his hip will deteriorate over time.

219. Dr SB expresses the opinion that JT is permanently restricted in his capacity to perform physical activities requiring heavy or moderately heavy lifting, handling or bending, prolonged or moderately prolonged walking, standing or sitting, any significant amount of climbing or squatting, any running or for activities likely to cause jerking, jolting or jarring of his lower back and/or his left hip.

220. Dr B, the husband's current general practitioner, records that the husband's major ongoing problem is pain from his left hip and low back. His current treatment consists of regular physiotherapy and analgesics. The doctor says the husband has managed to cease narcotic use but continues to require high dose Tramal and Tricylic antidepressants to control his pain.

221. Doctors B, W and SB have all told the husband that he should wait for his hip replacement as long as possible. At his age the longer he waits and puts up with the pain the better it is for him. The husband currently takes extra painkillers for pain in his hip, back and knee.

222. Dr B is of the opinion that the husband will require high doses of various analgesics as well as physiotherapy in the short term. The doctor believes that the husband may be able to return to part time desk work, preferably home-based. However it might be some time before a clearer prognosis is

established. The doctor opines that JT may require some re-training or career counselling to assist him to realise future employment options.

The income, property and financial resources of each of the parties and the physical and mental capacity of each of them for appropriate gainful employment (s.75(2)(b)) and commitments necessary to support himself and herself and the children (s.75(2)(d))

223. As set out above the husband at the current time does not have the capacity for gainful employment. The wife's employment is restricted by the need for her to be the primary carer of the two children of the marriage. In the analysis below I will disregard income currently received on 4B Cross Street as it is clear it is to be sold.

Effect of a splitting order on parties' income and child support

224. Upon the assumption that a splitting order is immediately made which gives the wife 15% of the husband's current gross pension, the effect is as follows:-

Effect on the husband

225.

	Per week
Husband's gross income	$1,751.96
Reduction by 15% splitting order	($263.00)
	$1,488.96
Tax payable on $1,488.96 at 15%	223.35
	$1,265.61
Less payment of child support (as discussed below)	349.00
Total husband's net income	$916.61

226. The husband's expenses as stated in his financial statement are $931.00. Those expenses however include child support at $21 which has already been taken into account in the calculation in the preceding paragraph. His overall expenses are therefore in the sum of $910 per week.

The wife's income (based on the proposed splitting order and reduction in child support

227. The wife's weekly income after the proposed splitting order and reduction in child support is:

Wages	$495.00
Social Security pension	140.00
Child support (see paragraphs 240 - 241 below)	349.00
Splitting order	263.00
Tax on splitting order (at 15%)	(39.45)
	$1,207.55

228. The wife in her financial statement sets out her expenses at $1,348 per week.

229. The above calculation doesn't take into account any effect on social security benefits of the income stream the wife is given by the splitting order (but that effect would not be great).

230. The husband is presently living in modest accommodation being a 1 bedroom unit. The husband gave evidence that he had brought appropriate bedding for the children to stay overnight with him. I am mindful however that he may in the future need to move to accommodation that would better suit him having the boys with him overnight.

231. The husband's father is not in good health. He suffers from motor neurone disease and prostate cancer. He is 81 years of age. He gave evidence from a wheel chair. He still however drives a motor vehicle and assists his son in transportation, particularly in relation to contact with the boys. He gave evidence that upon his death he will be leaving his assets equally to his sons. I have no evidence however as to what he has by way of assets. He currently has a life interest in the property which he lives.

Whether either party has the care or control of a child of the marriage who has not attained the age of 18 years (s.75(2)(c))

232. The wife has the care and control of the two children aged 10 and 8. This is a significant factor and one to be given particular weight.

Eligibility for a pension under any superannuation scheme (s.75(2)(f))

233. Based on the proposed percentage splits, both parties will have the superannuation entitlement that proposed order gives them. Having made contribution findings one needs to be wary of double counting.

234. On the other hand the Court must be mindful that the husband's category 1 superannuation interest are far greater than the wife. In ***Bartlett and Bartlett*** (1996) FLC 92-721 where a trial judge had taken a formulaic approach quarantining a certain part of the superannuation, the Full Court commented:

> *"Care…must be taken, if that approach is adopted, to include in the considerations, the financial resource being that proportion of the present value of the superannuation quarantined after the application of the formula."*

235. I note that the wife has an superannuation interest in Colonial First State Superannuation and receives assistance from the Commonwealth by way of pension.

