

## Superannuation and divorce in Australia

JOHN DEWAR, GRANIA SHEEHAN AND JODY HUGHES

**Superannuation has become an increasingly important component of family wealth in Australia. However, findings from a recent Institute study show that most divorcing couples fail to consider superannuation in the division of property. In light of new proposals to divide superannuation benefits on divorce, pension-splitting may improve the post-divorce financial position of some women, but may worsen it for others, depending on its effect on the treatment of other assets.**

Savings for retirement in the form of superannuation funds have become an increasingly important form of wealth in Australia. Estimates suggest that the superannuation funds represents 15 per cent of the personal wealth of all Australians, second in importance only to the family home (Bordow and Harrison 1994; McCallum and Beggs 1991). The absolute and relative importance of superannuation as a family asset is likely to increase as a consequence of the Federal Government's policy of promoting self-support in retirement through compulsory superannuation membership.

Entitlement to the wealth represented by superannuation funds is unevenly distributed between men and women, because entitlements under most superannuation schemes are linked to earnings from employment (ALRC 1994; Millbank 1993; Sharp and Broomhill 1988). This disparity is concealed for married women so long as they can look to men for support in their retirement. However, divorce brings gender disparities in access to superannuation to the surface in an acute form.

### Current legal framework

As things stand, individuals and the Family Court of Australia are constrained in the way they deal with superannuation entitlements on divorce. The Family Court only has the power to deal with property that is owned by the parties at the date of the hearing (Family Law Act 1975, s.4(1)). Superannuation assets that are payable only on retirement, or on some other qualifying event,

are not considered 'property' for these purposes, unless that event has occurred and benefits have been paid (In the marriage of Crapp (12979) 5 Fam LR 47).

The Family Court has sought to escape these limits on its powers in two ways (Harrison and Harrison (1996) 20 Fam LR 322; Finlay et al. 1995:295-299).

- The first, sometimes called *offsetting* or 'adjustment of non-superannuation assets', entails increasing the dependent spouse's share of presently existing property to compensate for the loss of future superannuation rights.
- The second entails *adjourning* part of the property proceedings until the superannuation benefits become payable, and then making an order with respect to those benefits once they become payable.

Both approaches are unsatisfactory. Offsetting assumes that the liable spouse has sufficient assets to make good the other's loss of superannuation rights, and it is not a guarantee of an adequate retirement income for the recipient. Adjournment means that financial issues between spouses remain unresolved, possibly for many years after their divorce; and further, the actual payment of benefits may depend on events outside the control of the liable spouse – for example, under the terms of some schemes, a wife would lose entitlement altogether if the husband dies before he becomes entitled to the benefits, since earmarking does not give her a share of his superannuation in her own right.

## Policy reform

In May 1998, the Australian Federal Government issued a Position Paper, *Superannuation and Family Law*, which proposed a new regime for dealing with superannuation interests after separation. Essentially, this would split superannuation benefits attributable to the period of cohabitation. Each party would take a separate share of accrued superannuation assets, either by a transfer of money into a different fund, or into a separate account in the same fund.

Parties would be encouraged to agree on the proportions of the split, with legislation supplying a default division of 50:50. The 1998 Position Paper places a heavy emphasis on the promotion of private settlement of superannuation issues by the parties themselves. The knowledge that the Family Court would be obliged presumptively to split the superannuation assets equally provides the parties with a default rule that will steer private negotiations.

However, under the proposals, the Family Court would be given some discretion to depart from an even split, in defined circumstances. These are:

- where the amount of superannuation is too small to divide;
- where there are multiple superannuation interests held by the parties;
- where it would otherwise be necessary to sell the family home and that would cause disruption the care of children;
- where it would be necessary to sell a business which would reduce the earning capacity of one of the parties.

In March 1999, the Government issued a Discussion Paper, *Property and Family Law: Options for Change*, outlining two possible options for reform of the system of property division in Australia. Briefly, the first is a continuation of the current separate property regime but with a presumptive starting point of equal sharing based on an assumption of equal contribution. The second is a more radical proposal in which certain property would be classified as community property to which each party would have an equal entitlement.

Superannuation would be divisible under either option. Under the first, it would be divided in the same way as any other item of property. This means that there would be a presumption of an equal split that could be departed from. Superannuation would not be singled out for special treatment. Under the second option, the Government's original proposals would apply, so that a departure from an equal split would be available only on the grounds specified above.

