

## CHAPTER 13:

# SUPER AND DIVORCE

*Superannuation is frequently the major asset or financial resource of the parties to a marriage, and one party may have forgone superannuation coverage for a number of reasons, including what was considered to be adequate coverage on the part of the other party to the marriage to provide for both parties in the future.<sup>1</sup>*

### Marriage breakdown

13.1 The problems of low levels of superannuation for women are exacerbated where marriage breakdown occurs and the female partner, who may have had a lengthy absence from the workforce, finds herself with no superannuation in her own right and limited employment prospects.<sup>2</sup> Case Study 2 presented by Boranup Community states:

By 31 she was divorced, a single parent and employed by the State government. She did not contribute to the super scheme as her limited income as a clerk was spent on day care and accommodation. The divorce settlement did not entitle her to her spouse's superannuation.<sup>3</sup>

13.2 As has been outlined in Chapter 2, women's earnings, and hence their superannuation accumulations, are such that few retired women have superannuation as their main source of income. For 36 per cent of women the main source of income at the start of their retirement was 'someone else's income'.<sup>4</sup> For many women, it is their male partner's superannuation scheme which is the one on which their future income relies.<sup>5</sup> They have foregone superannuation coverage for a number of reasons, including assuming a carers role in the family, typically based on the belief that their partner's superannuation provided adequate coverage for both parties in the future.<sup>6</sup>

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<sup>1</sup> The Hon Peter Duncan, MP, Parliamentary Secretary to the Attorney General, SW Sub No 79

<sup>2</sup> AMP, SW Sub No 55

<sup>3</sup> SW Sub No 26

<sup>4</sup> Australian Bureau of Statistics, *Australian Woman's Year Book* 1994, Catalogue No. 41240, p 105

<sup>5</sup> Minister for Women's Affairs, Victoria, SW Sub No 66

<sup>6</sup> Duncan, op cit

13.3 However, as pointed out by the Women's Action Alliance, increasing rates of divorce mean that women can no longer assume that they will be supported by their husbands in retirement.<sup>7</sup>

13.4 In 1993, there were 48 324 divorces in Australia, accounting for between 11 and 12 per 1 000 married women.<sup>8</sup> Financial dependency associated with non-paid work during marriage generally means a decline in the standard of living after divorce - two thirds of women have a decline in standard of living after divorce.<sup>9</sup>

13.5 The ease with which each party can be given rights to superannuation assets, and the time at which this should be done, are at the heart of whether the entitlements ultimately awarded in the case of divorce are just and equitable. The question of whether superannuation assets received from a divorce settlement should be subject to the same preservation rules as all other superannuation was raised.<sup>10</sup>

### **The division of property**

13.6 Until the late 1970s the Family Court took the view that equality should be the starting point in dividing property. However, in *Mallet v Mallet*<sup>11</sup> the High Court held that there was no legislative basis for presumption of equal shares, and stressed the discretionary basis of the *Family Law Act 1975* (the Act).<sup>12</sup>

13.7 The Act requires the Court, in considering what order should be made with respect to property, to have regard to the contributions made by each party to the acquisition of property. The Act also recognises that a party may contribute indirectly, or make a non-financial contribution, to the acquisition of property. This may include the contribution made by a party as a home maker or as a parent of children of the marriage.<sup>13</sup>

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<sup>7</sup> SW Sub No 15

<sup>8</sup> Australian Bureau of Statistics *Australian Women's Year Book 1994* p10

<sup>9</sup> Weston R, quoted in Walpole S, *Indirect Discrimination and Superannuation in Women and Superannuation: Selected Seminar Papers*. EPAC Background paper No 41, August 1994, p 121

<sup>10</sup> Capstick D, SW Sub No 60

<sup>11</sup> (1984) 156 CLR 605

<sup>12</sup> Walpole, op cit, p 122

<sup>13</sup> Duncan, op cit

13.8 The Sex Discrimination Commissioner submitted that women fare badly in a discretionary system where judges undervalue work in the home compared to earning a living, suggesting that the going rate in the Family Court for work in the home has been 20-30 per cent of financial contribution.<sup>14</sup>

