

FAMILY LAW - PROPERTY SETTLEMENT ISSUES

Ascertaining the assets of a husband and wife and the contributions to those assets are central to arriving at a property settlement in family law. Usually, assets such as the matrimonial home, cars, shares etc are valued in order to determine the “net asset pool” available for division between husband and wife. The contributions to these assets by, and future needs of, the husband and wife are then assessed in order to ascertain what, if any, alteration of the interests of the parties in the assets should occur.

The Court considers contributions made by the parties to the acquisition, improvement and maintenance of the matrimonial assets from a financial and non-financial (both direct or indirect) basis and contributions made as a parent and homemaker, as well as other factors such as age, health, income earning capacity and the parties living standards.

Problems may arise where assets not normally acquired in a relationship come to light for consideration in a property settlement - such as post separation (but pre-settlement) lottery winnings, “gifts” and other contributions by the parents of the husband and/or wife, inheritances and other “windfalls”, and more recently, superannuation.

In order to avoid the rocky and costly path of litigation, it is useful to consider the Family Court’s

view in order to ascertain what would likely be a fair and reasonable settlement if these sorts of assets are available for division.

Post-separation Lottery Wins

In the Family Court’s decision in *In the Marriage of Farmer and Bradley* [2000] FamCA, the Full Court found that although no contribution had been made by a party at the time of a lottery win by the other party, the parties’ contribution throughout the marriage and post-separation should be taken into account as a whole.

In that case, the parties were married for 10 years, had one young child (living with the wife) and were asset poor. At the date of the hearing, the wife had remarried and had a child of that relationship. Within 2 years of the parties’ separation, the husband won \$5million in a lottery. The wife applied for orders for property settlement, with the only asset available for division being the lottery winnings. The wife was awarded \$750,000 (15%) of the lottery winnings.

The case is important for two reasons:

- Although contributions made to particular assets by one or the other party are an important consideration, contributions made before an existing asset is acquired can have a bearing on the outcome of the Court’s decision. The contributions of the parties are to be viewed as a whole;
- There need not be a link between a husband’s and wife’s disparity in financial position and the marriage itself.

However more recently in the case of *Eufrosin & Eufrosin* [2014] Fam CAFC 191 the Court found that the wife did not have to share her \$6m lotto win that she won 6 months after her 20-year marriage ended because at the time of purchase of the

lottery ticket there was no financial relationship between the parties. Based on this case, if a party to a marriage receives a windfall such as a lottery, sharing the money will depend on whether a financial relationship or financial dependency still exists.

Gifts & other Contributions by Parents

Where the parents of the husband or wife give a gift to their child, such as a large cash sum as the deposit for the matrimonial home, this is viewed as a contribution made by the relative party.

However, uncertainty may arise where a gift from the parents of the husband or wife is given as a gift to both the husband AND wife together. In such cases it must be determined who such a contribution is to be attributed to.

In the Family Court’s decision in *In the Marriage of Gosper* (1987) 90 FLR 1, the Court found that where a wife’s parents had transferred ownership of a property into both the wife’s and her husband’s names, such a contribution should be treated as being made directly on behalf of the wife.

The Court reasoned that:

- such contributions should be attributed to the relative spouse as the parents would more than likely have made the gift because of the relationship, and to benefit the relative in the marriage;
- the motivating factor was the relationship between the parents and the relative spouse.

Inheritances & Other “Windfalls”

Where a husband or wife receives an inheritance, it will usually be taken into account in determining the end property settlement result.

In the Family Court's decision in *In the Marriage of Figgins* (2002) FamCA 688, the Full Court found that a wife was entitled to \$2.35 million from the husband's \$22.5 million net worth (mainly the inheritance the husband had received from his parents at the beginning of the marriage).

In that case the husband had inherited estates and a group of companies valued at \$28 million. The companies were largely operated by a board which did not include the husband due to his limited expertise. On separation, due to having acquired the requisite expertise, the husband took control of the company. There was one young child of the relationship, who lived with the wife. The parties had lived together for 7 years and were then married for 3 years.

The Court found that:

- it was artificial to draw a distinction between the periods when the board ran the business and when the husband controlled the business (which would have effectively "quarantined" the inheritance);
- the inheritance should not be assessed separately to the other assets of the marriage;
- the factors to be taken into account regarding contributions included the short period of the marriage, the large financial contribution of the husband and the significant contribution of the wife to the welfare of the family and her contributions as homemaker and parent;
- the factors to be taken into account regarding future needs included the wife's diminished earning capacity and her future needs relating to her care of the child.

In summary, the case stands for authority that, like gifts, contributions made by the husband and wife are to be taken into account "as a whole" in the circumstances of the case, and assets such as gifts

or inheritances will not be "quarantined" from the asset pool available for division.

Superannuation

Since 28 December 2002, amendments to the *Family Law Act* have allowed the Court to "split" superannuation interests between a husband and wife. Before this legislative change, superannuation was not considered as an asset capable of division, instead it was treated as a "financial resource", essentially influencing the division of the assets of the parties but not itself being capable of division.

The "Super-Splitting Laws" treat different superannuation interests differently. The legislation is complex, but the essential feature and practical implication for parties involved in a property settlement is that the Court can make an order to "split" the superannuation in whatever proportion the "justice and equity of the case" requires, including orders not to split the superannuation at all.

The 2 main types of orders that can be made (for the majority of super funds):

- *Type A orders*: an order that gives the non-member spouse a fixed amount of the member's entitlement;
- *Type B orders*: an order that gives the non-member spouse a specified % of the member's entitlement at the time the interest becomes payable;

A major consequence with a Super-splitting order is that the funds will only be payable *whenever the member spouse becomes entitled to it* - ie generally upon their retirement.

This raises problems in that where a Court awards one party the majority of "realisable" assets and

the other the majority of the super, that party can be left in a position where they have no *liquid funds* readily available. This real possibility must be kept in mind when entering into negotiations for a property settlement.

Since its inception, the Courts have taken varying views in relation to the use of the legislation.

For example, in *OSF & OJK* (2004) FMCAfam 63, the Federal Magistrates Court ordered that the wife receive the majority of her share of the assets from the realisable assets, with the result that the husband received the majority of the superannuation but a minimum sum of realisable assets.

In *G and G* (unreported, 28 March 2003), the Court decided to split the property (excluding superannuation) between the parties by 70%/30% favouring the wife, but ordered that the superannuation be split on a 50%/50% basis.

It is quite clear that, although not intended by the legislation, the Courts are prepared to treat superannuation differently to the other assets and award the parties different proportions from the realisable assets and the superannuation.

For further information please don't hesitate to contact:

Grahame Jackson BEc.LLb
grahamejackson@gjalaw.com

Tel: **02 9908 1700** Fax: 02 9908 1755

Grahame Jackson & Associates
Attorneys at Law
Suite 4, 3-7 Grosvenor Street
Neutral Bay NSW 2089
ABN: 31 099 497 551