THE APPROACHES OF THE FAMILY COURT OF AUSTRALIA TO SUPERANNUATION ENTITLEMENTS

by

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I. INTRODUCTION

Before 1976, Australian matrimonial property law looked first to the reasons for the breakdown of a marriage and then reallocated matrimonial property in accordance with the responsibility for the breakdown.[1] The *Family Law Act* 1975 (Cth.) operates primarily on the basis that the breakdown of a marriage is a fact, and it attempts to reallocate matrimonial property on a just and equitable basis according to the parties' needs, contributions to the property and financial resources (unless matrimonial misconduct has affected those resources).[2]

Part VIII of the Act specifically enables the court to take a superannuation entitlement into account in relation to both maintenance [s. 75 (2) (f)] and on adjustment of property interests between spouses [s. 79 (4) (d)], and the interpretation of other sub-sections in Part VIII by the courts has resulted in further justification for such entitlements being considered in various ways.[3]

The following are the common features of superannuation schemes which are relevant to the present issue. A superannuation scheme provides an employee with a contingent entitlement to receive an amount of money (either by way of lump sum, pension or both) at some time in the future. The contingency may be retirement, resignation, retrenchment, dismissal or death. Some schemes are contributory; others are non-contributory. The actual amount received will vary not only according to the length of time of service, but also according to the type of contingency which renders the entitlement immediately payable. Any contingency other than retirement on an anticipated date will often render payable an amount of little more than the employee's contributions, with the consequent loss of the employer's usually substantial contributions. There is, therefore, no certainty as to the amount which will actually be received. During the contributing period, the employee has little or no power to deal with the future entitlement (a common exception to this being an ability to use it to raise a loan for housing).

If the employee dies prior to retirement, his/her 'spouse' (and some-

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1 For example, *Davis* v. *Davis* (1963) 5 F.L.R. 398.

2 *Soblusky and Soblusky* (1976) F.L.C. 90-124.

3 Infra, especially the appeal in *Crapp and Crapp* (1979) 35 F.L.R. 153; (1979) F.L.C. 90-615.

times a dependent child) will be entitled to varying proportions of the benefit. The term 'spouse' is commonly defined as the legal widow/widower, but it can also include a *de facto* spouse.[4] Moreover, if the deceased was separated (but not divorced) from a legal spouse and living with a *de facto* spouse, both the legal and *de facto* spouses may be entitled to a portion of the benefit according to their respective needs.[5] It is significant that a divorced spouse (and it is usually the ex-wife in these circumstances)[6] has no claim unless she can be classified by the trustees of the fund as a dependent of the deceased contributor. For the purpose of avoiding death and estate duties, the power of the trustees to make payments from the fund is discretionary — this is so even where the employee is given the right to nominate anyone at all as beneficiary of the entitlement on his/her premature death.

Therefore, a divorced wife has no automatic right to claim against her husband's entitlement *vis-a-vis* the trustees of the fund either during her former husband's lifetime or afterwards. The assumption inherent in the superannuation legislation and schemes seems to be that a divorced wife of a contributor ought not claim because provision will have been made for her already in the divorce proceedings.

Thus, the effect of this situation is that the Family Court will usually be the ex-wife's only means of access to the husband's entitlement, either through an application for maintenance or adjustment of property interests or both.[7]

In relation to maintenance, an ex-wife who is already in receipt of maintenance may apply for variation of the order if the former husband does actually receive his superannuation entitlement during his lifetime.[8] However, if the husband dies before retirement, it is much more difficult for the wife to apply for variation of the order, not only because the maintenance payments will automatically cease on the husband's death unless the order was expressed to continue for the lifetime of the wife (or children),[9] but also because the power of the trustees to make payments from the fund is discretionary, with the result that the benefit will not form part of the deceased husband's estate against which the wife could claim.

In relation to an application for adjustment of property interests, an application may be made on the basis of the matters in s. 75 (2) of the *Family Law Act* which are incorporated into this area of consideration by s. 79 (4) (d), or on the basis of the wife's non-financial contribution

4 For example, *Superannuation Act* 1976 (Cth.) s. 3.
5 Ibid s. 110.
6 Consequently, throughout this article, it will be assumed that it is the wife who desires to make a claim based on her husband's superannuation entitlement, unless the contrary is stated.
7 A proclamation dated May 27, 1976 (published in the Australian Government *Gazette* No. G22, June 1, 1976) pursuant to *Family Law Act* s. 40 set June 1, 1976 as the date from which such applications could only be commenced in the States in the Family Court.
8 *Family Law Act*, s. 83.
9 Ibid, s. 82 (2), (3).

as homemaker, and parent under s. 79 (4) (b)[10] (the latter notion, incidentally, being totally alien to the superannuation legislation). It must be appreciated, however, that such an application can only be made in relation to concurrent, pending or completed proceedings for principal relief[11] and that it cannot be made later than twelve months from the date of the decree nisi except by leave of the Court.[12]

The result of these provisions is that, if the wife is to have any hope of making an effective claim in relation to the husband's superannuation entitlement, she must not only bring her application in the Family Court, but she must also do so at the time of dissolution of the marriage or no later than twelve months afterwards. This poses practical problems as at this stage the benefit may not vest in actual possession for several years and the eventual amount to be received will be a matter of speculation.

The Family Court is therefore obliged to embark on an examination and resolution of issues which it is not entirely fitted to do, either by reason of expertise or by virtue of the powers given to it under the *Family Law Act*, as the Court has itself admitted.[13]

Public attitudes to the Family Court's approach to superannuation entitlements have reflected the vacillating attitude to this issue of the Court itself. Some sections of the community believe that the Court in general and the Act in particular do not go far enough in protecting a perceived right of the ex-wife to a portion of the husband's superannuation[14] (even to the point of alleging a breach of Australia's international obligations).[15] On the other hand, other opinions contend that the Family Court has not only gone too far in this regard, but that its approach to superannuation smacks of unjustifiable expansionism, that 'To match its zeal in jurisdictional empire-building, one would have to go back to the fragmented court system of England 200 years ago'.[16]

The insubstantial and vague provisions of the *Family Law Act* relating to superannuation entitlements, together with the practical problems already mentioned, not only enable the Court to exercise a discretion on

10 *Bird and Bird* (1979) F.L.C. 90-678;
Lange and Moores (1979) F.L.C. 90-651.

11 *Family Law Act* s. 4; *Russell* v. *Russell* (1976) 9 A.L.R. 103; (1976) F.L.C. 90-039.

12 *Family Law Act* s. 44 (3).

13 In *Bailey and Bailey* ((1978) F.L.C. 90-424) the Full Court had been asked to determine the wife's claim to a share of the husband's future superannuation entitlement with very little evidence to guide it and seemed, with respect, to adopt a compromise approach in increasing the amount of maintenance payable rather than make an order directly relating to the superannuation entitlement itself. *In Crapp and Crapp* (ante) Fogarty J., in discussing the Court's powers in relation to superannuation said, at p. 78170: '... the Family Law Act is most imperfectly geared as it presently stands to do financial justice to the parties ...'.

14 For example, the submissions of the Women's Electoral Lobby to the Parliamentary Joint Select Committee on the *Family Law Act*, in Vol. 1, *Submissions Authorised for Publication* at pp. 901-42.

15 Ibid, Vol. 2, Submission No. 11 by Gwendoline Ewens at pp. 1360-70. The submission cites Article 23 of the International Covenant on Civil and Political Rights.

16 S. Robertson: 'Will the Family Court move into Superannuation?' in *Rydge's*, August 1979, pp. 151-4 at p. 151.

these matters, but indeed force it to do so, resulting in the possibility of the Court applying 'palm tree justice'.[17] This is an unsatisfactory situation considering the fact that superannuation entitlements, as assets of usually considerable value, are being made available to an increasing number of people in the workforce.[18]

II. THE CRAPP AND CRAPP *DECISIONS*

Of the judgments delivered under the *Family Law Act* which have had to deal with superannuation entitlements, the first reported decision and the appeal in *Crapp and Crapp*[19] provide a nice illustration of the substantially different conclusions that can be drawn from exactly the same set of facts and legislation because of differences in the approach to the problem.

