

**FAMILY LAW ACT 1975**

**CASE STATED**

**IN THE FULL COURT OF  
THE FAMILY COURT OF AUSTRALIA  
AT BRISBANE**

**File No. BRM 1585 of 2004**

**IN THE MATTER OF:**

**C**

**Applicant**

**- and -**

**H**

**Substituted Respondent**

**- and -**

**THE DEFENCE FORCE RETIREMENT AND  
DEATH BENEFITS AUTHORITY**

**2<sup>nd</sup> Respondent**

**REASONS FOR JUDGMENT OF THE FULL COURT**

**BEFORE:** Bryant CJ, Finn, Coleman, Warnick and O’Ryan JJ  
**DATE OF HEARING:** 21 September 2004  
**DATE OF JUDGMENT:** 2 June 2005

**APPEARANCES:**

Mr Murphy of Counsel (instructed by Hartley Family Law Services) appeared on behalf of the Applicant.

No appearance on behalf of the Substituted Respondent (Kennedy Guy Lawyers).

Mr Hanks of Queens Counsel with Mr Kent of Counsel (instructed by Australian Government Solicitor) appeared on behalf of the 2nd Respondent.

## APPEAL SUMMARY

<b>MATTER:</b>	<b>C and H and THE DEFENCE FORCE RETIREMENT AND DEATH BENEFITS AUTHORITY</b>
<b>FILE NUMBER:</b>	BRM 1585 of 2004
<b>CORAM:</b>	Bryant CJ, Finn, Coleman, Warnick and O’Ryan JJ
<b>DATE OF HEARING:</b>	21 September 2004
<b>DATE OF JUDGMENT:</b>	<b>2 June 2005</b>
<b>CATCHWORDS:</b>	FAMILY LAW – JURISDICTION – PROPERTY SETTLEMENT – SUPERANNUATION – Power of the Court pursuant to s 79(1) and (8) of the <i>Family Law Act</i> 1975 (“the Act”) to make orders in accordance with s 90MS and s 90MT of the Act – Power to make such orders when a payment becomes payable to a surviving spouse from a surviving spouse pension under s 38 of the <i>Defence Force Retirement and Death Benefits Act</i> 1973 (“the DFRDB Act”) – Power to make such orders when a payment becomes payable from a surviving spouse pension under s 41A of the DFRDB Act – Power to make such orders when a payment of productivity benefit becomes payable to a deceased’s estate under Clause 6(1) and (4) of the <i>Defence Force (Superannuation) Productivity Benefit Determination</i> – Whether benefits received by a surviving spouse of a deceased member are property of the surviving spouse or whether they remain the property of the deceased member – Discussion of interpretation of relevant statutory provisions – The Court has no power to make such orders in respect of payments under the surviving spouse pension if those payments are the property of the surviving spouse – Found that payments under the surviving spouse pension are not the property of the estate of the deceased member.

### Caselaw cited:

*Australian Alliance Assurance Co. Ltd. v Attorney-General of Queensland and John Goodwyn* (1916) St R Qd. 135

*Evans v Public Trustee for the State of Western Australia* (1991) FLC 92-223

*Fisher v Fisher* (1986) 161 CLR 438

*Ascot Investments Pty Ltd v Harper* (1981) 148 CLR 337

1. By Case Stated (pursuant to s 94A(3) of the *Family Law Act* 1975) dated 27 May 2004 Federal Magistrate Jarrett posed three questions for the consideration of this Court. Those questions were:-
  1. Does a Court exercising jurisdiction under the *Family Law Act* 1975 have power pursuant to s 79(1) and (8) of that Act, to make orders in accordance with ss 90MS and 90MT of that Act to the effect that:
    - 1.1 whenever a payment of a surviving spouse pension under s 38 of the *Defence Force Retirement and Death Benefits Act* 1973 becomes payable to the substituted First Respondent by reason of the death of DRH, the Applicant is entitled to be paid a specified percentage of that payment with a corresponding reduction in any entitlement of the substituted First Respondent to that pension;
    - 1.2 whenever a payment under s 41A of the *Defence Force Retirement and Death Benefit Act* 1973 becomes payable to the substituted First Respondent in commutation of a portion of any surviving spouse pension payable to her under s 38 of the DFRDB Act by reason of the death of DRH, the Applicant is entitled to be paid a specified percentage of that payment, with a corresponding reduction in any entitlement of the substituted First Respondent to that payment;
    - 1.3 whenever a payment of productivity benefit under Clause 6(1) and (4) of the *Defence Force (Superannuation) Productivity Benefit Determination* becomes payable to the deceased's estate, the Applicant is entitled to be paid a specified percentage of that payment, with a corresponding reduction in any entitlement of the deceased's estate to that productivity benefit.