Standard of living (s.75(2)(g))

236. Both parties will have sufficient for them each to maintain a reasonable standard of living.

The effect of any proposed order on the ability of a creditor of a party to recover a creditor's debt so far as that effect is relevant (s.75(2)(ha)

237. One of the proposed orders will require the husband's brother to be paid back a debt of $25,936. Repayment of that debt to the brother may provide some ability for the husband's brother to provide the husband further assistance in the future given that the husband's brother in the past has demonstrated a capacity to provide such assistance.

The duration of the marriage and the extent to which it has affected the earning capacity of the party whose maintenance is under consideration (s.75(2)(k))

238. As noted earlier, the wife accepted a redundancy in order to follow her husband to G. The fact that the wife took on the primary role of home maker affected her ability to earn to pursue employment during the marriage and continues to do so.

Protecting the wife's continuing role as parent (s.75(2)(i))

239. It was not an issue at the hearing that the wife wishes to continue her role as the party with the primary parenting responsibilities.

Any child support under the Child Support (Assessment) Act 1989 where a party to the marriage has provided, is to provide, or might be liable to provide in the future, for a child of the marriage (s.79(4)(g))

240. The current rate of child support being paid by the husband from his pension is $840 a fortnight. That payment will be reduced by any percentage splitting order of the current pension the husband receives. In the event that the proposed splitting order in relation to current pension is made (namely 15%), then the effect will be that the husband's gross fortnightly pension will reduce by $526 per fortnight (3,503.91 x 15%). The husband currently is paying 27% of that amount by way of child support. Based on current child support percentages, the reduction in the fortnightly child support the husband will pay and the wife will receive is $142 per fortnight (526 x 27%).

241. The new amount of child support will be $698 per fortnight ($840 - $142) or $349 per week.

The terms of any financial agreement that is binding on the parties (s.75(2)(p))

242. There is no financial agreement that is binding on the parties.

Other matters

243. I do not find that any other matter is of any relevant weight as a 79(4) (d) – (g) factor.

Conclusion on 79(4)(d) – (g) factors

244. As set out above I intend to consider what adjustment would be appropriate in dollar terms having regard to, in this case, to the percentage that amount represents in relation to the net property and assets (including category 1 and category 2 superannuation).

245. As a cross check, I shall also consider that dollar amount as it represents a percentage of:

    245.1. The net property and category 2 superannuation; and

    245.2. The net property.

246. My conclusion is an adjustment in the favour of the wife in the amount of $94,354 is an appropriate adjustment for 79(d)-(g) factors.

247. Looked at on the whole of the net property and net assets, this represents an adjustment of 4% (94,354/539,168 + 1,808,607).

248. As a cross check:

    248.1. If the category 1 superannuation is excluded it represents an adjustment of approximately 9.8% (94,354/539,168 + 419,443).

    248.2. As a percentage of the net property (excluding all superannuation) it represents an adjustment of 17.5% (94,354/539,168).

JUST AND EQUITABLE

249. I have found that the wife receives 37.5% of the net property based on contributions. The adjustment of $94,354 in the wife's favour at step 3 is 17.5% of the net property. The result is the wife receives 55% of the net property (excluding superannuation).

250. In addition I confirm my proposal to make a percentage splitting orders of the category 1 and category 2 superannuation in the same percentages as my findings as to the wife's contributions to those assets. The wife's receipt of the category 2 superannuation gives her a nest egg in her retirement. One of the objects of the introduction of Part VIIIB Family Law Act was to provide a mechanism by which both parties might have superannuation to be used to maintain and improve living standards in retirement (see page 6 of the Explanatory Memorandum). These splits of 15% of the category 1 superannuation and 40% of the category 2 superannuation to the wife, fit within what I consider to be a just and equitable order.

251. So, the wife shall receive the following percentage division and value of the property and liabilities, the category 1 superannuation and the category 2 superannuation:

Percentage received by wife	Total value of asset	Value Wife receives
55% of the property and liabilities	$539,168.00	$296,542.00
15% of the category 1 superannuation	$1,389,163.00	$208,347.00
40% of the category 2 superannuation	$419,443.00	$167,777.00
	$2,347,774.00	$672,666.00

252. Standing back, this represents about 28.65% of the net property and assets to the wife.

253. I find this result to be just and equitable in the circumstances of this case and I confirm the orders earlier proposed for splitting the superannuation.