The facts of the case were as follows. The parties had been married for 16½ years. The husband, a pilot with Qantas Airways, received a substantial salary ($550.00 per week, net), was a contributor to a superannuation scheme (worth $81,000.00 if he retired at the date of the hearing and $300,000.00 if he retired at the age of fifty-five in eleven years' time) and had accrued leave entitlements worth $55,000.00. The superannuation benefit, which could be paid in a lump sum or by another agreed manner, was contributory and discretionary, and an ex-wife would have no direct rights under it unless classified by the trustees as a 'dependent' of the husband should he die before retirement. There were provisions in the deed for varying percentages of interest to be paid on the husband's contributions should he resign, or be retrenched or dismissed. The husband was living apart from the wife and paying $60.00 per week rent, 63.00 per week towards the mortgage on the matrimonial home and $50.00 per week to his de facto wife. The wife was working as a clerk with a net weekly salary of $120.00 and the two children of the marriage (aged seventeen and fifteen) were living with her. The matrimonial home, which was jointly owned, was valued at $90,000.00 and was subject at the date of the hearing to a mortgage of $14,000.00.

Watson J. held that because of uncertainties in the amount of superannuation the husband might eventually receive, he would consider the husband's notional entitlement as at the date the parties' marriage was dissolved. This amount was found to be 136,000.00 ($81,000.00 superannuation plus $55,000.00 accrued leave). Even taking taxation into account, this would still leave the husband with an amount comfortably in excess of $100,000.00. It did not matter that the entitlement was inalienable by the husband, it was held, because the approach of the Court is not to make orders directly on the entitlement itself but to direct the husband to take other measures because of the entitlement.

17 As suggested in H. A. Finlay: *Family Law in Australia* (2nd Ed. 1979) at p. 247.

18 For example, the A.C.T.U. is currently proposing to set up a scheme to cover all the members of its affiliated unions.

19 (1978) F.L.C. 90-460; (1979) 35 F.L.R. 153, (1979) F.L.C. 90-615.

Following an exhaustive survey of United States' authorities (dealing with community property) the superannuation entitlement was held to be an entitlement vested in the husband as it was a chose in action, not a mere expectancy, over which he had some degree of control, in that his entitlement in possession was governed by his own choice to remain or resign, regardless of the somewhat drastic nature of the latter step. As a result, the matrimonial assets of the parties were found to be the combined net values of the matrimonial home and the husband's superannuation and leave entitlements (a total amount of approximately $180,000.00).

Since the husband's earnings were much greater than the wife's, and taking into account the fact that the wife had been largely responsible for the upbringing of the children of the marriage, it was thought to be just that she receive the matrimonial home (the asset the Court could directly adjust) and that the husband pay off the mortgage on it. In order not to financially burden the husband, the mortgage did not have to be paid off immediately, but only at its present rate of repayment, unless the husband borrowed against his entitlement, received a benefit under it greater than $15,000.00, or died. To cover the latter contingency the husband was directed to place a clause in his will directing that the unpaid balance of the mortgage be a debt due and payable by his estate.

From this case, two basic approaches can be extracted. First, the Court did not make any orders directly in relation to the superannuation entitlement — the orders were that the husband was to take other measures because of it (transfer of the matrimonial home, add a clause to his will) and restrictions were placed on his right to borrow from the entitlement or use moneys received from it.

Secondly, the husband's entitlements to superannuation and the value of accrued leave, together with the matrimonial home were regarded as property and were the 'major assets of the spouses'.[20] It would appear that Watson J. had undertaken (at least de facto) a community property approach to the issue, especially considering: the fact that the relevant date of valuation of the assets including the superannuation entitlements, was the date of dissolution of the marriage; a precise valuation was made; the outcome of the case was a virtual fifty/fifty split between the parties of the assets as the Court estimated them; the reliance on United States' cases concerning community property. The husband appealed against this decision.

The Full Court[21] held that the superannuation entitlement was not in fact 'property' as that term is understood in the *Family Law Act*. The husband might have an eligibility to some amount of money, but this eligibility was not property consisting of a sum certain in possession as at the date of dissolution, nor a chose in action of a specified value. The entitlement was inalienable during the husband's lifetime and would not form part of his estate should he die. He therefore had no control over

20 (1978) F.L.C. 90-460 at p. 77,355.
21 Pawley S.J., Fogarty and Dovey J.J.

it and the fact that he could receive the money by voluntarily resigning did not make the entitlement property as at the date of the hearing. Nevertheless, the husband's entitlement was an 'eligibility' which could be taken into account (especially as it was such a large sum) under s. 75 (2) (b) (as a 'financial resource' of the husband), or under s. 75 (2) (f) (as an eligibility under a superannuation fund), or under s. 75 (2) (o) ('any fact or circumstance which ... the justice of the case requires to be taken into account'), or because the matters set out in s. 79 itself are not exhaustive.[22]

It was held that the Court is therefore obliged to take superannuation into account in some way. Fogarty J. considered the possible types of orders that could be made and rejected most of them as unsuitable. He found that the wife was entitled to half the value of the home (which was jointly owned) and to 'an additional amount by way of counterbalance' against the husband's entitlements and his stronger future position. Accordingly, the wife was given an additional $18,000.00. The order was that the home be sold and the wife received $56,000.00 (*i.e.* half its net value — $38,000.00 — plus $18,000.00) or 74% of the net proceeds of the sale, whichever would be greater. From the point of view of the approach taken by the Full Court, any *de facto* notion of community property was wiped out in relation to the superannuation entitlement by the finding that such an entitlement is not 'property' at all. No precise valuation was made. Instead, a 'just and equitable' approach was taken.

However, it is interesting to observe that this did not substantially alter the other approach of Watson J. No order was made directly on the superannuation entitlement, but other orders (for the sale of the matrimonial home and division of the proceeds) were made because of the entitlement. The only change here was as to the amount the wife was to receive (74% of the net value instead of 100% of the gross value). Indeed, no actual amount ('sum certain') was entertained at all, the entitlement being considered in very general terms having regard to the husband's 'better' future financial position. Indeed, the $18,000.00 additional amount awarded to the wife bore no relation to either the husband's actual contributions ($17,000.00) or his present entitlement ($80,000.00). (The future entitlement had been discarded as a consideration too speculative for reasonable calculation). It is, with respect, difficult to identify the virtue of the valuation aspect of the decision.

III. OTHER CASES AND APPROACHES

1. *The 'Property' Question*

The Full Court in *Crapp* decided that the husband's superannuation entitlement was *not* 'property'. Although Watson J. at first instance had said that the husband did have some control over it (by resignation), the Full Court disagreed on the basis that the husband had no control

22 Following *Wardman and Hudson* (1978) F.L.C. 90-466.

over it at the *date of the hearing*, which is when the Court must take it into account, and that at this date there could not be said to be any sum certain in the husband's possession.

This line of reasoning had been used in an earlier case, *Stacy and Stacy*,[23] and seemed to be followed in the majority judgment of another decision of the Full Court in *Bailey and Bailey*,[24] although in the latter case Evatt C.J. and Murray J. appear, with respect, to have declined to hold the particular entitlement before them to be property because there was insufficient evidence upon which to make a definitive statement.

In *Bailey*, the separate opinion of Simpson J. expressed disagreement with this approach. His Honour said that an absence of a present right in property does not mean that the entitlement itself is not property. Following the reasoning in *Duff and Duff*,[25] he held that there must be an entitlement in possession or reversion and this would exist unless there was the possibility of the superannuitant losing all of his entitlement under the scheme because of misconduct or through an absolute discretion of the trustees. The entitlement would be property if there was at least the certainty of receiving some amount at some future date. This argument was disapproved of by all the judges in the second reported judgment in *Crapp's* case, Fogarty J. disagreeing with it mainly on the basis that the lack of evidence in *Bailey's* case could not support the conclusions of Simpson J. The most recent reported decisions on the issue do follow this 'present control approach': *Richardson and Richardson*[26] (which followed the majority view in *Bailey*); *Lange and Moores*[27] (which followed *Richardson*); *Whitehead and Whitehead*;[28] and *Murkin and Murkin*[29] (which followed *Crapp*). It would appear, therefore, that unless the superannuation scheme gives the superannuitant some real present control over the entitlement, the Court will not consider it to be 'property' within the meaning of the *Family Law Act*.

