child support payable in respect of the said child be fixed at nil dollars from 19 August 1993 until 15 March 1995.

The form 63 application filed 28 February 1997 be as otherwise dismissed.

[¶92-751] STAY, DL v STAY, GB
Full Court of the Family Court of Australia at Brisbane
Judgment delivered 7 May 1997
Full text of judgment below

Family law — Property settlement — Superannuation — Effective control of superannuation funds by parties — Superannuation entitlements as property.

Property settlement — "Special" or "extra" contributions — Assets valued in the medium range.

This was an appeal against property orders made by May J on 11 December 1996.

The husband was aged 55 at the time of trial and the wife was aged 53. They married on 2 May 1964 and separated finally in December 1991. There are five adult children of the marriage.

There were no significant assets held at the commencement of the marriage. The wife ceased substantial work outside the home in 1965, becoming full-time parent and homemaker, while the husband continued in various forms of employment before establishing a building enterprise. The trial Judge found that the bulk of the assets of the parties had been acquired from 1985 until separation through the husband's efforts in his building enterprise.

The trial Judge found that the net value of the assets of the parties at the date of hearing was $3,706,217. In addition, she found that the parties had what she described as contingent assets being their respective interests in two superannuation funds. Although urged by the wife to do so, the trial Judge did not include the parties' interests in those funds, less notional income tax, in the value of the assets to be divided between the husband and the wife. In addition, she found that the contributions made by the husband had the quality described in some authorities as "special" or "extra".

Held: **appeal allowed.**

In relation to the wife's superannuation, the effect of the trial Judge's order was to create a situation as a result of which the trustee thereof would clearly be the creature of the wife. Overall, the evidence disclosed that the wife could put herself in a position to obtain her superannuation entitlements without suffering any detriment.

The husband disclosed little information in relation to his superannuation entitlements. There is a positive obligation on a party to make a full disclosure of all relevant affairs. Once it is clear that there has been a non-disclosure, the Court should not be unduly cautious in making findings in favour of the innocent party. The husband was obliged to make a full and frank disclosure in relation to the trustee of the superannuation fund of which he was the only member. He failed to do so.

It was proper to infer in this case that the trustee of the fund was his creature and that he could put himself in a position to obtain his superannuation entitlement without suffering detriment.

In the circumstances of this case, the trial Judge ought to have treated the parties' respective entitlements to superannuation as property available for division.

In this case, the application of the skills of the husband, his ingenuity and enterprise produced assets in the medium range rather than the high range as in Ferraro and Ferraro (1993) FLC ¶92-335, McLay and McLay (1996) FLC ¶92-667 and Whiteley and Whiteley (1992) FLC ¶92-304.

The trial Judge erred in concluding that his contribution had the quality described in the authorities as "special" or "extra" or as she found as being extraordinary.

Discretion re-exercised and the husband ordered to pay the wife's costs of the appeal.

[*Headnote prepared by the CCH FAMILY LAW EDITORS from that written by the Court*]

Appearances: Mr Hamwood of counsel (instructed by Wight & Co) appeared on behalf of the appellant wife; Mr Carrigan of counsel (instructed by Peter J Sheehy) appeared on behalf of the respondent husband.

Before: Nicholson CJ, Ellis and Lindenmayer JJ.

Nicholson CJ, Ellis and Lindenmayer JJ:

Introduction

Proceedings between the parties pursuant to the provisions of ss 74 and 79 of the Family Law Act were heard by May J over a period between October 1995 and December 1996. On 11 December 1996, May J made the following orders:—

"1. The HUSBAND and WIFE forthwith do all such acts and things and sign all such documents as may be required to effect a sale of the commercial property situate at and known as 2042 Logan Road, Upper Mt Gravatt in the State of Queensland ('the Mt Gravatt property') and for the purposes of effecting a sale:

1.1 The listing price for the Mt Gravatt property shall be $3.550m or as agreed between the parties.

1.2 The Mt Gravatt property shall be listed for sale by private treaty with Knight Frank or such other registered real estate agents as agreed by the parties.

2. That in the event the Mt Gravatt property has not been sold by or before a date three months from the date of the making of this order, then the HUSBAND and WIFE shall make all such arrangements and do all such acts and sign all such documents to procure a sale by public auction of the Mt Gravatt property upon the following terms:

2.1 The auctioneer shall be as agreed between the parties and failing agreement as shall be nominated by the President of the Real Estate Institute of Queensland.

2.2 The auction shall take place within one month after the deadline date for sale by private treaty.

2.3 The reserve price shall be as agreed by the parties.

3. That upon completion of the sale of the Mt Gravatt property, the proceeds of sale be applied as follows:

3.1 To pay all costs, commissions and expenses of the sale.

3.2 To discharge the loan from the Advance Bank and the overdraft with the Commonwealth Bank.

3.3 The balance then remaining to be divided in the proportions of:

3.3.1 45 per centum thereof to the WIFE;

3.3.2 55 per centum thereof to the HUSBAND.

4. That the HUSBAND and WIFE forthwith do all such acts and things and sign all such documents as may be required to effect a sale of the former matrimonial home situate at and known as Twin Peaks Road, Bli Bli in the State of Queensland ('the house') and as by way of consequential arrangement that shall be made for the purposes of effecting a sale:

4.1 The listing price for the house shall be $320,000.

4.2 The house shall be listed for sale by private treaty with one registered real estate agent nominated by each party.

5. That in the event the house has not been sold by or before a date three months from the date of the making of this order, then the HUSBAND and WIFE shall make all such arrangements and do all such acts and sign all such documents to procure a sale by public auction of the house upon the following terms:

5.1 The auctioneer shall be as agreed between the parties and failing agreement as shall be nominated by the President of the Real Estate Institute of Queensland.

5.2 The auction shall take place within two months after the deadline date for sale by private treaty.

5.3 The reserve price shall be the sum of $310,000 or as agreed by the parties.

6. That upon completion of the sale of the home, the proceeds of sale be applied as follows:

6.1 To pay all costs, commissions and expenses of the sale and to pay any council and water rates and maintenance levies outstanding in respect of the home save for any arrears or payments to be met by the WIFE referred to in order 7.

