

Family law and superannuation update cont...

attributing to the former any greater importance because they were available here and now, and a lower significance to the latter because there was still a need to wait until they fell into possession. In para 60 of the judgment, Her Honour posed the question:

"This leads to the question of whether matters should be left at this or whether Ms Levick's entitlement should be satisfied entirely from currently available non-

superannuation assets. Or, as it was agreed was open, whether there be a lesser splitting order applied to the superannuation component, accompanied by an increase in the proportion of non-superannuation assets. It is a question that has to be determined by reference to what is just and equitable in all of the circumstances."

Her Honour recognised that in view of the wife's inferior financial position, her application to take "her

superannuation entitlement by an adjustment to the other assets might be a better arrangement for her", but to do so would "result in her taking now all of her entitlement from the currently available assets and it would leave her with no provision for her future retirement." Justice Moore went on to say, "The tension between these two possible outcomes has led me to conclude that the better arrangement would be for her to take her entitlement partly by a splitting order and partly by an increase in entitlement to other assets."

The Court also recognised the need to make allowance for the fact that a delay was involved and that tax would be payable once the superannuation fund was accessed by the husband.

Cahill v Cahill

This decision was handed down on 7 March 2003. Justice Coleman was faced with a need to come to a just and equitable decision where the husband had a DFRDB pension in payment phase, and at the time of the trial, he was also a member of the PSS, ie, he also had a defined benefit in growth phase. The husband had been a member of the DFRDB for some considerable time pre and post marriage.

Coleman J assessed contributions to all assets and to all superannuation entitlements. Perhaps with some degree of controversy, His Honour held that the wife had not made any contribution to the DFRDB pension. This would appear to run counter to a number of decisions, none of which seem to have been raised in argument before His Honour. It has long been the practice of attributing in favour of the non-member spouse, an indirect contribution to the member spouse's superannuation (see the Full Court decisions in *Morris v Morris* (1982) FLC 91-271, and more recently in *Bassi and KD Sales Force Specialists Pty Ltd v Maas* (1999) FLC 92-867}. Even

Wider range of penalties for corporate offenders

In a new report, the New South Wales Law Reform Commission is calling for a wider range of penalties for corporations that commit crimes

The report recommends that the penalties available in sentencing corporations should (in addition to, or in place of a fine) include:

- * **Incapacitation orders**, which can prevent a corporation from carrying out certain business activities or, in the worst class of case, wind up the company;
- * **Correction orders** (or probation orders), which can require a corporation to alter its systems, policies and procedures to ensure future compliance with the law;
- * **Community service orders**, which can direct a corporation to undertake or contribute to work on projects that benefit the community; and
- * **Publicity orders**, which can require that a corporation publish details of its conviction (including information about the offender, the offence and its consequences, and any other penalty imposed) to a specific group of people or the general community.

The main sentence currently imposed on corporations is a fine. However, a fine is sometimes an inadequate

penalty according to Law Reform Commissioner Professor Michael Tilbury.

"Companies are often able to treat a fine as a mere licence fee for illegitimate business operations," Professor Tilbury said.

"A fine may also convey the message that corporate crime is less serious than other crime because corporations can buy their way out of trouble."

Professor Tilbury added that the objectives of sentencing corporate offenders would be furthered if a broad range of penalties were available to a court.

"Deterrence, denunciation and rehabilitation are more effectively promoted if a corporation is ordered to reform its management structure or its internal procedures, where these have given rise to the offence. A fine alone is unlikely to achieve those results."

A copy of this report is available from www.lawlink.nsw.gov.au/lrc or from the NSW Law Reform Commission on (02) 9228 8230. ①