The Court, apparently aware of its own inability to make orders directly affecting a superannuation scheme, seems to be adopting in relation to this particular issue the approach of requiring some present control by the superannuitant over the benefit so that an order can be made affecting the benefit *through* the superannuitant, with any future rights to control the entitlement being regarded as irrelevant to this issue of 'property'. The cautious approach of Evatt C.J. and Murray J. in *Bailey's* Case, where lack of evidence as to the provisions of the deed prompted them to decline to make orders directly in relation to it, would seem to support this contention.

The approach in other countries, on the other hand, is somewhat different, especially where the concept of community property has been

23 31 F.L.R. 34; (1977) F.L.C. 90-324.
24 (1978) 20 A.L.R. 199; (1978) F.L.C. 90-424.
25 (1977) 15 A.L.R. 476; (1977) F.L.C. 90-217.
26 (1979 F.L.C. 90-603.
27 (1979) F.L.C. 90-651.
28 (1979) F.L.C. 90-673.
29 (1980) F.L.C. 90-806.

incorporated into the law. In California, for example, an interest in a retirement fund has for at least three decades been regarded as a component of the community property,[30] the approach being that such benefits have vested, even though they may mature at a later date.[31] One recent case[32] has held that such a pension right is vested if the employer cannot unilaterally repudiate the right without terminating the employment relationship (reasoning which is in many respects similar to that of Simpson J. in *Bailey* and that as it is a right of the contract of employment it is therefore a chose in action, and capable of division between the parties in some way.

Similarly, West German law allows for an 'equalization of benefits' under a superannuation scheme whereby the partner of a contributor is inalienably entitled to some of the contributor's benefits, because of an indirect contribution to them, on retirement.[33] A similar regime was recommended for Ontario.[34]

In New Zealand, the *Matrimonial Property Act* 1976 provides in s. 8 (i) that, 'matrimonial property' includes:

> Any pension, benefit or right to which either the husband or the wife is entitled or may become entitled under any superannuation scheme if the entitlement is derived, wholly or in part, from contributions made to the scheme after the marriage or from employment or office held since the marriage.

This entitlement, therefore, need not be a present entitlement, a situation in distinct contrast to the present Australian approach.

However, the submission of the Law Council of Australia to the Parliamentary Joint Select Committee on the *Family Law Act*[35] has suggested that the definition of 'property' in the *Family Law Act* be as wide as possible, along the lines of the definition in the *Bankruptcy Act* 1966.[36] The Discussion Paper on Superannuation of the Family Law Council recommended a similar change.[37] However, the Council's final Working Paper on superannuation[38] and the Report of the Joint Select Committee on the *Family Law Act*[39] both avoid this issue by concentrating on other approaches such as the deferment of the application or order.

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30 *Crossan* v. *Crossan* 35 Cal. App. 2d 39; 94 P. 2d. 609 (1939).
31 *Fithian* v. *Fithian* 10 Cal. 3D. 592; 517 P. 2d. 449 (1974).
32 *Brown* v. *Brown* 15 Cal. 3D. 838; 544 P. 2d. 561 (1976).
33 As described in Submission No. 41 to the Joint Select Committee on the *Family Law Act* by the Australian Federation of Business and Professional Women; *Submissions Authorised for Publication* — Vol. 1 at p. 539.
34 Ontario Law Reform Commission: *Report on Family Law* (1974) Part IV (Family Property Law) at p. 93.
35 Submission No. 315, *Submissions Authorised for Publication* (*ante*) — Vol. 2 at pp. 1502-1503.
36 S. 5 (1): 'Property means real and personal property of every description, whether situate in Australia or elsewhere, and includes any estate, interest or profit whether present or future, vested or contingent arising out of or incident to any such real or personal property.'
37 In its conclusions at paragraph 17.1 it recommended 'That the definition of "property" in the Family Law Act should be amended or deleted so that it could include (inter alia) an interest in expectancy'.
38 Working Paper No. 8, 'Superannuation and Family Law', June 1980.
39 *Family Law in Australia*, Vol. 1, July 1980.

The attitude of the Family Court itself to the issue of reform appears to have been expressed only once[40] and in the context of the practical difficulties faced by the Court. Judicial disposition for amendment along the lines of the *Bankruptcy Act* is unenthusiastic because of the difficulties that arise when the superannuation entitlement is the only major asset of the parties and the constitutional limitations to the *Family Law Act* make it virtually impossible for the Family Court to bind the discretion of the trustees of the fund. The Court adopts a rigid stance because it feels that to do otherwise would be futile.

However, it is submitted that the somewhat narrow approach of the Family Court on this issue has to a large extent been circumvented by the other aspects of the Court's approach.

2. *Recognition of Other Factors: The 'Just and Equitable' Approach*

The 'just and equitable' criterion in s. 79 (2) of the *Family Law Act* enables the Court to tailor its decision to the perceived requirements of each particular case. However desirable this may be, it does not necessarily allow for precision in the Court's approach to the superannuation entitlement. As Baker J. said in *Whitehead and Whitehead*, when remarking on *Crapp's* Case:

> ... one is left with the strong impression that the decision eventually arrived at by the Full Court in Crapp's Case was just as arbitrary between the parties as was the decision of the Trial Judge.[41]

Indeed, the only reported decision where the Court seems to have gone to any pains to spell out specific factors it will take into account in coming to a final determination is the Full Court decision in *Bird and Bird*,[42] where Evatt C.J. stated that the Court should take into account the extent of the superannuation entitlement, the time lapse before its falling in and the present resources of the parties. Other cases, however, do not seem to be concerned with such specificity and take a superannuation entitlement into account in a more general way as a 'significant factor' which cannot be ignored,[43] and by treating it as an enigmatic 'financial resource' of the parties (under *Family Law Act* s. 75 (2) (b)) rather than in more detailed terms.[44] This is especially so where the parties are young and have substantial periods of work ahead of them.[45]

Often, the result obtained does appear to apportion an amount to the wife which is unrelated to the husband's entitlement. However, this is so because an equitable approach rejects an arithmetical calculation of entitlements, as was pointed out in *Matthews and Matthews*[46] where Nygh J. remarked:

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40 Statement by Fogarty J. in *Crapp and Crapp* (1979) F.L.C. 90-615 at pp. 78,181-2.
41 (1979) F.L.C. 90-673 at p. 78,583.
42 (1979) F.L.C. 90-678.
43 *Kutcher and Kutcher* (1978) F.L.C. 90-453 following *Bailey and Bailey* (1978) F.L.C. 90-424.
44 *Crapp and Crapp*, ante.
45 *McHarg and McHarg* (1980) F.L.C. 90-811.
46 (1980) F.L.C. 90-887.

> Care must be taken . . . to avoid a cumulative effect, such as saying that the wife by reason of her contribution [to the property of the parties] should have 60%, then add 10% for loss of security and 10% for loss of a share in income. These various contributions are to a certain extent mutually reinforcing. The Court cannot arrive at an order which merely adds up these various considerations, but must arrive at an order which takes account of these considerations as a whole.[47]

The recent case of *Thomas and Thomas*[47a] does provide, however, an illustration of a mathematical approach which details specific contributions and entitlements. Gee J. calculated the number of years the husband would belong to the superannuation scheme from the time of his joining the fund until his normal time of retirement. His Honour then calculated the number of years of cohabitation with the wife during which contributions had been paid, expressing this latter period as a percentage of the overall period of contributions. This percentage was then applied to the sum the husband would normally receive on retirement.

It was held that the wife would be entitled to one half of that percentage sum. As the husband had 11½ years remaining before retirement, his Honour calculated a sum which, if invested at 12% for 11½ years, would yield to the wife her ascertained entitlement.

However, the apparent simplicity of this approach was then complicated by the fact that this final sum was 'discounted' (in an unspecified way) to take into account the husband's reasonable obligations. The sum he would eventually receive would have to be used to meet mortgage repayments and it would be the resource from which he would have to live.

Therefore, despite the apparent simplicity and specificity of this approach, which appears to ignore the earlier warnings of the court not to regard the entitlement as a 'sum certain' because of unforeseen contingencies which may alter the eventual amount received,[47b] the requirements of justness and equity for both parties resulted in the purely mathematical approach being inappropriate.

