Superannuation Post Separation (No 2)

In **Hopper [2016] FCCA 84 Judge Harman** was confronted with difficult parenting and financial issues involving a couple in their early 30's who had separated in 2012 after an eleven year relationship which had borne two children who were aged 8 and 5 when the case eventually came to trial in December 2015. The Judge ultimately ordered that the children live primarily with the Wife.

The property pool available for division between the parties comprised essentially only the husband's relatively modest superannuation entitlements.

The superannuation funds available to the parties at the time of the trial comprised the Wife's funds totalling only about $2K and the Husband's of $144K. While the Husband submitted that only the superannuation which had accumulated during the relationship should be divided, the Judge readily concluded that such an approach was not only at odds with settled authority but was mathematically disingenuous notwithstanding that the Husband had clearly continued to contribute to his superannuation post separation.

The Judge noted that there was no evidence to determine what the value of the fund would have been had the Husband ceased to make any further contributions to it and had simply continued to accrue interest and incur fees in the post separation period. The Judge also noted that in the absence of such calculations the Wife would be prejudiced as she was entitled to benefit from the continued growth of the Husband's superannuation which had increased from $69K at about the time of separation to $144K at the time of the trial.

Judge Harmon stated that there was no basis to seek to limit or arbitrarily and falsely determine the portion of the superannuation entitlements referable to the relationship. That which existed at the time of the trial, included some degree of post separation contribution but also included the continued accumulation from the balance of the benefits at the time of separation.

Judge Harmon concluded that as both parties had contributed directly and indirectly to the fund which commenced during their relationship, the Husband's superannuation should be included for division between these parties in the same manner as tangible assets would have been, had there been any.

Judge Harmon also took the view that it was appropriate to consider a section 75(2) 'future financial needs' adjustment in the Wife's favour notwithstanding that she would not be able to access the superannuation funds for many years.

The Judge considered that the following section 75(2) considerations were relevant:

- the Wife's health which would impact upon her capacity to work in the future;
- the Wife's duties as homemaker and parent and the Act's recognition of the need to protect a parent carrying out those roles which would restrict her future income earning capacity as would her qualifications and experience when compared to the Husband's;
- the Judge considered that he should also have regard to the standard of living that each of the parties would have in retirement and noted that the Wife was unlikely to accrue superannuation and employment benefits by retirement which would match those of the Husband at that time;
- as a consequence of the relationship and the birth of the children of the relationship, the Wife's past, present and future income, earning capacity, employability and employment skills were impacted;
- the Husband was cohabiting while the Wife was not and his household's income was approximately $160K.

Overall, the Judge was satisfied that an adjustment should be made in the Wife's favour of 10 to 15% and ordered a base amount split of $80K after making allowance for a matrimonial debt to be repaid by the Husband. This represented close to a 60/40 split of the Husband's superannuation in the Wife's favour.