## **BACKGROUND**

2. The necessary background to the Case Stated appears in the Case Stated under the heading "THE FACTS". It is appropriate to briefly recount those facts which are central to this Court's consideration of the questions raised by the Case Stated.

3. DRH (to whom we shall refer as “the deceased member”) was born in December 1965. ETC (to whom we shall refer as “the former wife”) was born in August 1967. In 1983 the deceased member commenced contributing to the Defence Force Retirement and Death Benefits Scheme (“the DFRDB Scheme”) which was established pursuant to the *Defence Force Retirement and Death Benefits Act 1973* (Cth) (“the DFRDB Act”). The second respondent to the Case Stated, the Defence Force Retirement and Death Benefits Authority (“the DFRDB Authority”) administers the DFRDB Scheme.
4. The deceased member and the former wife were married in January 1991. They had two children, CH and DH, who are now respectively aged ten and eight years. The deceased member and the former wife separated in October 1998. Their children continued to reside with their mother. In 1999 the former wife and the children relocated to New Zealand to live with former wife’s new partner. Those arrangements continue.
5. On 10 June 2001 a decree of dissolution of the marriage of the deceased member and the former wife became absolute and on 23 March 2002 the deceased member married KB-H (to whom we shall refer as “the widow”).
6. On 7 May 2002 the former wife commenced proceedings in the Federal Magistrates Court at Brisbane pursuant to the *Family Law Act 1975* (Cth) (“the Act” or “the Family Law Act”) against the deceased member in which she sought an order:-

That an account be taken of the net matrimonial assets and same be divided in the proportions 30% to the Husband and 70% to the Wife.

7. The deceased member died in October 2003. He was at the time of his death a contributing member of the DFRDB Scheme. At the time of his death the deceased member and the widow were living together with the child of the widow, DB, who is now aged seven.

8. On 12 December 2003 the former wife filed an Amended Application seeking a “splitting order” pursuant to s 90MT(1)(b) of the Act:-

5. That in accordance with section 90MT(1)(b) of the Family Law Act 1975:
  - (a) The Applicant be and is entitled to be paid the specified percentage of each splittable payment out of the interest of [the deceased] under the [DFRDB Act] ...; and
  - (b) The entitlement of the [substituted First Respondent], or any other person to whom a splittable payment may be made, to payments out of the interests of [the deceased] under the [DFRDB Act] is correspondingly reduced in accordance with subparagraph 90MT(1)(b)(ii) of the Family Law Act 1975. (Case Stated, paragraph 17)

9. Section 90MT provides:-

#### **Splitting order**

- (1) A court, in accordance with section 90MS, may make the following orders in relation to a superannuation interest (other than an unsplittable interest):
  - (a) if the interest is not a percentage-only interest—an order to the effect that, whenever a splittable payment becomes payable in respect of the interest:
    - (i) the non-member spouse is entitled to be paid the amount (if any) calculated in accordance with the regulations; and
    - (ii) there is a corresponding reduction in the entitlement of the person to whom the splittable payment would have been made but for the order;
  - (b) an order to the effect that, whenever a splittable payment becomes payable in respect of the interest:
    - (i) the non-member spouse is entitled to be paid a specified percentage of the splittable payment; and
    - (ii) there is a corresponding reduction in the entitlement of the person to whom the splittable payment would have been made but for the order;

- (c) if the interest is a percentage-only interest—an order to the effect that, whenever a splittable payment becomes payable in respect of the interest:
    - (i) the non-member spouse is entitled to be paid the amount (if any) calculated in accordance with the regulations by reference to the percentage specified in the order;
    - (ii) there is a corresponding reduction in the entitlement of the person to whom the splittable payment would have been made but for the order;
  - (d) such other orders as the court thinks necessary for the enforcement of an order under paragraph (a), (b) or (c).
- (2) Before making an order referred to in subsection (1), the court must make a determination under paragraph (a) or (b) as follows:
- (a) if the regulations provide for the determination of an amount in relation to the interest, the court must determine the amount in accordance with the regulations;
  - (b) otherwise, the court must determine the value of the interest by such method as the court considers appropriate.
- (2A) The amount determined under paragraph (2)(a) is taken to be the value of the interest.
- (3) Regulations for the purposes of paragraph (2)(a) may provide for the amount to be determined wholly or partly by reference to methods or factors that are approved in writing by the Minister for the purposes of the regulations.
- (4) Before making an order referred to in paragraph (1)(a), the court must allocate a base amount to the non-member spouse, not exceeding the value determined under subsection (2).

Note: The base amount is used to calculate the entitlement of the non-member spouse under the regulations.”