On several occasions the Court, in attempting to be just and equitable to the husband, has stated that he should not be forced to capitalize his entitlement to satisfy an order of the Court,[48] nor be 'financially punished',[49] and that too great a disproportion should not be introduced into the order because of benefits not to accrue in the husband's possession for many years.[50] While the Court could direct the husband to make an election under his entitlement, it is reluctant to do so. However, in the case of *Murkin and Murkin*[51] it would appear that the Court was in effect forcing the husband to capitalise his entitlement. The form

47 Ibid, p. 75,601.
47a (1981) F.L.C. 91-018. 47B. *Crapp,* ante; *Bird* (1979) F.L.C. 90-678.
48 *Kutcher and Kutcher,* ante.
49 *Crapp and Crapp* (1978) F.L.C. 90-460.
50 *Bird and Bird* (1979) F.L.C. 90-678.
51 (1980) F.L.C. 90-806.

of the order in that case was such that it might be defeated should the husband elect to take his entitlement on retirement as a pension rather than in a lump sum. Nygh J. said that this problem could be overcome as the husband, once he does retire, has for himself the *power* to capitalise his pension and the Court could assess the value of *that* right and order the husband to pay a proportion of its value to the wife on retirement.[52] The problem here was that the superannuation entitlement was the parties' only real asset. Nygh J. was effectively forcing the husband to capitalise his pension (as the husband could not satisfy such an order in any other way) even though such capitalisation would occur at the time of retirement rather than immediately. Indeed, *Murkin's* Case was expressed to be decided, 'on the balance of hardship',[53] and the Full Court has itself admitted that to be just and equitable 'is all a matter of degree'.[54] This approach has also been employed to take into account the superannuation entitlement of a third party. In *McLeod and Somlo*[55] the wife was cohabiting with a man she intended to marry. In the adjustment of property interests between the parties, that man's superannuation was taken into account to determine that the wife's share of the matrimonial home should not be more than fifty per cent.

The only reported decision concerning a wife's superannuation without the husband having a similar entitlement is the judgment of the Full Court in *Healy and Healy*.[56] In this case, the sole asset of the husband was a grazing property in which he had an equity of $64,000.00. The wife had run the matrimonial home and had worked on the property. After separating from the husband she obtained a job as a clerk and received an adequate income together with superannuation benefits. At first instance it was held that as the grazing property was the husband's only asset, he should not be forced to sell it, and the wife was awarded a lump sum of $15,000.00. On appeal, the Full Court held that the wife was entitled to one third of the value of the property ($21,500.00), taking into account her employment, her superannuation, her age and her need to buy a home. It is significant that this was the only reference to superannuation in the judgment, and the following extract from the decision is illuminating:

> If the respondent's [the husband's] financial position and opportunity for employment had been more favourable, it may well have been that a more substantial award would have been appropriate.[57]

In other words, the wife received a lower amount than otherwise she might, not because of her assets, but because of her husband's lack of them. If the husband did lack assets, then it is respectfully submitted that more attention should have been paid to the wife's assets, considering that this case was an application under s. 79 and not a maintenance

52 Ibid, p. 75,085.
53 Ibid, p. 75,084.
54 *Bird and Bird* ante, p. 78,621.
55 (1976) F.L.C. 90-073.
56 (1977) F.L.C. 90-295.
57 Ibid at p. 76, 565.

application. However, her superannuation was virtually ignored in this case. Although this entitlement could not have been exceptionally large because of the wife's short period of employment, other cases where the entitlement has been relatively small have looked very carefully at the husband's entitlement and have regarded it as 'significant'.[58] However, further cases involving the superannuation of a wife will have to be decided before it could be alleged that the Court is adopting a double standard.

Another important aspect of the 'just and equitable' approach is the extent to which the Court will recognize the husband's superannuation entitlement not from the point of view of his future gain, but from the point of view of the wife's future loss. English legislation[59] provides for such a 'lost chance' to be taken into account by enabling the Court to evaluate a benefit which a party to a marriage would lose the chance of acquiring because of the dissolution of the marriage and to place the parties, so far as practicable, in the financial position they would have been in had the marriage not broken down.

In Australia, Marshall S.J. in *Hope and Hope*[60] held that the question of a wife having 'lost an asset' in the husband's superannuation rights which were intended to provide for both of them in old age was a factor which was relevant through s. 75 (2) (o) of the *Family Law Act*, but only for assessing the overall position of the parties and that it should not have an important bearing on the final decision. This was despite the fact that the parties had been married for twenty-two years.

A more detailed examination of this issue was made by McGovern J. in *Stacy and Stacy*.[61] His Honour stated emphatically that the 'lost chance' doctrine had no place in the *Family Law Act*, which, he held, accepts that marital breakdown can lead to financial disadvantages and that it is therefore a mistake to look to the situation which would exist if the breakdown had not occurred. Furthermore, he held, s. 79 (4) and s. 75 (2) of the *Family Law Act* are expressed in positive rather than negative terms. The Court should not look to negative speculations (the wife's 'loss') but to positive facts (the likelihood of the husband's future gain). Therefore, there could be no notion of compensation for the wife.

However, the Full Court has not adopted such a rigid approach. The majority in *Bailey's* Case[62] held that the loss of a wife's right to share in her husband's superannuation is an important financial consequence of

58 For example, *Bird and Bird, ante,* where the entitlement was notionally $8,000.00 at the date of the hearing.

59 *Matrimonial Proceedings and Property Act* 1970 s. 5 (1); *Matrimonial Causes Act* 1973 s. 25.

60 (1977) F.L.C. 90-294.

61 (1977) F.L.C. 90-324.

62 (1978) F.L.C. 90-424.

the dissolution as it has meant the loss of available money during the marriage.[63]

A good illustration of this approach is the case of *Bird and Bird*,[64] where the parties had been married for twenty-six years. The jointly-owned matrimonial home had a net value of $19,000.00, and while the husband had a reasonable income, he was supporting a second wife and paying the mortgage and insurance expenses on the (first) matrimonial home. He had a superannuation entitlement, the notional value of which to him was $8,000.00 at the time of the hearing and approximately $89,000.00 plus a pension of $338.00 per fortnight if he retired at sixty-five (fourteen years hence). On prior death, his widow would receive two thirds of his pension entitlement as at the age of sixty-five. The (first) wife was an invalid pensioner.

The Full Court held that the husband's present entitlement of $8,000.00 was an indication of his contributions and that the wife was entitled to some benefit of this. However, it was held that this figure is not necessarily the one the Court should take into account — this will depend on the circumstances of the case. The wife was found to have notionally contributed to the husband's superannuation because the contributions had come from income that could otherwise have been used by both parties. The wife was also in poor health. She was found to deserve something, but not so much as would be the equivalent of the whole of the husband's present assets. (The Trial Judge had awarded her the husband's half share in the matrimonial home). It was considered equitable to award the wife one half of the husband's interest in the home, thereby leaving him with one quarter of its net value and effectively awarding the wife $4,750.00. However, because the husband should contribute to the maintenance of the wife and because it was fairer to leave the wife in the home (where she could earn an income from boarders) rather than force its sale, the husband was ordered to pay lump sum maintenance to the wife in the form of his remaining one-quarter share in the home.

While the effect of this appeal between the parties was little different to that of the original order, the Full Court's different approach is significant. It is submitted that the approach of the Court to the issue of the wife's loss of rights in her husband's superannuation is one of recognizing a more general (equitable) 'entitlement' of the wife *relating to* a resource which was to provide for her future security, rather than one of actually compensating her for a specific monetary loss.[65] This

63 *Contrast Whitehead and Whitehead* (1979) F.L.C. 90-673 where Baker J. held there was no such loss as the parties were able to save money during the marriage. It is submitted, with respect, that in this case the saving was made possible by the wife working part-time and the husband taking a second job. A saving may indicate hard work and frugality rather than indicate there has been no loss through the superannuation contributions.

64 (1979) F.L.C. 90-678.