6.2 To the mortgage (in the name of Stay Enterprises Pty Ltd, being approximately $27,000) to the Commonwealth Bank, Maroochydore, together with the costs of any release of mortgage.

6.3 The balance then remaining to be divided in the proportions of:

6.2.1 45% thereof to the WIFE;

6.2.2 55% thereof to the HUSBAND.

7. That the WIFE be at liberty to reside in the house at Bli Bli until sale upon her maintaining the house in proper condition and making the property available at all reasonable times for inspection by purchasers and agents. The WIFE pay all rates, insurances and other statutory charges and outgoings for the period of her occupancy.

8. That the WIFE attend to such repairs to the home as may be agreed between the parties in writing, signed by the parties and not otherwise with the cost of the repairs to be paid:

(a) as to 55% by the HUSBAND; and

(b) as to 45% by the WIFE.

That the WIFE retain all receipts evidencing the repairs done to the home and that the HUSBAND reimburse the WIFE for his share of the repairs within seven days of the receipt by him of a written request for payment together with copies of invoices from the WIFE.

9. That the HUSBAND, his servants or agents be restrained from entering upon, remaining upon or loitering near the home at Twin Peaks Road, Bli Bli, save that the HUSBAND be permitted to attend at the home for the purpose of inspecting the home prior to sale or attending the auction, or for doing work agreed between the parties in writing. The HUSBAND to give the WIFE's solicitors three days written notice of his intention to attend at the home. The HUSBAND to be accompanied by another person.

10. In each case where property is auctioned the HUSBAND and WIFE be at liberty to bid at such auction. Should the HUSBAND or the WIFE bid at such auction and be the successful bidder then the HUSBAND and WIFE shall sign or cause to be signed by the Stay Family Trust, through its trustee, all necessary transfer documents required to effect a transfer of the Bli Bli property or the Mt Gravatt property as the case may be to the party who was the successful bidder.

11. That pending the completion of the sale of the Mt Gravatt property, the rentals from the Mt Gravatt property shall be paid to the Advance Bank in reduction of the loan indebtedness and any shortfall in loan repayments are to be funded immediately by the parties in the proportion of 45% of any deficiency by the WIFE and 55% of any deficiency by the HUSBAND.

12. That upon completion of the sale of the Mt Gravatt property, the HUSBAND and WIFE do all such acts and things and sign all such documents as may be required to transfer to the WIFE at the expense of the WIFE the eight units situate at and known as Carseldine Gardens free from all encumbrance.

13. That the WIFE is entitled to retain for her absolute benefit all rentals from the Carseldine units from 1 November 1996.

14. That the HUSBAND retain ownership or have transferred to him the following property interests without further claim from the WIFE and indemnify the WIFE in respect of all liabilities attaching thereto including capital gains tax:

14.1 The Stay Family Trust interest in the Triad Unit Trust (Alice Springs property);

14.2 The Bray Unit Trust (A-Mart building Kawana);

14.3 The Kentia Street house;

14.4 The Holden Calibra motor vehicle;

14.5 The Holden utility motor vehicle;

14.6 50% of the chattels of the parties and all remaining loose opals;

14.7 The balance of any bank accounts in the HUSBAND's name;

14.8 The shareholding in the HUSBAND's name;

14.9 The balance of the assets and liabilities including all the WIFE's loan accounts in the Stay Family Trust, save for those assets transferred to the WIFE below.

15. That the WIFE retain ownership of or have transferred to her the following property interests without further claim from the HUSBAND and indemnify the HUSBAND in respect of all liabilities attaching thereto including capital gains tax:

15.1 Magna motor vehicle;

15.2 Advance to Mr MacGregor for purchase of motor vehicle;

15.3 Jewellery in the WIFE's possession;

15.4 50% of the chattels;

15.5 Balance in any bank accounts in the WIFE's name;

15.6 Any shareholding in the WIFE's name;

15.7 The Buderim land;

15.8 The loan accounts owing by the children to the Stay Family Trust;

15.9 Loan moneys reimbursed by Stephen Stay.

16. That the HUSBAND and WIFE each be responsible for payment of their own personal income tax liabilities.

17. That the HUSBAND pay to the solicitors for the WIFE the sum of $120,000 within two months of today. The balance cash payment representing 45% of the parties net assets to be paid without interest on or before a period of two months after the completion of the sale of the Bli Bli house.

18. That the WIFE receive 45% of the value of the Holden utility motor vehicle. The sum of $4,500 to be paid by the HUSBAND to the WIFE's solicitors within one month of today. Failing such payment the vehicle be sold and the net proceeds divided as to 55% to the HUSBAND and 45% to the WIFE.

19. That the HUSBAND and WIFE do all such acts and things and sign all such documents to cause Stay Enterprises Pty Ltd to resign as trustee of the Stay Enterprises Pty Ltd Staff Superannuation Fund and that the WIFE forthwith appoint a replacement trustee. The HUSBAND be responsible for any costs associated with the transaction.

20. That the HUSBAND forthwith pay to the Stay Enterprises Pty Ltd Staff Superannuation Fund the sum of $24,878. The HUSBAND's loan account in the sum of $20,000 in relation to these moneys be adjusted accordingly.

21. That the HUSBAND within 30 days pay to the Stay Enterprises Pty Ltd Staff superannuation Fund such sum representing the net sale proceeds of 85,300 Quokka shares less $2,888.35.

22. That each party retain their respective benefits in the superannuation funds.

23. That the HUSBAND and the WIFE provide within seven days in writing a list of any furniture or chattels removed by them from the Bli Bli house referring to the description of such item and its present location, such items to be included in the list of chattels to be divided.

24. That the HUSBAND and WIFE provide within seven days in writing a list of any furniture or chattels in their respective possession.

25. That the chattels presently in the possession of the HUSBAND and the WIFE and the chattels referred to in paragraph 23 be divided equally between the HUSBAND and the WIFE and that for the purpose of dividing the chattels the parties toss a coin to decide who will be the first to choose an item from the list and thereafter the parties are to take turns to choose an item from the list until all items are allocated.