EFFECT OF ORDERS

254. In order to achieve a 55/45 division of the property and liabilities in favour of the wife, the husband needs to pay to the wife $9,850 from his share of the proceeds of the sale of 4B Cross Street. This sum will be expressed as a 3.4% of the net proceeds of sale (9,850/290,000). Consequently the wife shall receive 58.4% of the balance proceeds of sale (55 + 3.4). The effect of the orders I propose will be as follows:

	Assets	Husband	Wife
1.	4B Cross Street	130,500.00	159,500.00
2.	Balance of proceeds of sale of 4C Cross Street	27,488.00	33,596.00
3.	Partial property settlement	40,000.00	
4.	Partial property settlement		40,000.00
5.	Bank account balances		Nil
6.	Bank account balances	Nil	
7.	Motor vehicle	7,000.00	
8.	Nissan motor vehicle		13,000.00
9.	Household contents	4,000.00	
10.	Household contents		1,500.00
11.	Colonial First State Superannuation		19,680.00
12.	Funds in rent account	9,151.00	11,185.00
13.	Moneys payable on husband's father's death	17,100.00	20,900.00
14.	NRMA shares (284 x 5.62)		1,596.00
15.	Employment contract payout (H) (net after payment of superannuation surcharge)	44,108.00	
	Total property	**279,347.00**	**300,957.00**
	Liabilities		
16.	Superannuation surcharge (paid out from employment contract payout)	Nil	Nil

	Assets	Husband	Wife
17.	Car lease	(15,200.00)	
18.	Loan from WT	(11,671.00)	(14,265.00)
	Net property	**252,476.00**	**286,692.00**
19.	Payment by Husband to Wife	(9,850.00)	9,850.00
	Effect of the Orders	**242,626.00**	**296,542.00**
		45%	55%

PROPOSED ORDERS[vi]

1. That pursuant to Section 79, an order be made in the terms of clauses 2 to 12 ("the Section 79 order").

2. That the husband and wife do all things necessary to forthwith join in to sell the jointly owned property known as 4B Cross Street ("the property") at the earliest possible date and:

   2.1. the parties agree on the real estate agent to be appointed for the sale of the properties and, failing agreement within seven (7) days of the date of order either party be at liberty to appoint a real estate agent conducting his business in the approximate locality of the former properties of both parties; and

   2.2. the price for sale (by either private treaty or public auction) be that mutually agreed between the parties, or failing agreement, the price to be the value ascertained by a registered valuer appointed by the President of the Australian Institute of Valuers and Land Administrators (Inc.) New South Wales Division and the parties jointly pay the cost of that valuation; and

   2.3. the properties firstly be offered for sale by private treaty and if not sold within two (2) months of the date of first being listed for sale with the real estate agent, or such extension therefore as is mutually agreed between the parties, then they be offered for sale by public auction to be held within six weeks of the expiration of the said two months or agreed extension thereof; and

2.4. in the event the properties fail to sell at public auction, the properties be re-offered for sale by public auction each ten weeks thereafter until it is sold; and

2.5. upon sale of the properties the proceeds of sale be distributed in the following order, manner and priority:-

2.5.1. in payment of real estate agent's commission and auction expenses (if any) and the legal costs and disbursements of the sale;

2.5.2. in payment of the loan in the sum of $25,936 to WT;

2.5.3. in payment to the wife an amount being 58.4% of the balance proceeds of sale;

2.5.4. in payment to the husband of the remainder of the balance proceeds of sale.

3. Pending sale of the properties pursuant to Order 2 above:-

3.1. the parties shall account to each other in respect of any rental income received from 4B and 4C Cross Street, and the net rental income presently held in the parties' Police Credit Union account be divided 55% to the wife and 45% to the husband;

3.2. neither party shall redraw any part of the repaid housing mortgage loans from Aussie Home Loans or encumber the properties referred to in Order 1 above without the consent in writing of the other party; and

3.3. the parties hold their respective interests in the properties referred to in order 1 above on trust pursuant to these Orders.

4. The amount held in trust for the parties by AJM & Associates, solicitor, being the balance proceeds of sale of the property owned formerly by the parties, namely 4C Cross Street be divided 55% to the wife and 45% to the husband.

5. 5.1 In this clause:

category 1 splittable payment is the fortnightly payments made by the SAS Trustee Corporation ("the trustee") to the Husband prior to the Husband reaching the age of sixty (60) and any lump sum the husband

receives as a result of him choosing to partially commute his pension between the ages of 55 and 60; and

category 2 splittable payment is all other payments made by the trustee to the Husband which are not category 1 splittable payment.

5.2. That in accordance with paragraph 90MT(1)(b) of the *Family Law Act 1975:*

5.2.1. the Wife is entitled to be paid the specified percentage, being 15%, of the category 1 splittable payment to be made from the Husband's superannuation interest in the SAS Trustee Corporation Pooled Fund and payable in accordance with the *Police Regulation (Superannuation) Act 1906* (NSW); and

5.2.2. the Husband's entitlement to that payment from the SAS Trustee Corporation Pooled Fund, is correspondingly reduced.