65 Contrast *Crawford and Crawford* (1979) F.L.C. 90-647 where the husband's savings were regarded as 'fruits of the marriage' and thus capable of division between the parties in the same proportions as the division of interests in the matrimonial home.

view would appear to be supported by another decision of the Full Court in *Mapstone and Mapstone*[66] where the Court refused to make a declaration under s. 78 of the *Family Law Act* relating to the wife's alleged 'interest' in the husband's superannuation entitlement. Similarly, the decision of Nygh J. in *Matthews*, while it does refer to a notion of compensation for the wife, is ultimately based on a notion of the wife's loss of security rather than on a loss of a specific proportion of the husband's entitlement.[67]

In contrast to this approach is the decision of Gun J. in *Lange and Moores*[68] where His Honour did in fact award the wife a specific lump sum payment representing a half-interest in the husband's entitlement. The relevant facts in this case were that at the date of separation the husband was notionally entitled to $4,000.00 from the fund. However, a change in the scheme between the date of separation and the date of hearing meant that by the latter date the husband's notional present entitlement had increased to $18,000.00. After finding that the latter amount was in the nature of windfall after the date of separation (similar to the re-zoning of land in *Zappacosta's* Case[69] or the effect of inflation in *Wardman and Hudson*[70]), His Honour awarded the wife a specific lump sum payment of one half of the notional value as at the date of separation (*i.e.* $2,000.00).

It is submitted that while the judgment in *Lange and Moores* was handed down two months after that in *Bird's* Case, it appears to have been delivered without knowledge of the latter case. It would appear, therefore, that the approach in *Bird's* Case and the later cases is the one that will be followed.

3. *The Maintenance Aspect*

The relationship of a superannuation entitlement to an application for maintenance was explained in the majority decision in *Bailey and Bailey* where it was said:

> The existence of the entitlements may have no effect upon the party's resources at the present time, but gives considerable security for the future and reduces the party's present need to build up capital assets to provide such security. As such the entitlements are relevant to maintenance.[71]

In other words, the approach to this specific issue is undertaken by considering primarily the effect of superannuation on the ability of the party paying maintenance to pay it, and by considering only secondarily the needs of party receiving it (although the latter is relevant to the *overall* issue of maintenance on an equal footing with the question of

66 (1979) F.L.C. 90-681.
67 (1980) F.L.C. 90-887, at p. 75,601. A similar approach is to be found in *Petterson* (1979) F.L.C. 90-717.
68 (1979) F.L.C. 90-651.
69 (1976) F.L.C. 90-089.
70 (1978) F.L.C. 90-466.
71 (1978) F.L.C. 90-424 at p. 77,147.

ability to pay). In *Bailey's* Case the wife sought a payment of $28,000.00 from the husband, as lump sum maintenance comprising one half of his present notional entitlement of $56,000.00. This order, sought on appeal by the wife, was dismissed, although the amount of periodic maintenance was increased for reasons pertaining to the issue of maintenance generally. Simpson J., in his separate judgment, said that it would only be in exceptional circumstances that a wife could make a claim for lump sum maintenance as well as periodic maintenance purely on the basis of her husband's superannuation, especially when she is able to support herself. This approach can also be seen in the recent case of *McHarg and McHarg.*[72]

However, the Court has on occasion awarded both periodic and lump sum maintenance. In *Richardson and Richardson,*[73] Goldstein J. awarded the wife $100.00 per week maintenance for herself and the child of the marriage and $10,000.00 lump sum maintenance. However, in this case the wife not only had little earning capacity and a four-year-old child to care for, but the husband, who was sixty-two years old, had a gross income of over $52,000.00 per year and a superannuation policy under wihch he would collect $158,000.00 in three years' time.

The attitude of the Full Court on this issue was recently expressed in *Mapstone and Mapstone.*[74] Here, the wife was in poor health and unable to work. The husband was due to retire in four years' time with a superannuation entitlement worth $170,000.00. This amount would be less if he resigned in the meantime, and he would collect only $20,000.00 if he were dismissed. At first instance, the wife was awarded the jointly-owned matrimonial home (net value: $45,000.00) and its contents, maintenance for herself and child of $55,00 per week and the net proceeds of a sale of some land ($7,000.00). The husband retained a block of land worth $11,000.00 and had his superannuation entitlement. The wife appealed on the ground that the husband's future prospects were so much better than hers due to his superannuation that it would be just and equitable for her to receive a lump sum maintenance payment of $20,000.00.

The Full Court,[75] in dismissing the appeal, held unanimously that as the husband's entitlement was only an expectancy, he would have to borrow in order to be able to pay such a sum. Although he would probably receive a substantial amount of money in four years' time and thereby be able to repay the loan, the interest payments during this period might leave him in a precarious financial position. As the purpose of superannuation is to provide the husband with an income for his retirement, the amount of $20,000.00 plus interest payments over four years might make a substantial hole in the amount and so reduce the return on it from investments. It would be the income from these in-

72 (1980) F.L.C. 90-811.
73 (1979) F.L.C. 90-603.
74 (1979) F.L.C. 90-681.
75 Asche and Marshall S.JJ., and Hogan J.

vestments on which the husband would have to live. While the Full Court did not rule out the possibility of the wife re-applying for such an order in four years' time, it held that an award for lump sum maintenance could only be awarded at this stage for very compelling reasons.

Indeed, while the Court did take into account the requirements of s. 81[76] of the *Family Law Act*, stressing the convenience of making an order which would finally determine the future financial relationship between the parties, it nevertheless conceded the attractive nature of an order related to maintenance in cases dealing with superannuation in the following passage:

> ... the very order for periodic maintenance in a case such as this allows for proper variation when anticipated events finally occur and may therefore be a practical way of dealing with the problem because proper adjustments can be made at a time when the anticipated change in the financial circumstances has occurred and the financial position of the parties can then be ascertained with reasonable accuracy.[77]

On the other hand, a somewhat different approach is exhibited by Connor J. in *Petterson and Petterson*.[78] In that case the parties had been married for thirty-four years. The husband was four years from retirement, at which time he would receive approximately $42,000.00 in a lump sum plus a pension. The matrimonial home was owned jointly and the wife wanted the matrimonial home for herself. The Court refused to make such an order on the basis that the husband had present needs and that he should be left with some ability to purchase accommodation for himself. In effect, the Court was being just and equitable in attempting to be fair to the husband as well as to the wife. However, the Court took into account the fact that the husband's income would always exceed that of the wife, who had never worked on a permanent full-time basis. Therefore, it was held that the husband had an obligation to support the wife, and it was at *this* stage that his superannuation entitlements were taken into account. Taking the wife's age (sixty-one) and actuarial tables into account, His Honour estimated that the wife had another eighteen years to live. Finding that a fair amount of maintenance for the wife would be $60.00 per week (but not indicating how this figure was ascertained) Connor J. ordered that a figure should be calculated which, if invested at ten per cent, would yield for the wife an income of $60.00 per week for eighteen years. This figure he calculated to be approximately $25,000.00.

It is significant to note that His Honour considered that s. 81 of the Act should be taken into serious consideration, and that the utmost be done to finalise the financial relationship between the parties in this case.

76 S. 81: 'In proceedings under this Part, other than proceedings under s. 78 or proceedings with respect to maintenance payable during the subsistence of a marriage, the Court shall, as far as practicable, make such orders as will finally determine the financial relationships between the parties to the marriage and avoid further proceedings between them.'

77 *Ante*, at p. 78,639.

78 (1979) F.L.C. 90-717.

Consequently, the matrimonial home (which was valued at $80,000.00 and in which the wife already held a half share) was ordered to be sold, and the wife was to receive from the proceeds of its sale the sum of $65,000.00 (that is, $40,000.00 plus $25,000.00). The wife was awarded no maintenance as such, but it can be seen from this order that the husband's superannuation entitlement was used in effect in relation to the *maintenance component* of the property order.

The approach to the maintenance aspect of superannuation would therefore appear to be that although superannuation contributions may reduce current income, they are also recognized as acting as a form of very efficient saving because the superannuitant will not have to reserve so much of the current income for provision for old age. Consequently, superannuation may enable a claim to be made for higher periodic maintenance or an increased share in some other matrimonial asset at the time of dissolution. However, because superannuation entitlements are in the nature of an expectancy, the Court is reluctant to grant lump sum maintenance in respect to them, other than in exceptional circumstances, at the date of the original hearing.