26. That upon completion of the sale of the Mt Gravatt property and the transfer of the Carseldine Units to the WIFE, that the WIFE sign all such documents as may be required to resign as a director of the Stay Enterprises Pty Ltd and contemporaneously therewith the WIFE sign all such documents as may be required to transfer to the HUSBAND or his nominee her shareholding in Stay Enterprises Pty Ltd.

27. That the parties' accountants prepare a further report for the parties in relation to the following issues:

(a) the loan accounts of the children as at 30th June, 1995;

(b) the sum payable, if any, by way of income tax for 1994 or prior years;

(c) the amount of a loan for the HUSBAND's tax included in the Commonwealth Bank Overdraft of $27,000.

28. That should the parties fail to agree on or before the 20th December, 1996 or such further time as may be agreed in writing in relation to those issues then an expert be appointed pursuant to Order 30A being either Mr Rodger Flynn Ms Marian Micalizzi or such other accountant as may be nominated by the President of the Institute of Chartered Accountants. The parties pay the fees and expenses of such expert equally.

29. That such report be provided to the Court on or before 3rd February, 1997.

30. That the WIFE's application for spouse maintenance be dismissed."

The effect of the orders made pursuant to s 79 of the Act, against which the wife has appealed, was to divide the assets of the parties, not including what the trial Judge described as contingent assets of superannuation, as to 55 per cent to the husband and 45 per cent to the wife.

Background facts

The trial Judge set out in detail, in her reasons, the facts relevant to the issues raised at the hearing. Having regard to the grounds of appeal, some of those issues are now not relevant. Before us, other than as we hereafter specifically indicate, the facts as found by the trial Judge were not in dispute and may be summarised as follows.

The husband was born on 11 May 1941 and the wife on 17 June 1943. They married on 2 May 1964 and finally separated 27 years later in December 1991.

There are five children of the marriage, aged respectively at the date of hearing before the trial Judge, 21, 24, 27, 29 and 31 years.

At the date of the marriage, the wife was employed as a teacher and the husband by a firm of stockbrokers. At that date, neither party had assets of any significant value. However, after January 1963 but prior to their marriage, the parties purchased land at The Gap. The husband paid the deposit in relation to the purchase of the land and the wife subsequently paid the deposit in relation to the house thereafter erected on that land.

The wife ceased work in February 1965 when she was expecting the parties' first child and did not thereafter work full-time outside the home although, for short periods, commencing in 1971, she worked as a supply teacher.

In 1966, the husband resigned from his then employment and commenced working for Thiess Peabody Mitsui. This employment necessitated the parties moving around various Queensland mining sites until 1968 when they returned to Brisbane.

The husband resigned from Thiess Peabody Mitsui in August 1971 and commenced a building project at Dickie Beach on the Sunshine Coast. For a time, the wife and the then three children lived in a caravan on the building site.

Over the next five years, the husband undertook studies, mostly part-time, to qualify as a builder. In addition, he held employment with his brother.

At first, the building enterprise was a partnership between the husband and the wife but in December 1977, the Stay Family Trust was established with Stay Enterprises Pty Limited as the trustee. The husband and the wife are the directors and shareholders of that company.

Thereafter, the husband undertook various commercial and residential developments through the vehicle of the Stay Family Trust and through joint ventures with others.

In 1976, the parties acquired land at Bli Bli on which they erected the former matrimonial home. That home was used as security for various projects undertaken over the years. The husband and the wife resided in that home together until the husband, from about 1989 onwards, often lived in Brisbane.

The former matrimonial home was listed for sale in 1992 but for a number of reasons, including the husband's then reluctance, was not sold.

The wife moved out of the former matrimonial home and commenced residing

with her then fiance in about November 1992. That relationship subsequently broke down. Without reference to the husband, the wife, in 1995, leased the home to a Dr and Mrs Stone. She received the rental moneys and met the outgoings.

Between 1974 and 1979, a number of blocks of land were bought and sold. Substantial profits were generated between 1978 and 1981, particularly from a project at Bundilla which involved the construction of units and a shopping centre. The proceeds of sale of the complex were used to acquire vacant land, including a site at Alexandra Headlands.

In 1983, the husband was involved in the construction of a commercial building at Alice Springs. That development was carried out through the Triad Unit Trust of which the Stay Family Trust has a one-third interest. The Triad Trust was established in about 1983, the trustee being Stay Enterprises Pty Limited.

In 1984, Stay Enterprises Pty Limited as trustee for the Stay Family Trust purchased land at Maroochydore, originally borrowing from Westpac Banking Corporation $600,000 for that purpose but in a foreign currency. Following a fall in the value of the Australian dollar relative to that currency, the amount outstanding on the loan rose to $A1.2 million. The husband later was instrumental in Westpac Banking Corporation paying to the Trust a cash settlement covering part of the losses occasioned as a consequence of the loan being in foreign currency.

In 1985, the parties separated for a period of some seven months. During that period, the husband was involved in the purchase of land at Kawana and the construction thereon of a commercial building, the A-Mart Building. The property is owned by Stokenchurch Pty Limited as trustee for the Bray Unit Trust. The directors of that company are the husband and a business partner. The husband has a one-half interest in the Trust.

In 1988, what was known as the Carseldine Gardens project was commenced. Subsequent to separation, the parties sold one of the units at Carseldine Gardens to the wife's parents at an undervalue of approximately $60,000. At the date of hearing, the parties held eight units in the project which the wife was then managing. A vacant block of land which it had intended would be stage 3 of the project was sold in October 1992 for $513,000.

In June 1992, the wife participated in the completion of a contract to purchase a commercial property at Mt Gravatt for $4,477,510. Part of the purchase price was the transfer to the vendor of the Maroochydore property acquired in 1984, valued at $1.2 million. The wife also participated in signing guarantees to borrow the sum of $3.5 million from the Advance Bank to complete the purchase.

