

# FAMILY LAW

## LEGAL UPDATE

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## What Is Superannuation and How Should It Be Dealt With?

*As a result of the recent case of Coghlan v Coghlan (2005), superannuation interests are now recognised as being different from property and treated separately. The Courts must apply the 4 step process set out in s79 of the Family Law Act 1975 (Cth) ("The Act") to the division of superannuation interests, even if the parties are not seeking splitting or flagging Orders.*

### Key message

*"Although a trial judge has a discretion as to how superannuation interests are treated in a particular case, the majority recommended that they be listed as assets separate from property..."*

In *Coghlan v Coghlan*, the parties were married in 1991 and separated in late-2002. With no children of the marriage, net assets of the parties at separation stood at \$590,208 (exclusive of superannuation). In late-2001, the husband received a lump sum superannuation payout of \$66,954 and while this had been dissipated at the time of trial, the husband still had superannuation interests of \$231,096 which he received as a fortnightly pension. The wife held superannuation interests of \$65,482.

At trial, neither party sought an Order in relation to superannuation interests and Rose J made no superannuation Orders. The wife appealed.

### Unique Species Of Assets

On appeal, a majority of the Full Court of the Family Court of Australia (Bryant CJ, Finn and Coleman JJ) held that under the Act, superannuation interests are a unique species of assets, different from property. Particular emphasis was placed on s90MS(1) of the Act which states that the Court can 'also make orders in relation to superannuation interests'. If superannuation was classified as property, the words

'property ... which includes superannuation interests' would have been used.

Although a trial judge has a discretion as to how superannuation interests are treated in a particular case, the majority recommended that they be listed as assets separate from property, and that the 4 step process that applies to the division of property under s79 of the Act be applied independently to them. They stated that a Court cannot make ultimate Orders that are just and equitable unless it takes into account the parties' superannuation interests and applies the 4 step process to their division. This applies regardless of whether or not an Order under Part VIIIB of the Act is sought by a party.

The wife's appeal was allowed, and a re-trial ordered.

Justices Warwick and O'Ryan agreed with the majority that the wife's appeal should succeed and that Courts are obligated to consider the parties' superannuation interests. They strongly dissented, however, on the nature of superannuation. Their Honours found that the legislature had intended to include superannuation interests in the definition of property,

and that the trial judge was accordingly obligated to include them in the overall asset pool. They expressed concern that if the majority's approach was adopted, it might be impossible to make Orders under s79 of the Act in cases where only superannuation interests exist.

Their concern was based on a view that s79 of the Act requires either property or an interest that is treated as property to be present.



## Moving Forward

The majority and dissenting judges had divergent views of the effect of the majority's decision.

In contrast to O'Ryan J who believed the majority's decision was 'confusing and likely to promote uncertainty', Bryant CJ, Finn and Coleman JJ believed there was little difference in the practical consequences of the judgments. Whether this proves to be true or not, will largely depend upon whether the Courts can still make Orders under s79 of the Act where only superannuation interests exist.

Further more, even if the majority's decisions does not effect the overall percentage division of assets between parties, it may limit parties' ability to effect a flexible division of assets by requiring superannuation interests to be dealt with separately. For example, a party may no longer be able to accept a greater percentage of property other than superannuation in lieu of receiving a split of their spouse's superannuation interests.

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## Capital Gains Tax: Extended Roll-Over Relief

*As part of the 2005/2006 Federal Budget, the Commonwealth Government has announced that it will extend the capital gains tax (CGT) roll-over relief for relationship breakdowns.*

At present, CGT roll-over relief under s126-5 of the *Income Tax Assessment Act 1997* (Cth) is limited to transfers that result from a court order or an maintenance agreement approved by a court. Binding financial agreements and similar state or foreign agreements are not court orders; they are private agreements that oust the courts' jurisdiction provided certain requirements are satisfied.

**While the extended CGT roll-over relief is likely to increase the popularity of binding financial agreements and make them more useful in a majority of circumstances, there may be occasions when a spouse wishes to avoid CGT roll-over relief and trigger a CGT liability.**

### Relief Available

CGT roll-over relief will soon be available where assets are transferred to a spouse or former spouse pursuant to:

- » a binding financial agreement under the *Family Law Act 1975* (Cth) ("The Act") or a similar agreement under a corresponding foreign law;
- » an arbitral award under the Act or a corresponding award made under a corresponding state, territory or foreign law; and
- » a written agreement under a state, territory or foreign law relating to de facto marriage breakdown where the agreement is similar to a binding financial agreement.



The Government also intends to introduce two related amendments.

The CGT main residence exemption will be amended so that it interacts better with CGT roll-over relief for relationship breakdowns. The main residence exemption will apply if a transferor spouse received a dwelling (or interest in a dwelling) on or after 20 September 1985 and CGT roll-over relief is available due to a relationship breakdown. How both spouses used the dwelling will be taken into account when determining the transferee spouse's eligibility for the exemption. Under the second amendment, cash settlements resulting from relationship breakdowns will not give rise to CGT liabilities.

## Avoiding Protracted Litigation

Assistant Treasurer Mal Brough hopes that the amendments will 'encourage separating couples to settle to their own affairs and avoid potential costly and protracted litigation'.

Whilst the extended CGT roll-over relief is likely to increase the popularity of binding financial agreements and make them more useful in a majority of circumstances, there may be occasions when a spouse wishes to avoid CGT roll-over relief and trigger a CGT liability. For example, a spouse may have incurred capital losses when disposing of other assets and want to utilise them by crystallising an offsetting capital gain.

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## Further info

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