

## Alternatives to Splitting a Defined Benefit Superannuation Pension

In **Wylie & Russo [2015] FCCA 3257** both parties were aged 67. They had cohabited for about 26 years but there were no children of the relationship.

The following facts emerged:

- the husband had an entitlement to a Defence Force superannuation benefit which was already being received as a non-commutable indexed pension at the time of the hearing;
- the husband's entitlement from his defined benefit superannuation was to an annual pension of \$33,232 adjusted annually in accordance with CPI regardless of what income he earned from other sources;
- neither party proposed a split the husband's pension payments;
- the husband's interest in receiving future payments was contingent upon his survival, he had no control over it, and his entitlement would terminate upon his death;
- the current value of the husband's superannuation pension as valued pursuant to the Superannuation Regulations was \$416,804; and
- the parties' assets excluding the husband's pension had a net worth of approximately \$1.5M.

Due to the characteristics of the fund, **Judge Cole** was concerned that bringing the husband's superannuation entitlement to account in the pool as a lump sum had a significant degree of artificiality about it.

However the Judge also reviewed Family Court cases which took the alternative view that attributing a lump-sum value to a non-commutable pension was not artificial. Those Judges had considered it reasonable to conclude that such a pension had a real value given that a similar purchase price was required to obtain an annuity with the income stream of the amount of the husband's entitlement. In those matters much of the debate as to whether the valuation methodology was an artificial exercise was eliminated by splitting the fund by dividing the pension.

While the superannuation pension was certainly able to be valued pursuant to the legislation, it did not have the same characteristics as other assets, in that the husband was unable to access the benefits of a lump sum of \$417K. Furthermore Judge Cole considered he was unable to allow for that value by discounting the figure as there was no evidence on which he could rely to reach a conclusion as to what such a discount should be.

The Judge summarised the alternative approaches available to him in the following nebulous terms which only serve to illustrate the generous extent of judicial discretion in these matters:

- make an adjustment in the financial orders to achieve justice in the division of the parties' assets;
- exclude the value of the fund from the pool with the husband's pension entitlement to be taken into account as a 'powerful' future financial needs factor; or
- consider it as part of a separate pool requiring some (unspecified) alternative approach.

Ultimately it was obvious that the wife would receive an adjustment in the form of a cash amount from the non-superannuation pool as opposed to an annuity.

As the Judge concluded that an equal division of the assets would normally have been appropriate, the husband would have had a significant advantage if his superannuation pension was not dealt with fairly, he determined that it would be just and equitable to adjust the wife's portion of the pool (excluding the husband's pension) to 55%.