The Family Law Council's Working Paper on Superannuation[79] agrees that superannuation may be relevant to maintenance or to the maintenance component of a property order, but points out the difficulty that can occur when the superannuitant dies, in which case a maintenance order will usually abate. It recommends an amendment to the *Family Law Act* to prevent such an abatement.

4. *The Approach to Orders*

Once the Court has determined the extent to which superannuation will be taken into account in a particular case, it must then give effect to this through its orders and this will often be an integral component of this determination.

The types of orders canvassed by the Court fall into four main groups.

(a) *The Deferred Order*

Deferred orders are frequently made in relation to the parties' interests in realty.[80] Under a deferred order an amount or percentage of the entitlement is fixed at the hearing but made payable at some future date, for example, on receipt of the entitlement in possession by the contributor.

If, under the terms of the superannuation policy, the entitlement could be said to be 'property' then a deferred order could be made in relation to it.[81] However, the Court only has power to make an order with respect to the superannuitant's existing interest in the fund, it cannot change the *nature* of that interest. If the interest is not itself property,

79 Working Paper No. 8, *ante*, Recommendation B 1 (b) at p. 8.

80 A recent example is the order in *Radford and Radford* (1979) F.L.C. 90-687.

81 *Stacy and Stacy* (1977) F.L.C. 90-324.

the Court has no power to make an order *directly* affecting it under s. 79 of the *Family Law Act*.[82] There are also difficulties where, if a deferred order could be made, the contributor dies prior to retirement (as the benefit will not usually form part of his estate) or where circumstances change between the date of the order and the later date so as to render the order inequitable.[83] It has been suggested that the latter problem might not arise where the period between the order and the falling in of the entitlement is short.[84]

In any event, deferred orders may be contrary to s. 81 of the *Family Law Act*.[85]

There is one reported case where the Court did attempt to make a deferred order: *Sharp and Sharp*.[86] In this case the husband had converted approximately $15,000.00 of the wife's property. He had a reasonable income and a superannuation entitlement which would become payable seven years after the date of the hearing at a value of $130,000.00. Its surrender value at the time of the hearing was $17,000.00. The wife had previously been relatively well-off but at the date of the hearing she was earning a small income and was not in good health. Toose J. decided that, taking all factors into account, the wife should be paid a lump sum of $20,000.00 by the husband. As there was no asset from which the husband could pay such an amount, he was ordered to pay it on retirement when he collected his superannuation benefit, and until that time he was ordered to pay the wife $52.00 per week. To circumvent the problem of the husband's death prior to this time, Toose J. directed that a copy of the order be served on the trustees of the fund, so that the wife could be classified as a 'dependant' of the husband within the terms of the trust deed and therefore be eligible to receive monies from the fund. As the fund itself could not be charged in any way the husband was also ordered to make a personal covenant binding himself, his heirs and his executors to pay the sum to the wife.

It is submitted, with respect, that the ploy of serving the trustees of the fund with a copy of the order will not guarantee that the wife will receive anything on the husband's death prior to retirement. The power of trustees to make payments in such a circumstance is discretionary, and in this case the husband had remarried. It would be legally open to the trustees to pay all available monies to the second wife, and this amount would not form part of the husband's estate. The Court could suggest to the trustees the way in which their discretion could be exercised, but it cannot bind them.[87] This view would seem to be supported

82 *Crapp and Crapp* (1979) F.L.C. 90-615.

83 Ibid; see also the Family Law Council's Discussion Paper on Superannuation, paragraph 9.9 (b), and its Working Paper No. 8, *ante*, paragraph 5.13.

84 *Bailey and Bailey* (1978) F.L.C. 90-424.

85 Ibid, per Simpson J.; but note that s. 81 directs the Court to finalize the parties' financial relationship 'as far as practicable'. *cf. Mapstone, ante.*

86 (1978) F.L.C. 90-470.

87 See the remarks of Fogarty J. in *Crapp's* Case, *ante.*

by the decision of the High Court in the appeal in *Ascot Investments Pty. Ltd. and Harper and Harper.*[88]

Fogarty J. discussed the *Sharp* judgment in *Crapp's* Case and observed that the lump sum ordered did not appear to have been ordered against an interest under a superannuation fund as such, but that the order was an attempt to secure the amount of the lump sum against the husband's only likely asset. The figure arrived at was not based on the present or future value of the husband's entitlement.[89]

While similar observations could be made with respect to other cases,[90] the difficulties with which this type of order is fraught have not made it a popular one with the Court in cases where superannuation is involved.

It is interesting to note that the New Zealand legislation specifically provides for property orders being made conditionally, with the superannuitant entering into a deed of covenant similar to the one in *Sharp's* Case. This deed can then be served on the 'manager' of the superannuation scheme, thus binding him by its provisions, 'notwithstanding the provisions of any Act, deed or rules governing the scheme'.[91]

The enactment of similar legislation in Australia would be beset by Constitutional difficulties.[92]

(b) *The Deferred Application*

Another approach is to defer that part of the application relating to superannuation until the entitlement has vested in possession. The superannuation is effectively ignored until a later date.

While such an approach is not inconsistent with a literal interpretation of s. 81 of the *Family Law Act*, this ploy has been criticised by the Full Court as being contrary to the philosophy of that section.[93] Similarly, in *Bird and Bird* the feeling of the Full Court was that, as well as s. 81, the effect of s. 79 of the Act and the limitations to the variation of orders adjusting interests in property obliges the Court to do what it can for the parties at the date of the hearing and not at a later time.[94]

The Supreme Court of South Australia did implement this approach in *Finnis* v. *Finnis.*[95] In that case the wife, who was sixty-two years old, was in poor health and had little likelihood of being able to obtain employment. Her sixty-three year-old husband received a gross salary of $23,000.00 per year and would be entitled to a payment of $125,000.00 from his superannuation fund in two years' time. The matrimonial home was owned jointly. Walters J. ordered that the wife should receive the home and he also felt that it would be just and equitable that the wife receive a payment of $20,000.00 out of the husband's superannuation

88 (1981) F.L.C. 91-000.
89 *Crapp, ante,* at p. 78,181.
90 See infra: (c) and (d).
91 *Matrimonial Property Act* 1976, s. 31.
92 See, for example, the *Final Report of the National Superannuation Committee of Inquiry* (1977) Part 2 at pp. 51-2.
93 *Crapp, ante,* at p. 78,184, followed in *Petterson ante; cf. Mapstone, ante.*
94 (1979) F.L.C. 90-678 at p. 78,621.
95 (1978) F.L.C. 90-437.

fund. As he could do nothing about the latter, he adjourned this part of the application *sine die*. In these circumstances this was reasonable as it would be a relatively short time until the husband received his benefit.

It is interesting to note, however, that His Honour remarked that if at the time the benefits fell due to the husband an order were made for the husband to pay $20,000.00 to the wife and the trustees refused to exercise their discretion accordingly, the wife might be able to invoke the inherent jurisdiction of the Court[96] to enforce the order for payment. However, the Family Court would appear to have no similar inherent jurisdiction. As Emery J. said in *Vergis and Vergis*:

> The Family Court is not a Court of Common Law or a Court of Equity as are the Supreme Courts of the States with inherent jurisdiction. The Family Court is a creature of statute and has no powers other than those given to it by statute.[97]

The appeal to the High Court in *Taylor's* Case would seem to make little difference to this situation in this context.[98]

The only reported decision in which the Family Court has adopted the approach of deferring the application is the judgment of Nygh J. in *Murkin and Murkin*,[99] where the husband's superannuation assumed a particular significance.

The husband was a school teacher who would retire within three years from the date of the hearing and whose superannuation entitlement at that time would enable him to elect to collect his benefit partly by way of a lump sum and partly by way of a pension. The maximum lump sum he could collect would be $120,000.00. This represented the only substantial asset of the marriage, the parties having always lived in rented accommodation and finding it impossible to save. Nygh J. found that the wife was in need of maintenance of $45.00 per week and made an order to that effect. In relation to the husband's superannuation and any adjustment the wife might receive because of it his Honour said: 'There is no question that I have discretionary power to stand over an application indefinitely',[100] and he proceeded to do so.

It has been held that where a Court is properly seized with a matter and there is no procedure laid down which enables it to deal with the particular problem before it, the Court has the discretion to devise its

96 Alternatively, the Court was held to be able to invoke its jurisdiction under the Supreme Court Rules, Order 55 rule 1: *Bowskill* v. *Dawson (No. 2)* (1955) 1 Q.B. 13.

