



Dixie Ann Middleton & ASSOCIATES

Family Law & Estate Administration

Welcome to the summer edition of our Newsletter – *Yours, Mine, Ours*

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Please note: Many of the comments in this publication are general in nature and anyone intending to apply the information to practical circumstances should seek professional advice to independently verify their interpretation and the information's applicability to their particular circumstances.

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Firm News

Welcome to the first edition of our newsletter for 2018! Our firm had a lovely end to 2017, enjoying lunch at Stokehouse in Southbank.



We hope you had a Merry Christmas and wish you a safe, happy and prosperous New Year!!

Here are a few tasks to add to your new year "to do" list:

1. Do you have a current Will? We encourage you to review your Will annually to ensure that it covers your current financial and family circumstances. If your Will is out of date or you do not yet have a Will, telephone our office on 3395 5502 to make an appointment.
2. Have you checked that your death benefit nomination for your superannuation is current? Even binding nominations lapse 3 years after being made. If you have a self-managed superannuation fund, we can assist in drafting a binding death benefit nomination.
3. Are you following us on Facebook? For more updates about Family Law, Wills and Estates, please like our Facebook page.



News from our readers

Looking for an investment property?

Suite 9/195 Hume Street, Toowoomba is available for lease or sale. It is a fully fitted out A grade suite of approximately 151m² and includes 3 basement car parks and office furniture.



[Click here](#) for more information.

If you have news that you would like to share with our readers, please contact us at mail@middletonlawyers.com.au.

Superannuation and a Family Law Property Settlement

On 28 December 2002, the *Family Law Act* was amended to give the Court the power to make orders dividing superannuation between separated spouses. These orders are called splitting orders. There is a great deal of complexity that has arisen because of the different types of superannuation schemes in Australia.

The two most common are **defined benefit superannuation**, where the member's entitlement is calculated by use of a formula, and **accumulation superannuation**, where the member's entitlement is calculated by combining member's contributions, the employer's contributions and interest earned, less fees, charges and tax.



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Complexity of Schemes

A spouse can acquire information about their spouse's superannuation for the purposes of family law property settlements. In the case of *Campbell v Superannuation Complaints Tribunal*, a member of the Military Superannuation and Benefits Scheme had objected to the Trustee issuing a response for information pursuant to this family law process. The Trustee of the relevant scheme had stated that the interest was a defined benefit interest.

Mr Campbell was receiving an invalidity pension benefit pursuant to the Military Superannuation Benefit Scheme. The matter came before the Federal Court and the questions to be determined were as follows:

1. Was his pension benefit a superannuation interest for Family Court purposes?; and
2. If yes, was it a defined benefit interest or an accumulation interest?

The Judge found that the pension was a superannuation interest as defined in section 90MD of the *Family Law Act* and found that it was an accumulation interest.

Mr Campbell would have been disappointed with this decision, as he had argued that superannuation was a benefit paid in respect of aged retirement, whereas his invalidity pension benefit was paid by virtue of a medical condition which occasioned a degree of incapacity to undertake remunerative work.

However, the answer to Mr Campbell's query really is determined by section 90MD of the *Family Law Act* which sets out the definition of "eligible superannuation plan". The particular plan under which Mr Campbell was receiving his benefit was caught by that definition.

The Court, however, accepted that on a close reading of all of the law, the actual interest fell outside of the definition of a defined benefit interest and, therefore, was picked up as an accumulation interest.

Splitting Orders

The following steps need to be established before a splitting order can be made:

1. Is there a superannuation interest as defined by section 90MD of the *Family Law Act*?
2. Is it a defined benefit interest or an accumulation interest?
3. Depending on what type of interest it is, how much is it worth? The method of valuation is a technically complex process in itself; and
4. How should the Court treat the interest, depending on the answers to the above steps?

In relation to stage 4, the Court has stressed in a whole series of cases that it is important to look at the nature, form and characteristics of the interest under consideration.

For example, a lump sum value pursuant to the methods of valuation set out in the legislation does not really reflect reality in all cases. This arises because some funds will only allow a pension only payment for life, or until recovery of good health.

Therefore, to artificially add into the matrimonial pool a lump sum value (when the parties realise that, under the terms of the superannuation plan, that lump sum can never actually be paid out) is highly relevant to the type of order that the Court will make in the matter.

The Case of *Welch v Abney*

The Wife was in receipt of a total permanent disability pension payable

through her superannuation plan which, pursuant to section 90MT(2) of the *Family Law Act*, had been valued at \$972,959. It was recognised that she could never receive this lump sum and that she received her entitlement as a pension upon which she paid tax and which entitlement would cease to be paid on her death or on her recovery of health.

Neither party had sought a splitting order and the Court, on appeal, said that the valuation determined pursuant to section 90MT(2) applied only when a splitting order was being sought. On appeal, it was also recognised that the pension entitlement arose from the Wife's contributions only.

The Wife at first instance had been awarded 60% of the nett pool, but her artificially valued pension of \$972,959 constituted a large portion of her claim. However, this figure would then be reduced by the tax she had to pay from it over time of approximately \$316,320.96.

The Full Court said that this did not seem to be an appropriate percentage in her favour, taking into account the artificial lump sum value attributed to her pension stream from her superannuation fund. The matter has been returned to the lower Courts for further consideration.

Conclusion

Superannuation can be a complex area of law and when overlaid with the *Family Law Act*, becomes a quagmire. You should seek professional advice when negotiating a financial settlement involving this type of "property".

For more information

Campbell v Superannuation Complaints Tribunal [2016] FCA 808

Welch v Abney [2016] FamCAFC 271

Family Law Act 1975 (Cth)