5.3. That the trustee shall do all such acts and things and have signed all such documents as may be necessary to:

5.3.1. calculate, in accordance with the requirements of the *Family Law Act 1975* and the *Family Law (Superannuation) Regulations 2001* the entitlement created for Wife in paragraph 5.2 of this clause; and

5.3.2. pay the entitlement whenever the trustee makes the category 1 splittable payment out of the Husband's interest in the SAS Trustee Corporation Pooled Fund;

5.4. That in accordance with paragraph 90MT(1)(b) of the *Family Law Act 1975:*

5.4.1. the Wife is entitled to be paid the specified percentage, being 40%, of the category 2 splittable payment to be made from the Husband's superannuation interest in the SAS Trustee Corporation Pooled Fund and payable in accordance with the *Police Regulation (Superannuation) Act 1906* (NSW); and

5.4.2. the Husband's entitlement to that payment from the SAS Trustee Corporation Pooled Fund, is correspondingly reduced.

5.5. That the trustee shall do all such acts and things and have signed all such documents as may be necessary to:

5.5.1. calculate, in accordance with the requirements of the *Family Law Act 1975* and the *Family Law (Superannuation) Regulations 2001* the entitlement created for Wife in paragraph 5.4 of this clause; and

5.5.2. pay the entitlement whenever the trustee makes the category 2 splittable payment out of the Husband's interest in the SAS Trustee Corporation Pooled Fund;

5.6. That this clause has effect from the operative time and the operative time is the date of this order;

6. That in the event that the Trustee does not pay to the wife each fortnight 15% of the category 1 splittable payment between the date of these orders and 4 June 2007 then the husband will pay each fortnight 15% of the amount that he receives each fortnight from the trustee until such time as the trustee commences to make payment to the wife pursuant to the preceding clause.

7. That, in the event the wife gives the husband written notice to do so, the husband shall, within the time required by the trustee and in a form required by the trustee in accordance with s.14K of *Police Regulation (Superannuation) Act 1906*, elect to commute to a lump sum form the pension payable to the Husband by reason of his being hurt on duty, such commutation to take effect upon the Husband reaching his sixtieth birthday.

8. That it be noted that nothing in the preceding clause be taken as a prohibition against the Husband exercising his right at age 60 to commute his superannuation interest to a lump sum.

9. That the wife return to the husband within 14 days the barbeque and Noritake dinner sets.

10. That the wife deliver to the husband within 14 days the family videos and the family photographs and the husband take any copies he wishes and the husband then return to the wife the family videos and family photographs within 14 days of them being delivered to him.

11. That the wife be declared to be the sole beneficial owner of the superannuation entitlements in which she is names as the superannuant.

12. That each party be solely entitled to the exclusion of the other to all other property and chattels of whatsoever nature and kind in the possession of such party as at the date of the making of these orders and for that purpose bank accounts are deemed to be in the possession of the person whose name appears on the bank records thereof, insurance policies are deemed to be in the possession of the beneficiary thereof, any motor vehicles are deemed to be in the possession of the registered owner thereof.

13. That in the event either party refuses or neglects to execute any deed or instrument, the Registrar of the Court be appointed pursuant to Section 106A to execute such deed or instrument of the name of such party and to do all acts and things necessary to give the liberty to the operation to the deed or instrument.

14. That either party have liberty to restore on seven days notice in respect of the implementation of these orders.

15. That the wife forthwith serve upon the trustee a copy of the Orders made this day and a copy of the Reasons for Judgment.

16. That the part of the Section 79 order contained in clauses 5.2 and 5.3 that require the trustee to make payments to the wife between the date of the order and 4 June 2007 be suspended for 28 days after service in accordance with order 15.

17. The trustee be at liberty to apply within 28 days of the date of service to discharge the part of the Section 79 order suspended by order 16.

I certify that the preceding pages are a true copy of the reasons for judgment herein of ***Justice Watts.***

Associate

[i] Descriptions of the characteristics of the PRSA are taken from a report written by Nick Gaudion, Forsythes Forensic Accounting in A & A SYF 2600 of 2005 and can be independently derived from reading the relevant legislation and Mr B's reports in these proceedings

[ii] Ibidem
[iii] Ibidem
[iv] Ibidem
[v] Ibidem
[vi] The proposed orders were varied by a subsequent consent application under the slip rule on 13 April 2006 where orders were made in the following terms:

1. That pursuant to the slip rule, the Orders made on 17 March 2006 be varied by:

   1.1. changing order 1 to insert after the words “clauses 2 to 12” the words “and clause 18”; and

   1.2. adding a new clause 18 in the following terms “That within 28 days of the payment of money to the Husband upon his father’s death, the Husband pay to the Wife or as she may direct in writing the sum of $20,900”.