97 (1977) F.L.C. 90-275 at pp. 76,470-1.

98 (1979) 53 A.L.J.R. 629; (1979) F.L.C. 90-674. The High Court of Australia held that the Family Court does have inherent jurisdiction to rehear a property application where both parties had not been properly heard. It is submitted that such a situation would not affect the Family Court's inability to make an order binding on the trustees of a superannuation fund. See also *Ascot Investments and Harper and Harper* (1981) F.L.C. 91-000 where the High Court held that the Family Court could not use its injunction powers to achieve a similar result.

99 (1980) F.L.C. 90-806.

100 Ibid, p. 75,084.

own procedure.[101] The Family Court has, as a generalisation, approved of this view.[102] However, when dealing specifically with superannuation entitlements, the Full Court has always been reluctant to use the discretion in this particular way.[103]

The thrust of the judgment in *Murkin* is one of intense practicality. Nygh J. held that the 'balance of hardship' on the parties and the fact that an adjournment would serve a 'useful purpose' would be factors allowing him to exercise his discretion in this fashion.[104] It would appear, therefore, that this would override the provisions of s. 81 of the Act as to the finality of orders. Similarly, it would also appear to override the conditions of s. 44 (3) of the *Family Law Act* which provides that property applications must be brought within twelve months of the granting of principal relief unless the leave of the Court is granted.[105]

The 'appropriate' nature of this approach is also emphasised in the reasoning where a comparison is made with the case of *White and White*[106] where the property in question was a remainder in realty postponed during a life estate. In *White*, the valuation of the property was difficult, but nevertheless possible. A standing over of the application was disallowed. In *Murkin* on the other hand, quantification of the husband's eventual entitlement was impossible. Therefore, it was concluded that a standing over would be appropriate. The important distinction between these cases is that in *White* the asset in question was 'property', whereas in *Murkin* it was not. *Murkin* adopted the convenient approach of adjourning the application until the asset would *become* 'property'.

It has not been finally settled what the approach of the Court would be at this later time. It would appear, however, that the question of contribution (if any) would be related back to the *earlier* period, but that the Court would still be obliged to take into account the other provisions of the Act at the *later* application to allow for any significant changes which may have occurred during the intervening period.[107]

Both the Family Law Council[108] and the Joint Select Committee on the *Family Law Act*[109] recommend that although orders of the 'once and for all' type are preferable, the *Family Law Act* ought to be amended specifically to give to the Family Court a discretionary power to defer the making of a final order and, where necessary, to make an interim order.

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101 *Bogeta Pty. Ltd. and Another* v. *Wales and Others* (1977) 1 N.S.W.L.R. 139 at p. 149.
102 *Pertsoulis and Pertsoulis* (1979) F.L.C. 90-613, at p. 78,156.
103 *Crapp, ante, and Bird, ante.*
104 *Murkin, ante,* at p. 75,084.
105 Ibid, at p. 75,085. However, His Honour's statement that the purpose of s. 44 (3) is in any event to provide *notice* to the respondent of such applications (rather than bring them to an end) is open to doubt.
106 (1979) F.L.C. 90-682, discussed in *Murkin, ante,* at p. 75,084.
107 Per *Crapp ante*; see also Family Law Council Working Paper No. 8, *ante,* paragraphs 6.1-6.3.
108 Working Paper No. 8, *ante,* Recommendation A (v).
109 *Report, ante,* Recommendation 33.

However, the approach in *Murkin* does raise some problems. Where the parties are not as close to retirement as they were in *Murkin*, an indefinite standing over of the application would be unfair to a superannuitant who remarries and naturally wishes to provide for a new family, both at present and in the future. Nygh J. himself states in *Murkin* that the first wife should have no necessary priority over the second in relation to the assets held by the husband,[110] and yet the effect of this decision may be the reverse if the parties are divorced at relatively early ages.

Also, it should be remembered that in *Murkin* there were effectively no other matrimonial assets. If there were, the overwhelming weight of authority from the decisions of the Full Court of the Family Court indicates that the Court should adjust the interests of the parties immediately, by means of those other assets, rather than stand over the application.[111]

Furthermore, this approach may be frustrated by the death of the superannuitant prior to retirement, prompting both the Family Law Council and the Joint Select Committee to recommend that the *Family Law Act* be amended to prevent the abatement of the application in such circumstances.[112]

With the exception of abatement due to the death of the respondent, the approach of deferring the application has been used *de facto* when superannuation has been taken into account in relation to an order for *maintenance*. The Full Court has said that adjustments to periodic maintenance can always be made at the time the contributor actually receives money from the superannuation fund, even to the extent of ordering a lump sum payment at that time.[113]

(c) *An Order Related to a Calculation of Contributions During Marriage*

In community property regimes, a Court is obliged to undertake substantially a mathematical calculation of entitlements and contributions, and can do so in various ways.[114] In Australia, the Family Court is not so obliged and it has been reluctant to use this approach. Moreover, such a calculation, if used, would only be a starting point from which to argue an amount for the wife depending on the circumstances of the case, rather than a final figure to which the wife would be automatically entitled.

The cases already discussed in relation to the notion of 'compensating'

110 *Murkin, ante,* at p. 75,081.
111 See (d), infra.
112 Working Paper No. 8, *ante,* recommendation B (1) (b); *Report, ante,* Recommendation 34.
113 *Mapstone, ante,* at p. 78,639. Note, however, that if there is no need of maintenance, the superannuation may be disregarded altogether: *W and W* (1980) F.L.C. 90-872.
114 For a discussion of the effects of various calculations, see G. J. van Bohemen: 'Superannuation Schemes and the Matrimonial Property Act 1976' (1979) 10 *Victoria Univ. of Wellington L.R.* 63, esp. at pp. 80-82.

the wife for a 'lost share' of her husband's entitlement are relevant here. The approach of the Full Court in *Bird's* Case[115] indicated that if the wife was entitled to some portion of the husband's contributions, the amount of those contributions was not necessarily the figure from which the Court would calculate her entitlement. This is not an approach relating to a mathematical calculation but to an equitable adjustment.

Indeed, the only reported case where the Court has specified the husband's actual contributions (rather than his present entitlement) is *Whiteread and Whitehead*,[116] but in this case the Court ignored this figure as it regarded that the parties had not in fact suffered a lower standard of living because of the husband's contributions to the fund, and took into account the entire resources of the parties.

In *Matthews*, Nygh J. refused to quantify the husband's superannuation entitlement in any way, whether as present entitlement or actual contributions.[117] It was merely 'a factor' to be taken into account generally, in relation to the parties' mutual financial security. This factor was then considered in a non-mathematical way, to consider as a whole the considerations relevant to s. 79.[118] In *Thomas*, Gee J. did quantify the contributions during marriage as a percentage of the overall period of contributions, but the final award to the wife was 'discounted' due to the existence of other factors.[118a]

It would therefore appear that in Australia the Court does not embark on a method of mathematical calculation to arrive at the amount awarded in its orders. Moreover, even where the wife is regarded as having 'lost' an asset in the husband's superannuation on dissolution of the marriage, the approach of the Court is not to look to the actual contributions and increments to the entitlement during the marriage (as is done in most community property regimes),[119] but to use, if at all, the notional value of the entitlement to the husband as at the date of separation, dissolution or retirement, and then merely as the starting-point from which to arrive at an amount on considerations of justness and equity. Often, it is the equitable considerations alone which are used, having regard to the relative financial security of the parties.