Under the current system the courts are vested with considerable discretion in determining: (1) the value of assets available for distribution; (2) the relative value of the parties' contributions to those assets; and (3) the weight to be attached to the parties' future needs. In contrast, the proposed reforms suggest that the starting point for the distribution of property might be equal sharing.

This signals the prospect of considerable change in the context in which superannuation is considered. At the time the 1999 Discussion Paper was released by the Attorney-General's Department, the Attorney-General announced that, whatever form any amendments to property might ultimately take, the Government would be seeking to amend the Family Law Act to give the court a new power to divide superannuation benefits.

## The Institute study

In late 1997 the Australian Institute of Family Studies conducted the *Australian Divorce Transition Project* which looked at superannuation in divorce. The most significant findings are as follows.

- The proportion of couples at least one of whom has superannuation is now 82 per cent, up from 55 per cent in the 1980s.
- Superannuation entitlements are still unevenly distributed between genders, in favour of men (76 per cent of men had superannuation entitlements on divorce, and 34 per cent of women).
- Men and women were generally ill-informed about their spouses' superannuation, and women were generally less well informed than men about their own and their former spouse's superannuation. Eighty per cent of men and 64 per cent of women who reported having superannuation were able to give a value for their own entitlements at the time of separation; while only 47 per cent of men and 36 per cent of women who reported that their former spouse had superannuation were able to give a value for their former spouse's entitlements at the time of separation.
- The median value of women's superannuation at divorce was \$5,590 compared with \$26,152 for men.
- The absolute value of parties' superannuation at divorce depends on a range of factors. Age at divorce is the key factor, but asset wealth, time out of work and the number of children are also significant. However, the effects of these factors is not the same for women and men. The more children in the family, for example, the lower the value of women's superannuation, while the value of the husband's superannuation increased in line with the number of children.
- Superannuation accounts on average for 25 per cent of the parties' total asset wealth, up from roughly 14 per cent in the 1980s; but the relative importance of superannuation varies significantly according to the parties' total asset wealth so that the smaller the total asset pool, the greater the relative significance of superannuation.
- Superannuation is considered, taken into account or explicitly divided in a minority (46 per cent) of cases.
- The likelihood that superannuation will be taken into account on divorce is related to its absolute value (the more valuable in absolute terms, the more likely it was to be taken into account) and its relative value (the more valuable in relative terms, the less likely it was to be taken into account). The latter finding was especially evident in marriages of low asset wealth, where superannuation has greater relative significance to the parties but is least likely to be taken into account. However, for older couples, for whom superannuation was likely to be significant in relative and absolute terms, there was a higher likelihood of superannuation being taken into account.

## Significance of super in property settlements

The findings suggest that policy makers should have regard for the following three aspects of superannuation on divorce: (1) the need for the provision of information and education about superannuation entitlements; (2) the vulnerable position of

women from low asset marriages; and (3) the growing importance of superannuation as a family asset.

### Provision of information

The findings suggest that there are low levels of awareness among divorcing couples about their own superannuation entitlements, and those of their spouses. This is especially true for women. Providing information to parties about their own and, more importantly, their partner's superannuation entitlements, is a first step to ensuring that it is properly taken into account in the divorce process.

The Government's Position Paper (1998:38) makes two important recommendations in this context. First, the paper proposes to create a new legal duty on a spouse to disclose any interest he or she may have in a superannuation fund. Second, the paper proposes the creation of a new duty on superannuation trustees to provide information about a member's interest in the fund to that member's spouse, where requested in the event of marriage breakdown.

While these are important and, as Institute research suggests, much needed reforms, there is a concern that the proposed procedure for obtaining information may be too cumbersome, and too dependent on the cooperation of the contributing spouse, to be effective. In addition, a spouse needs to be aware that superannuation is an issue *at all* in order to make use of the proposed rights to information, and this points to the need for a broader campaign of raising awareness of superannuation amongst parties and their advisers.

### Position of women from low asset marriages

In marriages with minimal asset wealth, superannuation, where it existed, was of greater relative significance as an asset than in wealthier marriages, yet it was least likely to have been taken into account in divorce. There is a real possibility that women in this group have exited a marriage leaving what may be the parties' most valuable financial resource wholly in the hands of the husband, yet without obtaining any compensating transfer of other non-superannuation assets.