On 15 April 1993, the husband was ordered to pay to the wife maintenance in the sum of $300 per week. The wife asserted that such payments were often late and that, as a consequence, when she commenced to manage the Carseldine units in February 1994, she took the maintenance payments from the rental of those units. The trial Judge concluded that, since February 1994, the wife treated the Carseldine units as her own, depositing the rental moneys from the units in an account in her own name.

In July 1992, the husband entered into a joint venture with Bradley Allen in an asphalt plant known as "Allen's Asphalt", by purchasing a 30 per cent share for the sum of $150,000. A one-third share was sold to Stay Enterprises Pty Limited Staff Super Fund, a one-third share transferred to the husband's friend, Mrs Barlow, and a one-third share was retained by the husband. Mrs Barlow has not, nor is it intended that she will, pay for her share. Mr Allen repurchased the share in November 1994 and the wife asserted that the husband has not accounted to the Superannuation Fund for the whole of those purchase moneys.

The only members of Stay Enterprises Pty Limited Staff Superannuation Fund are the husband and the wife. However, during the year ending 30 June 1993, the husband established a fund known as the G B Stay Superannuation Fund as he desired to maintain his financial affairs separate from those of his wife. The only member of that Fund is the husband. In November/December 1993, he rolled-over the sum of $315,000 from the Stay Enterprises Pty Limited Staff Superannuation Fund to the G B Stay Superannuation Fund.

On 1 July 1993, the wife purchased a one-half interest in a vacant block of land at Buderim. The total purchase price was $115,000, the wife borrowing her one-half share.

The husband purchased land at Carseldine on which he built a house and where he thereafter resided, but wishes to move back to the Bli Bli property (the former matrimonial home) to pursue building interests on the north coast.

At the date of hearing, the wife was living with a Mr MacGregor. She ceased cohabiting with him, however, on 4 June 1996 and moved back to reside in the former matrimonial home.

In addition to outlining the relevant facts, the trial Judge referred to the evidence relating to the manner in which the parties utilised certain funds, particularly after 1985.

Judgment of the trial Judge

In her judgment, after referring to the nature of the claims of the parties and, in greater detail, to the facts which we have summarised, the trial Judge identified six issues as follows:—

1. Contributions of the parties from the date of marriage to the date of separation.

2. Contributions of the parties since separation.

3. Section 75(2) factors.

4. The division of furniture and chattels.

5. The wife's application for lump sum maintenance.

6. The parties' legal costs and how they should be treated.

She then turned to a consideration of each of those issues. Thereafter, she evaluated the evidence relating to the respective contributions of the parties and then relating to the relevant matters referred to in s 75(2).

The trial Judge next identified and where necessary assessed the value of the property of the parties. She ultimately said in relation to that property:—

> "Although there is a dispute as to how it should be dealt with the parties superannuation entitlements can be described as to $125,902 in the Stay Enterprises Pty Ltd Staff Superannuation Fund and the sum of $559,989 in the G B Stay Superannuation Fund. The notional tax assessed on both those funds is $121,018 so that the net worth of both funds is $564,873.
>
> In view of the findings I have made, I find that the property of the parties or either of them is as follows:

1.	Value of Interest	
	(a) The Stay Family Trust	$1,072,046
	(b) The Bray Unit Trust	$ 671,266
	(c) Stay Enterprises Pty Ltd	0
	(d) Stokenchurch Pty Ltd	1
2.	Amount Owing By/(To) Related Entities	
	(a) The Stay Family Trust	$ 549,514
	The Stay Family Trust Joint Loan	$ 354,890
	(b) The Bray Unit Trust	($ 142,101)
	(c) Stay Enterprises	($ 61)
3.	Real Estate Properties	
	(a) Twin Peaks Road, Bli Bli	$ 310,500
	(b) Lot 10 Kentia Street Carseldine	$ 193,500
4.	Investments in Shares	$1,296,820
5.	Other Assets	
	(a) Suncorp Account — balance at 7/6/94	$ 3,844
	(b) Bills Discount Facility	($ 300,000)
	(c) Loan moneys not reimbursed	
	— P. Barlow (Asphalt Plant)	$ 50,000
	— Darren Stay	$ 5,000
	(d) Metway Debit Card & Metway Visa Credit Card at 26/9/95	($ 1,005)
	(e) Equity in Buderim land — value of property 50% share — loan borrowings — balance at 26/9/95	$ 59,000 ($ 66,737)

(f) Falcon Futura Car (one-third share of $23,000)	$ 7,667
(g) Jewellery	To be divided
(h) Household Chattels	To be divided
6. Income Tax Position	
(a) 1991 year	($ 11,949)
(b) 1995 year	($ 19,477)
(c) Notional Capital Gains Tax	($ 326,000)
	$3,706,217

Contingent Assets — Superannuation

Stay Enterprises Pty Ltd Staff Superannuation Fund	$ 125,902
G.B. Stay Superannuation Fund	$ 559,959
	$ 685,891
LESS notional tax	$ 121,018
	$ 564,873''

Thereafter, the trial Judge referred to the approach to be adopted in relation to the competing claims for property settlement and went on to say:—

> ''In this matter, apart from the considerations I have already referred to in relation to Section 79, there are three other particular matters raised. The first is the question of whether the building up of the business assets were by the husband and, if so, should they be credited to him in such a way as to give him a much larger percentage of the property than the wife. The second question is how the parties (sic) respective interests in superannuation should be treated. It was contended by the wife that they should be included in the assets of the parties and a percentage division applied to them. The third question is how the Court should deal with the parties (sic) legal costs. A further important matter in this case is the consideration of the Section 75(2) factors and how that should be applied in this case particularly in view of the disparity in the parties' superannuation funds.''