Nevertheless, it has been suggested in one case that the Court's injunctive powers under s. 114 of the *Family Law Act* could be used to protect the wife's rights where an adjustment of matrimonial property includes a consideration of superannuation.[120] This was done on the basis that what would be protected was not the wife's actual entitlement to an assessed portion of the husband's benefit, but her right to an unassessed portion of an asset which will not become 'property' until a later date. This is a personal right of one party against the other, similar

115 (1979) F.L.C. 90-678.
116 (1979) F.L.C. 90-673.
117 (1980) F.L.C. 90-887, at p. 75,601.
118 Ibid.
118a (1981) F.L.C. 91-018.
119 For example, *Brown* v. *Brown* 15 Cal. 3D. 838; 544 P. 2D. 561 (1976).
120 *Murkin and Murkin* (1980) F.L.C. 90-806 at p. 75,083.

to the approach of the Full Court of the Family Court in *Sieling and Sieling*[121] where an injunction was granted to protect an inchoate right to bring an action at a later date when, at the date of the hearing, the parties were waiting for the mandatory twelve month separation period to expire so that an application for dissolution of the marriage could be filed and the Court then invested with jurisdiction to determine an application in relation to property. Such an approach has never actually been used in relation to superannuation by the Family Court.[122] However, it would appear that even an indeterminate right in the nature of a wife's claim *relative to* her husband's superannuation, although not *directly* on it, can be protected, despite the fact that contributions to the scheme, whether by the husband or notionally by the wife, are not considered by the Court in specific terms.

(d) *Orders Made in Relation To Other Property of the Parties*

Orders made in relation to other property of the parties, as opposed to orders made directly on the fund or on any notional entitlement to it, are the most popular method used by the Court to take into account the effect of a superannuation policy on the finances of the parties.

Obviously, it is simpler for the Court to recognize the existence of an entitlement and to adjust the parties' interest in other property, over which the Court does have some measure of control through its jurisdiction over those parties. However, the problem here is not only the necessity that the parties have other property, but again the problem of evaluating the wife's entitlement relative to that other property.

The approach to such an evaluation has varied in the cases from considerations of the notional value of the superannuation as at the date of separation,[123] to the notional value as at the date of dissolution,[124] to a valuation in general terms of the husband being 'better off' than the wife.[125]

Despite whichever approach is taken, the final amount effectively received can be dictated not by any judicial notice taken of the superannuation in whatever value, but by the value of the asset the Court chooses to adjust. Thus, in the decision at first instance in *Crapp's* Case, the wife received the matrimonial home, which was an asset of a value unrelated to any computation of either entitlements or contributions.

As the matrimonial home is usually the parties' most valuable realizable asset, it is invariably the target for such orders. Sometimes this will be in the form of leaving unaffected an existing division of the realty between the parties,[126] but more usually the sale of the property and

121 35 F.L.R. 458; (1979) F.L.C. 90-627.
122 In *Murkin, ante,* it was found to be unnecessary.
123 *Lange and Moores* (1979) F.L.C. 90-651.
124 *Crapp and Crapp* (1978) F.L.C. 90-460. Note that a deduction was made to this amount to take the effect of taxation into account.
125 *Bailey and Bailey* (1978) F.L.C. 90-424; *Crapp and Crapp* (1979) F.L.C. 90-615.
126 *Bailey and Bailey* (1978) F.L.C. 90-424; *Richardson and Richardson* (1979) F.L.C. 90-603.

division of the proceeds is specified,[127] although orders which in effect require one party to buy out the other party's interest have been made.[128]

The advantage of this type of order is that it is virtually immediate, and the difficulties that arise if the husband dies before retirement do not occur. Also, it is an adjustment of interests in property over which there is no question that the Court has jurisdiction. However, such an order is impossible if there is no other property to adjust, and, even if there is, the orders themselves can be arbitrarily limited to the value of that property.

Indeed, the vagueness inherent in the justifications made for these orders was highlighted by the Full Court in *Bird's* Case when it said that because of the limitations of s. 79 and s. 79A of the *Family Law Act* the Court must do the best it can with whatever property is available to the parties at the time of the hearing, and while any number of contingencies may occur in the future which may ultimately render the order less equitable than otherwise it might have been, the Court will adjust the available property 'while making suitable allowance for what it can forsee in the future'.[129] While the Court did refuse to act as a fortune teller in *Mapstone's* Case,[130] that case concerned the issue of maintenance, and maintenance orders may be modified at a later date when and if suspected contingencies do occur.[131] There was therefore no need for the Court to indulge in conjecture. In relation to adjustments of property interests, however, this problem persists, and while the Court will not usually speculate as to the future financial position of the parties, in effect it is forced to do exactly that.

IV. CONCLUSIONS

At the root of this problem in matrimonial property law lies not so much the particular questions of whether a superannuation entitlement should be defined as 'property' in the *Family Law Act* or whether Australian law should adopt a system of community property, but a fundamental lack of a coherent social policy as to the entitlement of a divorced spouse to a portion of the other spouse's superannuation benefits.

The Family Court of Australia does regard the wife's loss to any claim on her ex-husband's superannuation as an important financial consequence of the dissolution of a marriage,[132] and this, indeed, will be particularly so where the parties are relatively poor.[133]

The approach of the Court to the problem has been marked by a bumpy progression of advances and retreats according to the perceived justice and equity of particular circumstances and, moreover, by an

127 *Kutcher and Kutcher* (1978) F.L.C. 90-453; *Crapp and Crapp* (1979) F.L.C. 90-615.
128 *Whitehead and Whitehead* (1979) F.L.C. 90-673.
129 (1979) F.L.C. 90-678 at p. 78,621.
130 (1979) F.L.C. 90-681.
131 *Family Law Act* s. 83.
132 For example, *Bailey and Bailey* (1978) F.L.C. 90-424.
133 See J. Eekelaar: *Family Law and Social Policy* (1978) at pp. 165-9.

attempt to balance concepts with pragmatism. The overall result is that a superannuation entitlement may or may not be 'property', depending on the terms of the specific deed in question. If it is not property, the Court will still take it into account as a financial resource of the parties or as a significant financial factor in the dissolution of the marriage. However, this is approached in a general way rather than in a specifically compensatory fashion. Furthermore, the approach to the orders made to give effect to the Court's determination is characterized by conflicting judgments and plagued with vagueness.

The present situation offers little clarity as to where the parties stand in relation to each other financially on dissolution of the marriage and consequently grounds for appealing in all but the most straightforward situations are almost assured.

Suggested improvements to this situation have included the following. An amendment could be made to the definition of 'property' in the *Family Law Act* to include expectancies. Alternatively or additionally, specific provision could be made for the use of deferred orders or applications and of interim orders. An amendment to s. 79A could allow for variation of property orders. It would also be possible to enact a provision to provide that there be no abatement of an application on the death of the respondent.[134]

Such amendments have the attraction of empowering the Court to deal with a superannuation entitlement in situations which would otherwise place this resource beyond its competence. Nevertheless, without further amendments to the enforcement provisions of the *Family Law Ac* and *Regulations* the applicant may achieve merely a phyrric victory.[135]

Most important of all, none of the amendments to the *Family Law Act* which have been suggested can overcome the most basic problem. Once the entitlement becomes payable, whether during the superannuitant's lifetime or on death, it is the *trustees* of the fund who invariably exercise an absolute discretion as to its distribution. The Family Court cannot make its orders binding on them. Therefore, amendments to the *Family Law Act* providing that there be no abatement of an application on the death of the respondent or that the entitlement can be treated as property will be of no avail if the benefit never actually forms part of the respondent's estate. The only way such a problem could be overcome is through amendment of respective Commonwealth and State legislation on superannuation to allow a Court to control the administration of a fund by trustees, or at the very least to provide that a divorced wife be placed in the class of beneficiaries along with a *de facto* wife.[136]

134 Joint Select Committee Report, *ante*, Recommendations 32, 33, 34; Family Law Council Working Paper No. 8, *ante*, Recommendation 1 (a), (b).

135 Such further amendments include a provision for the attachment of pension and the repeal of Regulation 134 (22): Family Law Council Working Paper, *ante*, Recommendations 1 (c) (i), (ii).

136 Family Law Council Working Paper, *ante*, Recommendations 2, 3, 4.

Such Commonwealth/State legislative co-operation in matters of Family Law has not been particularly forthcoming in the past, and it is unlikely to be achieved in the near future.

Moreover, the further problem relating to an eventual quantification of the wife's entitlement, taking all factors of justice and equity between the parties into account, remains, regardless of legislative amendment.

If the Family Court's approach does smack of treating individual symptoms as they arise rather than of offering a comprehensive prognosis and treatment, it is due to the fact that it can do little else. Even with the amendments which have been suggested, the task of the Court, and of the practitioner, will remain formidable. It is more often than not an exercise in quantifying the unquantifiable.