One possible explanation for this is that women in this group are least likely to have legal advice or assistance on divorce, because men and women with low assets were most likely to have settled their property matters without formal legal intervention. For this group, there may be real benefits to be gained from improved awareness of superannuation entitlements; and perhaps some improvement would flow from an equal split in superannuation on divorce.

### Importance of super as a family asset

The findings suggest that superannuation has grown significantly in importance as a family asset since the early 1980s. More couples now have superannuation assets of some description, and superannuation assets are now of greater *relative* significance than they were previously. Indeed, in some low asset marriages, superannuation may be close in value to the family home.

To understand the significance of this, it helps to draw a distinction between basic and non-basic assets. The basic assets (matrimonial home and furnishings) are the assets most often used to compensate women in property division. Non-basic assets (superannuation, investments, and businesses) tend to be divided in favour of men (on

grounds of contribution). The trend in the shifting composition of family wealth is a trend away from basic to non-basic assets suggesting that, unless action is taken, wives' shares of assets on divorce may decline.

In other words, the trend is a shift in couples' investment priorities from an asset where women's and men's contributions are considered equal (although the nature of the contribution takes different forms) to an asset that currently is classified as non-basic and divided along gender lines, or not at all.

### An equal split of super?

The Institute's analysis suggests that a 50:50 split of superannuation assets would improve the position of women from low asset marriages on divorce, and would improve the position of other women, although to a lesser extent. However, in drawing this conclusion, it is assumed that *all other asset transfers would still be made* – yet there are reasons why this might not turn out to be the case in practice.

The present system of property distribution on divorce in Australia is a discretionary one, guided by general principles and specific factors. The Family Court is directed to distribute the property of the parties in recognition of their past contributions and future needs. The courts are vested with considerable discretion in determining the value of assets available for distribution, the relative value of the parties' contributions to those assets, and the weight to be attached to the parties' future needs.

In contrast, the Government's proposal in relation to superannuation is a default rule of equal division of superannuation assets. The effects of this default rule on the division of other assets under the current law is uncertain.

While under the current system offsetting transfers may take place to compensate for a wife's loss of superannuation, one consequence of an equal split of superannuation may be that these offsetting transfers would cease to occur, or would take place in smaller amounts. In the short term this may result in no overall net benefit to the wife and, indeed, may produce a worsening of her immediate post-separation position, because she will have lost an immediately enjoyable asset in exchange for one that cannot be accessed until some point in the future.

However, the Institute data suggest that offsetting transfers currently take place in only a minority (46 per cent) of cases, and that they are especially unlikely to be taking place in favour of women from low asset marriages. An equal split of superannuation would mark an advance for such women who are unlikely to forego offsetting transfers, simply because they wouldn't have received an offsetting transfer in any event. If anything, this underlines the need for monitoring of the new regime, if it were to be implemented.

A wife's ability to make adequate post-divorce contributions to her 'own' superannuation fund, once split from her former husband's fund, will depend on her ability to find remunerative employment – which remains more difficult for women post-separation than for men. An equal split may not provide a guarantee of security in retirement, while possibly adding to the short-term financial difficulties facing many women after divorce (McDonald 1986). This suggests that there may be a case for a split of superannuation that is *more* generous to the wife than 50 per cent.

So far, it has been assumed that the Government's proposals for superannuation would be superimposed on the existing law. However, the existing law may itself be changed with the introduction of a firmer starting point of equal division for all property. Because there are so many variables in play, it is hard to make predictions on the basis of the data of the effects of any such broader change.

However, the findings support three propositions:

- An equal split of superannuation may be an improvement for some women on the current position, because superannuation is often ignored.
- There is a risk that a reduction in the share of immediately enjoyable assets that might flow from an equal split of superannuation, or an equal split of all property including superannuation, would leave other women in a worse financial position immediately after divorce than is currently the case.
- An equal split of superannuation fails to recognise that men and women are not equally able to provide for their own retirements, a fact that may justify giving women more than a half share of superannuation assets.

### Is there a case for more than half?

The rationale offered for an equal split is a mixture of 'partnership', 'expectations' and 'needs' reasoning – that is, superannuation assets are built up by joint efforts during a marriage; but for divorce, each spouse has a reasonable expectation of equal sharing of the benefits in retirement; and each spouse has the same needs in retirement.