The trial Judge then set out her conclusions in relation to the contributions of the parties as follows:—

> ''Although the case was not argued in terms of stages, I have concluded that it could be said that from the time of the marriage in 1964 until 1971 the parties (sic) contributions were equal, from 1971 to 1985 they both worked hard, the wife particularly running the family, the husband began to develop the business. However, I regard as a matter of considerable significance that when the parties separated for about seven months in 1985 their net worth was approximately $500,000. It was the husband that fought back and, I find, put the parties in the position that they are in today. An analysis of the parties' net worth and the facts between 1985 and separation reveal that the assets have been acquired largely through the husband's efforts. I am satisfied that the wife continued as home maker but the children were substantially older by this time and to some extent the wife pursued her own interests. Some of her interests were related to the children, Scouts and Sunday School. I do not intend to give the impression of criticism of the wife, but I have concluded that the husband's contribution was extraordinary.''

The trial Judge then referred to *Ferraro and Ferraro* (1993) FLC ¶92-335 and *McLay and McLay* (1996) FLC ¶92-667, indicated that she was adopting a global approach to her consideration of the question of contribution and said:—

> ''In my view, it is clear that the contribution made by the husband in this case has the quality that has in some authorities been described as 'special' or 'extra'.''

Thereafter, she dealt with the parties' submissions in relation to superannuation, concluding that consideration by saying at page 54 of the Appeal Book:—

> "It was submitted on behalf of the wife that the proper approach is to include the funds in the assets to be divided. It was asserted that this was so in view of the ages of the parties and that it could be expected that the husband would retire. However, this is contrary to the submission that I should conclude that the husband will return to the building industry. In my view, there is no evidence that the husband or the wife will retire within a short space of time and thus will have the right to obtain those moneys. I have given this factor considerable weight as part of the Section 75(2) considerations.
>
> It needs to be observed, however, that this is not a case where the husband's superannuation which is now in his fund was built up entirely during the parties' cohabitation."

She then dealt with the issues relating to the treatment of the parties' respective liabilities for legal costs and the relevant s 75(2) matters. She concluded that she should take into account the liability of each for costs under s 75(2) and her consideration generally by saying:—

> "I have formed the view that in this case the Section 75(2) factors to which I have referred are so significant as to cause an adjustment to have the effect of reducing the husband's percentage based on contribtuion (sic) to the date of trial which I find to be 65% to 55%."

The trial Judge then considered the wife's claim for spousal maintenance, which she dismissed, and the issues relating to furniture, jewellery and the use and occupation of the former matrimonial home. Thereafter, she made the orders after giving each party an opportunity to consider her reasons and draft proposed orders.

Grounds of appeal

The grounds of appeal contained in the Amended Notice of Appeal, as amended at the hearing, are as follows:—

> "1. The decision was wrong in and contrary of law.
>
> 2. The decision was against the evidence and the weight of the evidence.
>
> 3. Her Honour, the Learned Trial Judge, erred in fixing a percentage distribution of the assets without including the parties' respective superannuation entitlements in the asset pool.
>
> 3A. Her Honour, the Learned Trial Judge, erred in treating the superannuation entitlements as a financial resource when they were at all times assets in the hands of the parties.
>
> 4. Her Honour, the Learned Trial Judge, erred in that she failed to have regard or alternatively sufficient regard to the contributions made by the wife during the marriage.
>
> 4A. Her honour, the Learned Trial Judge, erred in finding that the contribution made by the husband during the marriage was such as to entitle him to 65% of the assets based on his contributions.
>
> 4B. Her Honour, the learned Trial Judge, erred in finding that the husband's contribution to the date of hearing entitled him to 65% of the assets while holding that the husband was also entitled to receive a salary of $100,000.00 per annum post separation and to retain in his superannuation fund the sum of $153,814 appropriated by him to that fund since separation.
>
> 5. Her Honour, the Learned Trial Judge, erred in that she failed to give adequate or sufficient reasons for her finding that the parties' respective superannuation entitlements should be distributed in different proportions to the assets.
>
> 5A. Her Honour, the Learned Trial Judge, erred in determining the parties should each receive their respective superannuation entitlements without considering the contributions of each of the parties to the building up of such entitlements.
>
> 6. Her Honour, the Learned Trial Judge, erred in that she failed to have regard or alternatively sufficient regard to the contributions, both direct and indirect by the wife subsequent to separation.
>
> 6A. The determination of Her Honour, the Learned Trial Judge, whereby the wife received 38% of the net assets of the parties including their superannuation entitlements was outside the proper exercise of Her Honour's discretion.

7. There was no evidence, or alternatively no sufficient evidence, to enable Her Honour, the Learned Trial Judge, to find that the husband was entitled to a salary of $100,000.00 subsequent to separation.''

However, the grounds were argued under three headings namely, the treatment of superannuation (Grounds 3, 3A, 5 and 5A), the contributions of the parties (Grounds 4, 4A, 4B, 6 and 6A) and salary (Ground 7) and we will similarly consider the submissions.

Submissions on appeal

The treatment of superannuation

The trial Judge identified the superannuation entitlements of the parties as ''contingent assets'' when she identified them as part of her finding as to the property of the parties. She did so by saying:—

''**Contingent Assets — Superannuation**

Stay Enterprises Pty Ltd Staff Superannuation Fund	$125,902
G.B. Stay Superannuation Fund	$559,959
	$685,891
LESS notional tax	$121,018
	$564,873''

Later, in the reasons, she said:—

''The parties had different submissions in relation to the question of superannuation. The parties have acquired through the vehicle of Stay Enterprises Pty Ltd Staff Superannuation Fund and their respective contributions, which were controlled by the husband until recently, moneys in that fund. The husband post separation determined to remove his moneys from that fund so that it can be said that the sum of $125,902 represents the wife's interests. The husband's interests in the G.B. Stay Superannuation Fund is $559,989. The tax that has been estimated at (sic) notional on those two figures is $22,781 in the case of the wife and $98,237 in the case of the husband. It is appropriate to add as part of this consideration that one minor dispute was an allegation by the wife that the husband had overdrawn his entitlement in the Stay Enterprises Superannuation Fund by the sum of $4,878. Mr Calabro, in his evidence, explained how this had occurred and that it related to the husband's transfer of the Quokka shares to his fund. I accept Mr Calabro's evidence and intend to order that the husband cause the amount of the overpayment in that sum to be returned from the G.B. Stay Superannuation Fund to the Stay Enterprises Pty Ltd Staff Superannuation Fund. The effect then would be that the wife's fund would be in the sum of $130,780 and the husband's $555,111.''