### **The inclusion of superannuation assets in property settlements**

13.9 Although the Court usually regards accumulated superannuation funds as joint assets, there is no requirement to take retirement benefits into account in any property settlement.<sup>15</sup> A review undertaken by the Australian Institute of Family Studies found that, in the mid-1980s, superannuation was not taken into account in the settlement in 60 per cent of divorce cases and in three quarters of those cases, people were not advised about its relevance.<sup>16</sup>

13.10 Ms Jane Reynolds, Victorian Department of Justice, accepted that superannuation was increasingly being acknowledged in the settlement of assets on divorce in the Family Court, but put the view that it ought to always be factored into the settlement of assets on the point of divorce, as it has been found that women have been disadvantaged by that not happening.<sup>17</sup>

13.11 The AMP presented a strong argument in its submission to the Committee in support of inclusion. The AMP argued that:

Currently, when marriage breakdown occurs, the court can choose to take into consideration any accrued superannuation held by the partners... Clearly, it is in both parties interests if there is an option for the superannuation asset at the time of marriage breakdown [to be] equitably divided between the parties.<sup>18</sup>

13.12 The Committee supports this position, but acknowledges that no one formula will be appropriate for every instance.

13.13 The Committee understands that legislation to be introduced this year will maintain the status quo, that is, it will continue not to include superannuation as property of the marriage.

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<sup>14</sup> Walpole, op cit p 122

<sup>15</sup> Women's Action Alliance of Australia. SW Sub No 15

<sup>16</sup> Walpole op cit

<sup>17</sup> Evidence, pp 128, 129

<sup>18</sup> SW Sub No 55

## The treatment of superannuation entitlements on marriage breakdown

13.14 The difficulties for the courts in dealing with superannuation result from the question of whether superannuation falls within the definition of 'property' under the Act and how superannuation assets are valued.<sup>19</sup>

13.15 The following issues are pertinent in any discussion on the treatment of superannuation in family law:

- whether or not superannuation can be considered property under the Act;
- the characteristics of superannuation funds themselves and the implications these may have for proceedings in the Family Court;
- the valuation of superannuation entitlements; and
- the method of affecting a final settlement which includes the consideration of the superannuation.<sup>20</sup>

13.16 The Court has indicated that, wherever possible, superannuation entitlements will be treated as divisible property of the marriage. Decisions are made in relation to superannuation in the context of individual cases before it with the approach adopted depending upon the facts in each case.<sup>21</sup>

13.17 The following approaches have been used:

- hearings adjourned or orders deferred until superannuation becomes payable; or
- consideration of superannuation as a financial resource.

13.18 Each approach has advantages and disadvantages.

### *Deferral of hearings or orders*

13.19 Deferring orders until the superannuation becomes payable could create problems if the contributing spouse dies or other significant changes occur in the circumstances of the parties during the period of deferral of the operation of the order. Such an approach does not accord with the 'clean break' principle by

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<sup>19</sup> Joint Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act, *The Family Law Act 1975: Aspects of its Operation and Interpretation*, Nov 1992, p 237

<sup>20</sup> *ibid*

<sup>21</sup> Duncan, *op cit*

which the Family Law Act operates to ensure an end to the financial relationship of the parties.<sup>22</sup>

*Considering superannuation as a financial resource*

13.20 Superannuation is not considered as property until it is vested in the individual member's name. If superannuation entitlements are not characterised as property, under the Family Court's discretion they may be apportioned as a financial resource.<sup>23</sup>

13.21 This may allow the Court to take into account those financial resources to the extent that the other party may gain a greater percentage of the other property available for distribution. This has meant that wives have often been compensated for the loss of an interest in their husband's funds by receiving increased amounts of other assets.<sup>24</sup>