However, given that the parties' ability post-divorce to accumulate superannuation will depend on their earning capacity, it seems unlikely that an equal split of superannuation at the time of divorce will ensure that the eventual retirement needs of each are equally met. It could be argued, for example, that needs-based reasoning should lead to a *more generous* split in favour of the wife, since her ability to provide for herself is usually less than the husband's. Alternatively, there might be a case for a departure from an equal split of superannuation where a person has income or housing needs that could not be met if superannuation were equally split. This would permit a court to give one party a greater share of existing assets to meet greater existing needs, while leaving the other with more than half of the superannuation.

The increasing importance of superannuation suggests that an equal split may unduly limit wives' claims to what may be an asset close in significance to the family home. Given that superannuation is growing in relative importance, and that the proposed rule would 'quarantine' it and limit claims to 50 per cent, the net effect may be to depress the overall shares going to women.

When added to the postponed nature of the superannuation asset, and its uncertain effects on the

other elements of a property settlement, the picture is one that, again, needs careful monitoring. In particular, Institute findings suggest that the policy enshrined in the draft UK Pensions Sharing Bill, of avoiding a presumptive equal split of pension entitlements but allowing pension splitting to remain a matter of discretion (Rae 1998), may be a wiser policy than that currently proposed in Australia.

### References

- Attorney-General's Department (1999), *Property and Family Law: Options for Change: A Discussion Paper*, Commonwealth of Australia, AGPS, Canberra.
- Attorney-General's Department (1998), *Superannuation and Family Law: A Position Paper*, Commonwealth of Australia, AGPS, Canberra.
- Australian Law Reform Commission (1994), *Report No. 69, Equality Before the Law: Women's Equality*, AGPS, Canberra.
- Bordow, S. & Harrison, M. (1994), 'Outcomes of matrimonial property litigation: an analysis of Family Court cases', *Australian Journal of Family Law*, vol. 8, no. 3, p. 264.
- Finlay, H., Bailey-Harris, R. & Otlowski, M. (1995), *Family Law in Australia*, 5th edn, Butterworths, Sydney.
- McCallum, J. & Beggs, J. (1991), 'Determinants of household wealth: assets of divorcing couples in Australia', *Australian Economic Review*, no. 96, 4th Quarter.
- McDonald, P. (ed.) (1986), *Settling Up: Property and Income Distribution on Divorce in Australia*, Australian Institute of Family Studies and Prentice-Hall of Australia, Melbourne.
- Millbank, J. (1993), 'Hey girls, have we got a super deal for you: reform of superannuation and matrimonial property', *Australian Journal of Family Law*, vol. 7, no. 2, p.104.
- Rae, M. (1998), 'Solving the pensions issue', *Family Law*, vol. 28, p. 626.
- Sharp, R. & Broomhill, R. (1988), *Short-changed: Women and Economic Policies*, Allen & Unwin, Sydney.

### Cases

- Harrison and Harrison* (1996), 20 Fam.LR322.
- In the marriage of Crapp* (1979), 5 Fam LR 47.

### ABOUT THE STUDY

The Australian Institute of Family Studies *Australian Divorce Transition Project*, conducted in 1997, is a random national telephone survey of 650 divorced Australians designed to examine the divorce transition and its consequences (a) for parents and (b) for an older cohort of former spouses from longer-term marriages (15 years or more). Property division was a major theme within the study.

This Briefing Paper was compiled by Jody Hughes, AIFS Research Officer, from Working Paper No. 18, *Superannuation and Property Division in Australia*, by John Dewar, Grania Sheehan and Jody Hughes, to be published by the Institute in May 1999. The authors acknowledge the assistance of Margaret Harrison who reviewed an earlier draft of this Briefing Paper.



Australia's key source of research and information on families

AUSTRALIAN FAMILY BRIEFING NO.6 John Dewar, Grania Sheehan and Jody Hughes  
 © Australian Institute of Family Studies – Commonwealth of Australia 1999  
 ISBN 0 642 39460 1 ISSN 1038-0507  
 Design and layout by Double Jay Graphics Printed by XL Colour Printing  
 300 Queen Street, Melbourne, Victoria 3000, Australia  
 Phone (03) 9214 7888 Fax (03) 9214 7839 Internet: www.aifs.org.au/