Thereafter, in the passage at page 54 of the Appeal Book to which we have already referred, the trial Judge set out her reasons for not including the funds in the assets to be divided but for taking the respective entitlements into account as a relevant s 75(2) matter.

On behalf of the wife, it was submitted that the trial Judge erred, in the circumstances of this case, in not including in the assets available for distribution the sum of $564,873. If that submission is accepted, the value of the assets available for division would be $4,271,090.

In support of the grounds, it was submitted that it was not disputed at and was evident throughout the hearing that the husband, in particular, had full control of the assets in the two superannuation funds. Indeed, in the passage from the reasons to which we have just referred, the trial Judge found that ''[T]he parties have acquired through the vehicle of Stay Enterprises Pty Ltd Staff Superannuation Fund and their respective contributions, which were controlled by the husband until recently, moneys in that fund.'' That finding was not challenged.

On behalf of the husband, it was contended that the respective entitlements were not property within the meaning of the Act and were properly characterised by the trial Judge as financial resources. Our attention was specifically directed to the findings of the trial Judge that ''there is no evidence that the husband or the wife will retire within a short space of time and thus will have the right to obtain those moneys'' and that ''this is not a case where the husband's superannuation which is now in his fund was built up entirely during the parties' cohabitation''.

It was further submitted that the relevant superannuation deeds were not in evidence, that there was no evidence of any present entitlement or that the trustee of either fund was the creature of the parties or either of them. The evidence adduced in relation to the

superannuation question was minimal and unsatisfactory. However, it did disclose that the trustee of the Stay Enterprises Pty Limited Staff Superannuation Fund was Stay Enterprises Pty Limited of which the husband and the wife are the directors and shareholders. Additionally, it was put that there was no evidence that the husband could deal with the funds as he liked. Our attention was also drawn to the evidence relating to the management and growth of the wife's entitlement over the years and to paragraph 48 of the husband's affidavit filed on 1 September 1996 in which he deposed:—

> ''My reason for setting up the G.B. Stay Superannuation Fund in 1993 was that I am almost at retirement age and in doing this, it allowed me the opportunity to minimise taxation and increase my Reasonable Benefits limit. By only having my own funds in this Fund, I was able to invest in slightly more risky investments and by doing so, my entitlements have risen from $170,032.00 in July 1992 to over $500,000.00 at present.''

As was pointed out by the Full Court in *Wunderwald and Wunderwald* (1992) FLC ¶92-315, the Full Court in *Crapp and Crapp* (1979) FLC ¶90-615 and *Coulter and Coulter* (1990) FLC ¶92-104, expressed the view that, in general, an interest in a superannuation fund is not property as defined in s 4 of the Act. However, the Court in *Wunderwald and Wunderwald* (supra) went on to say:—

> ''... the Full Court in *Coulter's case* was referring to the majority of cases, but was not, we believe, intending to lay down a principle that in no circumstances could a superannuation entitlement be regarded as property. In this regard, it is important to have regard to the remarks of the Full Court in *Harris and Harris* (1991) FLC ¶92-254 at 78,709. In the latter case, the Full Court (Ellis, Strauss and Lindenmayer JJ) said:
>
> > 'It seems to us that the characterisation of an entitlement in a superannuation fund will depend on a consideration of the relevant statutory or private instrument in the light of all relevant facts and circumstances relating to the fund and to the parties. In a number of cases where injustice would be caused by treating the entitlements as property or as having a particular value, these entitlements have been described as a financial resource. In our view, it can be said generally that an entitlement under a superannuation scheme is a chose in action and property to that extent.'
>
> After citing *Perrett and Perrett* (1990) FLC ¶92-101 and *Evans and Public Trustee for the State of Western Australia as Legal Personal Representative of Evans* (1991) FLC ¶92-223, and the divergent views expressed in the latter case, the Court continued:
>
> > 'In the present case, the fund contained a defined amount. The immediate entitlements of the beneficiaries could be ascertained by certain arithmetical calculations. There was no evidence to suggest that either party would suffer any unfair disadvantage if the portion of the fund referable to the parties were realised and distributed among them. Even if the amounts standing to the credit of the parties were a resource rather than property (as to which we need express no concluded opinion) it was legitimate in the particular circumstances of this case to evaluate the entitlements of the husband and wife by treating them as having a present value of $31,512 and $18,222 and a total of $49,734. Cf *Dawes* (1990) FLC ¶92-108 at 77,732.'
>
> ...
>
> In a case where parties can clearly put themselves in a position of obtaining their entitlements to a superannuation fund, without suffering any detriment, such as the loss of the opportunity to continue with their career and in a case, such as this one, where the trustee of the superannuation fund is clearly the creature of the parties or one of them, it seems to us to be quite unreal to treat such an entitlement as other than property which is available for distribution pursuant to s 79. In such a case it seems to us that the distinction between 'property' and a 'financial resource' is a distinction without a difference.''

The effect of paragraph 19 of the trial Judge's order was to create a situation as a result of which the trustee of the Stay Enterprises Pty Limited Staff Superannuation Fund would clearly be the creature of the wife. Overall, in our judgment, the evidence disclosed that the wife could put herself in a

position to obtain her superannuation entitlements without suffering any detriment.

In relation to the husband's entitlement, in cross-examination, he disclosed that the trustee of the G B Stay Superannuation Fund was Yagham Pty Limited. There was no evidence as to the identity of either the directors or shareholders of that company. However, in paragraph 48 of his affidavit filed on 1 September 1996, the husband deposed:—

> ''My reason for setting up the G.B. Stay Superannuation Fund in 1993 was that I am almost at retirement age and in doing this, it allowed me the opportunity to minimise taxation and increase my Reasonable Benefits limit. By only having my own funds in this Fund, I was able to invest in slightly more risky investments and by doing so, my entitlements have risen from $170,032.00 in July 1992 to over $500,000.00 at present.''