13.22 *Matrimonial Property*, prepared for the Australian Law Reform Commission in 1987 (also known as the Hambly Report), outlined three major approaches judges may use to value superannuation if the benefits are treated as a financial resource:

- the 'notional realisable value' which assesses the amount of benefit that would be payable if the member resigned at the date of separation or at the date of the hearing;
- the 'discounted prospective benefit', which apportions the amount of benefit that would be payable on retirement in the same proportion that the period of co-habitation during which the member was a member of the scheme bears to the total period of membership of the scheme, and then discounts the figure to give its present value; and
- the 'take it into account' method, where the prospective benefit may be taken into account without detailed inquiry into its value.<sup>25</sup>

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<sup>22</sup> Office of the Cabinet, Queensland. SW Sub No 48

<sup>23</sup> *Noel v Noel* (1981) FLC 90-035 in Joint Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act *The Family Law Act 1975: Aspects of its Operation and Interpretation* Nov. 1992 p240

<sup>24</sup> SW Sub No 48

<sup>25</sup> Australia Law Reform Commission *Matrimonial Property* referred to in *Joint Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act*, op cit, p 241

13.23 Consideration of superannuation in this way has not been universally endorsed due to a number of considerations. There is a fair degree of dissatisfaction with cash settlements as, in most instances, no real savings are available to be retained for the future once expenditure to finalise the home mortgage or extra living expenses are taken out. The other side of the coin is that the partner who has to make the cash payment may not have the funds to make such a payment and he or she may have to borrow at fairly substantial rates.<sup>26</sup>

### *Super or housing*

13.24 Another option is trading off superannuation for housing. Housing and poverty are closely related issues and property settlements that trade off superannuation for housing may be desirable. Ms Roz Lambert argued that there are many separated and divorced women who do not own housing and who will therefore find themselves in poverty in retirement in 15 years time.<sup>27</sup>

13.25 However, the Office of the Status of Women submitted that the fact that women tend to have custody of children should not preclude them from either adequate housing or retirement income.<sup>28</sup> However, the reality of marriage breakdown is that the same resources are required to finance two households and two separate retirement incomes.

### **Solutions to the super and divorce question**

13.26 Dealing with superannuation assets in the event of divorce has been, and continues to be, the focus of discussions in a number of official fora.

13.27 Past reports include:

- *Family Law in Australia* (the first report of Joint Select Committee on the Family Law Act, 1980);
- *Matrimonial Property* (also known as the Hambly Report, for the Australian Law Reform Commission, 1987);
- *Superannuation and Family Law* (Family Law Council, 1987);

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<sup>26</sup> Morgan R, Evidence, p 535

<sup>27</sup> SW Sub No 56

<sup>28</sup> SW Sub No 97

- *Collective Investment Schemes - Superannuation* (Australian Law Reform Commission, 1992); and
- *The Treatment of Superannuation in Family Law* (Attorney-General's Department, 1992)

13.28 The Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act was established in response to community dissatisfaction with matters ancillary to divorce and the cost of justice.

13.29 That Committee recommended that superannuation be considered as property and that the Family Court be given a discretionary power to split a superannuation entitlement between spouses in proportion equal to the length of marriage or cohabitation by reference to the total period of contribution to the fund.

13.30 The recommendation of the Joint Select Committee was not accepted by the Government. Instead, a Governmental Working Group (Working Group to Develop a Scheme for Splitting Entitlement to Superannuation Under the Family Law Act) was formed to develop a scheme within the following parameters:

- (i) superannuation will be dealt with as a separate and discrete asset;
- (ii) the asset will be distributed between the parties, upon breakdown of marriage, equitably by operation of law;
- (iii) apportionment of the entitlement will be effected by reference to the period of cohabitation and the period of contribution to the fund; and
- (iv) the proposal is to be consistent with the retirement incomes policy.<sup>29</sup>

13.31 The Working Group consists of representatives of the Attorney-General's Department, the Department of Prime Minister and Cabinet, including the Office of the Status of Women, the Treasury, the Department of Finance, the Australian Taxation Office, the Insurance and Superannuation Commission, the Department of Social Security, and consultants from the Family Court of Australia and the Association of Superannuation Funds of Australia. The Family Law Section of the Law Council of Australia has been added as a consultant.

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<sup>29</sup> Government response to the report by the Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act 1975, *Family Law Act 1975 Directions for Amendment*, December 1993, p 42

13.32 Mr Morgan, Senior Government Counsel in the Family and Administrative Law Branch of Attorney-General's Department, informed the Committee that under the proposal being developed by the Working Group:

... superannuation would not be treated as property but as an asset or as a financial resource for the future. It would still retain its identity as a retirement benefit and it would be a retirement benefit for both parties...what we were seeking to do was to arrange for [the contributor's] entitlement to be split at the time of dissolution, or at the timing of the hearing of the matter, into two separate components - one in [one] name and one in [the] ex-spouse's name. That would continue to run in [the spouse's] case until such time as the normal vesting time came, in which case [the spouse] would then be entitled to pensions.<sup>30</sup>

13.33 The Committee is extremely concerned, however, that this Working Group does not appear to have come any closer to a solution to the issue. It is two years since the Government responded to the Joint Select Committee's Report and established the Working Party, yet options for reform have not been published. Whilst this Committee fully appreciates the difficulty of the problem, it was concerned to hear Ms Susan Ryan, Executive Director, Association of Superannuation Funds of Australia, comment that:

as yet, that aim [to develop an equitable formula for division of the superannuation benefits on divorce] has not been achieved. It is extremely complex and we have found the longer we are working on it the harder it is to solve it in an equitable way.<sup>31</sup>

13.34 The Committee finds it unacceptable that the Attorney-General's Department does not see a solution being developed that can be submitted to Government until at least 1996 and agrees with Mr Morgan that 'that is a fairly unsatisfactory state because it really leaves one major asset of the whole relationship to the current rules'.<sup>32</sup>

### **Spouse contributions**

13.35 During the course of the inquiry a number of witnesses argued that the establishment of separate superannuation accounts during the marriage, particularly during the time that the female partner is not engaged in the labour force for childrearing or other caring responsibilities, would go some way to

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<sup>30</sup> Evidence, p 534

<sup>31</sup> Evidence, pp 191, 192

<sup>32</sup> Evidence, pp 534, 535



overcoming the difficulties posed by superannuation entitlements as a result of divorce.<sup>33</sup> This issue is dealt elsewhere in the report (See Chapter 10: Spouse Contributions)

## Conclusion

13.36 There is little doubt that the treatment of superannuation entitlements in the event of marriage breakdown has the potential to impact significantly on the financial security of divorced women, particularly those women who have not accumulated benefits due to other demands being placed on them which have limited their participation in the paid workforce.

13.37 There is also little doubt that it is a complex issue, the solution to which will not be easy to find.

13.38 On the evidence presented, the Committee is convinced that failure to include superannuation assets as part of the marriage property is likely to significantly disadvantage a substantial proportion of women. Such assets should be considered in the settlement of assets at the point of divorce.

13.39 The Committee has been presented with a number of options which appear to have merit. However, given that other fora are addressing this issue, the Committee does not believe it is appropriate to make recommendations at this stage.

13.40 It does, however, call on the Government to allocate priority to the resolution of this very difficult area of superannuation.

### **Recommendation 13.1:**

**The Committee is greatly concerned with the serious delay that has occurred in the resolution of the treatment of superannuation assets in the event of marriage breakdown and recommends that the rectification of this matter be given priority.**

13.41 The Committee strongly encourages the Attorney-General to have appropriate legislation in place for consideration by the Parliament at the earliest possible time.

<sup>33</sup> Evidence, Smit P, p 41; Olsberg D, pp 222, 223; Evatt K, p 475