There is a positive obligation on a party in proceedings for property settlement to make a full and frank disclosure of all relevant financial affairs. Once it is clear that there has been a non-disclosure, the Court should not be unduly cautious in making findings in favour of the innocent party: *Black and Kellner* (1992) FLC ¶92-287 and *Weir and Weir* (1993) FLC ¶92-338.

In our view, the husband in this case was obliged to make a full and frank disclosure in relation to the trustee of the superannuation fund and the fund of which he was the only member. He failed to do so. Having regard to that factor and to his own affidavit evidence to which we have referred and to the evidence overall, in our view, it was proper to infer that in fact the trustee of the relevant fund was his creature and that he could put himself in a position to obtain his superannuation entitlement without suffering any detriment. In addition, his own evidence was that he ''was almost at retirement age''.

We are thus of the view that, in the circumstances of this case, the trial Judge ought to have treated the respective entitlements to the superannuation as property available for distribution pursuant to the provisions of s 79. Her failure to do so constitutes, in the circumstances, an appellable error.

The contributions of the parties (Grounds 4, 4A, 4B, 6 and 6A)

We have already referred to the question posed by the trial Judge, namely whether the husband was responsible for the building up of the business assets and, if so, should his efforts be credited to him in such a way as to give him a much larger percentage of the property than the wife.

The trial Judge partly answered that question when she said:—

> ''Although the case was not argued in terms of stages, I have concluded that it could be said that from the time of the marriage in 1964 until 1971 the parties' contributions were equal; from 1971 to 1985 they both worked hard, the wife particularly running the family, the husband began to develop the business. However, I regard as a matter of considerable significance that when the parties separated for about seven months in 1985 their net worth was approximately $500,000. It was the husband that fought back and, I find, put the parties in the position that they are in today. An analysis of the parties' net worth and the facts between 1985 and separation reveal that the assets have been acquired largely through the husband's efforts. I am satisfied that the wife continued as home maker but the children were substantially older by this time and to some extent the wife pursued her own interests. Some of her interests were related to the children, Scouts and Sunday School. I do not intend to give the impression of criticism of the wife, but I have concluded that the husband's contribution was extraordinary.''

She then went on to discuss *Ferraro and Ferraro* (supra) and *McLay and McLay* (supra) before concluding that, in her view, it was clear ''that the contribution made by the husband in this case has the quality that has in some authorities been described as 'special' or 'extra' ''.

On behalf of the wife, it was submitted that, on the facts of this case, an assessment that the husband should receive 65 per cent of the net value of the assets as found by the trial Judge was beyond a proper exercise of discretion. In addition, it was submitted that the trial Judge erred in finding that the contributions made by the husband had the quality described as ''special'' or ''extra''.

On behalf of the husband, it was submitted that, on the facts, the assessment of the trial Judge was clearly open to her and within the parameters of a proper exercise of the discretion. Counsel for both the wife and the husband referred us to a number of relevant findings and emphasised various aspects of the evidence. We do not consider that it is necessary to repeat those submissions.

It is clear from her reasons (page 53 of the Appeal Book) that the trial Judge did not commence her consideration of the contribution question from a presumption of equality. She found that what the parties said about each other was a convenient starting point and went on to say:—

> "The wife freely admitted that it was the husband's 'ingenuity and enterprise which has really generated the assets we see — Oh, I agree with that absolutely.' The wife said 'He was a very hard working man with a lot of very good ideas.' (see transcript page 47) However, the wife says that she did have some considerable input into the business because generally these enterprises were discussed with her, she answered the telephone and attended to secretarial duties and allowed properties in which she had an interest to be used as security. The other important aspect of the parties' lives was the raising of five children. The wife's case is that she did this almost single handedly because the husband was never home being involved with building activities. The husband's case is that he made a significant contribution."

Thereafter, the trial Judge set about the difficult task of evaluating the weight to be attached to the respective contributions of the parties, contributions which, as she recognised, were different. In so doing, she referred to the special or extra quality of the contribution of the husband. The trial Judge thus no doubt had in mind the following passage from *Ferraro and Ferraro* (supra):—

> "In all of the reported cases we have referred to it was said that the 'business acumen' or 'entrepreneurial skill' of the husband was a 'special skill' or an 'extra contribution'. They were all cases where the assets were of a very significant value. There does not appear to be any reason in principle or logic why those business skills should be treated differently from the high level of skill by a professional or trade person such as a surgeon, lawyer or electrician. Typically in those cases there is a high level of professional training and the picture of long hours of work over many years, the development of higher professional skills and the resultant imposition on the other partner of a substantial extra burden in relation to the home is common. The fundamental difference is that those cases normally do not produce the very high value of property with which this and comparable cases are concerned, and a common outcome, other aspects being equal, is one approximating equality (although as previously pointed out, s 75(2) may intrude to a degree in such cases).
>
> Whilst the application of skill may be the same, the difference seems to be that in the one case the application of that skill produces assets which fall within what may be described as the medium range whilst in cases such as that before us, it produces assets in the high range. We should perhaps add, as more recent experience demonstrates, they can also produce a high range of losses, although it never seems to be suggested in those cases that the losses should be shared other than equally."

In *Ferraro and Ferraro* (supra), the Court found that the total net value of the property of the parties was in round figures $12 million, whilst in *McLay and McLay* (supra) the total net value of the property was $8.838 million. In *Whiteley and Whiteley* (1992) FLC ¶92-304, the trial Judge, in considering the question of contribution, was conscious that because of his special skill as an artist, the husband made by far the major contribution to the acquisition of assets valued at hearing at $11.32 million.

In the instant case, the application of the skills of the husband, his ingenuity and enterprise produced assets in the medium rather than the high range as in the three authorities we have referred and, in our view, the trial Judge erred in concluding that his contribution had the quality described in the authorities as special or extra or as she found as being extraordinary. Thus, although conscious of the finding of the trial Judge, that "[A]n analysis of the parties' net worth and the facts between 1985 and separation reveal that the assets have been acquired largely through the husband's

efforts'', we are of the view that, in assessing the totality of the contributions of the parties, her Honour attached too much weight to the financial contributions of the husband and his efforts in the acquisition of the property.

Further, the result of the trial Judge's order is that at the end of the marriage lasting 27 years, of which there were five children and in which both parties performed their allotted roles, the wife, who has the lesser earning capacity, is left with 45 per cent of the value of the assets plus her superannuation entitlement ($130,780 less income tax) whilst the husband is left with 55 per cent of those assets plus his superannuation entitlement ($555,111 less income tax). That division is, in our judgment, outside the range of a reasonable exercise of the discretion vested in the trial Judge.

Salary (Ground 7)

In relation to the salary the husband paid to himself, the trial Judge said:—

> ''8. The wife complains that the husband has provided himself with a salary of $100,000 in the 1992 year and $25,000 in the 1993/94 year. I accept the husband's explanation that since he was the manager controlling a business turning over $3m per annum and making a gross profit well in excess of $1m and that he was working seven days a week this salary was not unreasonable. The husband's method in paying himself to avoid the order made on 16th April, 1993 is open to criticism, however I do not conclude that he was not entitled to these moneys.''

Those findings were clearly open to the trial Judge on the evidence.

Re-exercise of discretion

Having regard to the findings of the trial Judge and the evidence before her, this Court is well able to substitute its own discretion for that of the trial Judge. Indeed, no submission was made to the contrary.

In exercising that discretion, we would include in the pool of assets available for division the net value of superannuation entitlements described by the trial Judge as contingent assets. This would increase the net value of the assets by $564,873 from $3,706,217 to $4,271,090. Having regard to the respective contributions of the parties within the meaning of paragraphs (a), (b) and (c) of s 79(4) and giving due weight to the contributions of the wife, including her contributions as a homemaker and parent, and to the contributions of the husband, including his contribution to the building up [of] the assets, including the respective superannuation funds, particularly after 1985 and to the evidence relating to the use by each of the parties of funds, including joint funds, since 1985, we would assess those contributions, expressed as a percentage of the $4,271,090, not as being equal but as to 55 per cent by the husband and as to 45 per cent by the wife. In coming to that decision, we have had regard to the findings of the trial Judge relating to the skills, ingenuity and enterprise of the husband which resulted in the acquisition of the assets to which she referred.

As pointed out by the trial Judge, the relevant matters arising for consideration under s 75(2) are the present health of the parties and the significant disparity between their incomes and income earning capacities. The latter calls for an adjustment in favour of the wife. We do not take into account the respective entitlements to superannuation, in our s 75(2) consideration, having included that entitlement as property available for distribution. We would assess the adjustment under s 75(2) at five per cent in favour of the wife.

We are therefore of the view that the just and equitable order, in the circumstances of this case, is one that achieves an equal division of the $4,271,090.

Minute

At the commencement of the hearing of the appeal, we drew attention to the form of the orders sought by the wife, if the appeal was allowed, in the Amended Notice of Appeal. Counsel undertook, in the event that the appeal was allowed, to forward to the Court an appropriate Minute to give effect to our judgment.

Costs of the appeal

At the completion of the hearing of the appeal, we heard submissions relating to the costs of the appeal. In the event that the appeal was allowed, the wife sought an order that the husband be ordered to pay her costs of and incidental to the appeal. In that event, the husband did not oppose the making of such an order. We are of the view that the circumstances justify the making of an order for costs as sought by the wife.

Orders

We therefore order:—

1. That the appeal be allowed.

2. That the parties, within 14 days of the date hereof, forward to the Appeals Registrar, Brisbane, a Minute of Orders to give effect to the judgment.

3. That the husband pay the wife's costs of and incidental to the appeal; such costs to be as agreed or failing agreement as taxed.

[¶92-752] POLICE COMMISSIONER of SOUTH AUSTRALIA v CASTELL, SB
Full Court of the Family Court of Australia at Adelaide
Judgment delivered 16 May 1997
Full text of judgment below

Family law — Child abduction — Convention on the Civil Aspects of International Child Abduction — Application for contact by Central Authority on behalf of the father when no existing orders for contact nor breach of existing rights of contact — Standing of Central Authority to make application.

This was an appeal by the Police Commissioner of South Australia (the Central Authority) against the order of Burton J made on 16 December 1996, by which the Central Authority's application pursuant to the Family Law (Child Abduction Convention) Regulations brought on behalf of Clive Russell Howard (the father) for an order that the father have access to the six children of his marriage was dismissed.

The father and mother were born in England, marrying in England on 6 February 1982. There are six children of the marriage, the four elder being born in England and the younger two, twins, being born after the mother came to Australia with the four elder children and the consent of the father. The father remained in England.

On 1 November 1993, the Family Court ordered that the mother have custody of the six children. On 4 March 1994, a restraining order was made against the father. On 15 August 1995, an application of the father for access was struck out. The Central Authority then instituted proceedings in the Family Court following a request to do so by the Central Authority for England and Wales to the Commonwealth Central Authority, seeking yearly access and phone and letter contact.

The trial Judge treated the application as one for contact pursuant to the Family Law Act, but found that the question before him was whether it was open to the Central Authority to apply to institute proceedings pursuant to reg 25 for contact when no order for contact had been made in either England or Australia. Burton J held that interpreting reg 25 in such a way would exceed the regulation making power contained in s 111B and go beyond the obligations cast upon Australia by the Convention on the Civil Aspects of International Child Abduction.

Held: **appeal dismissed.**

1. The rights of access referred to in reg 25 are those already established in another Convention country by operation of law, as a consequence of a judicial or administrative decision or by reason of an appropriate agreement having legal effect. Where such provision has not been made, an application cannot be made pursuant to reg 25 for an order to organise or secure the effective exercise of rights of access to a child in Australia.

2. Regulation 25 does not confer standing on the Central Authority to apply to the Court to establish rights of access.

3. There was no breach of access rights of the type covered by the Convention, thus the Convention had no application.

The Central Authority was ordered to pay the costs of the mother.

[*Headnote prepared by the CCH FAMILY LAW EDITORS from that written by the Court*]