10. The widow has applied for benefits for herself pursuant to ss 38 and 41A of the DFRDB Act. Those sections provide:-

### **Spouse's pension on death of contributing member**

Where a member of the scheme who is a contributing member dies before retirement and is survived by a spouse, the spouse is entitled to a pension at a rate equal to five-eighths of the rate at which invalidity pay would have been payable to the deceased member if, on the date of the deceased member's death, the deceased member had become entitled to invalidity benefit and had been classified as Class A under section 30 and (in the case of a deceased member whose surcharge debt account is in debit when the pension becomes payable) had made an election under subsection 124(1). (s 38)

### **Commutation of spouse's pension**

(1) Where:

(a) a person is, or becomes, entitled to a pension under this Division because the person is:

(i) a spouse in relation to a contributing member who died on or after the commencement of the *Commonwealth Superannuation Schemes Amendment Act 1992* ; or

(ii) a widow or widower of a contributing member who died on or after the commencement of the *Defence Legislation Amendment Act (No. 2) 1990* but before the commencement of the *Commonwealth Superannuation Schemes Amendment Act 1992* ; or

(iii) a widow or widower of a contributing member who died on or after 15 October 1990 but before the commencement of the *Defence Legislation Amendment Act (No. 2) 1990* ; and

(b) in the case of a contributing member referred to in subparagraph (a)(iii)—that member is a member of a prescribed class of deceased spouses;

the person (in this section called the elector ) may, by notice in writing given to the Authority, elect to commute a portion of his or her pension in accordance with this section.

(1A) In subsection (1), widow and widower have their respective meanings given by this Act as in force immediately before

the commencement of the Commonwealth Superannuation Schemes Amendment Act 1992.

- (2) A notice given by an elector under subsection (1) must:
  - (a) specify the amount that is to be payable to him or her by virtue of the commutation (in this section called the *commuted amount*); and
  - (b) be given not later than one year after the elector becomes entitled to the pension.
- (3) The amount referred to in subsection (2) must not exceed an amount calculated in accordance with the following formula:

Annual Rate of Pay x 2

where:

*Annual Rate of Pay* is the annual rate of pay at the time of death of the deceased contributing member who was, immediately before his or her death, the spouse of the elector.

- (4) Where an elector makes an election under this section, then, subject to subsection (4A):
  - (a) the Commonwealth must pay to the elector the commuted amount; and
  - (b) the amount per annum of the pension payable to the elector, on and after the day on which the election takes effect, is the amount per annum that, but for this paragraph, would be payable to the elector, reduced by an amount calculated by dividing the commuted amount by 25.

- (4A) If:

- (a) an elector makes an election under this section; and
- (b) the deceased contributing member's surcharge debt account is in debit when the pension becomes payable to the elector;

the following provisions apply:

- (c) the Commonwealth must pay to the elector the difference between the commuted amount and:
  - (i) the member's surcharge deduction amount; or
  - (ii) if the member's surcharge deduction amount exceeds the commuted amount—so much of the surcharge deduction amount as does not exceed the commuted amount;

(d) the amount per annum of the pension payable to the elector, on and after the day on which the election takes effect, is:

(i) if subparagraph (ii) does not apply—the amount per annum referred to in paragraph (4)(b); or

(ii) if the member's surcharge deduction amount exceeds the commuted amount—the amount per annum worked out by using the formula:

$$\frac{\text{Basic rate} - \text{Excess}}{\text{Conversion factor}}$$

where:

"basic rate" means the amount per annum referred to in paragraph (4)(b).

conversion factor is the factor that is applicable to the member under the determination made by the Authority under section 124A.

excess means the amount by which the member's surcharge deduction amount exceeds the commuted amount.

(5) For the purposes of this section, an election is taken to have been made, and takes effect, on the day on which the notice of election is received by the Authority. (s 41A)

11. At the date of the Case Stated no claims made to the DFRDB Authority had been determined by the Authority. Subsequently, it is common ground, the DFRDB Authority has determined that:-

1. The widow qualifies for a spouse pension under s 38 of the DFRDB Act;
2. DB (the widow's daughter) qualifies for a child pension under s 42 of the DFRDB Act;
3. CH and DH (the children of the deceased member and the former wife) qualify for orphan pensions under s 43 of the DFRDB Act; and
4. The productivity superannuation payable pursuant to clause 6 (1) of the Defence Force (Superannuation) (Productivity Benefit) Determination

(“the Determination”) of \$25,537.58 gross is payable to the deceased’s estate.

## THE QUESTIONS IN CONTEXT

12. It may assist an understanding of the discussion which follows to give a context to the questions we are required to answer by re-stating the questions with reference to the relevant entities as identified early in this judgment. The questions thus become:-

1. Does a Court exercising jurisdiction under the Family Law Act 1975 have power pursuant to s 79(1) and (8) of that Act, to make orders in accordance with ss 90MS and 90MT of that Act to the effect that:
  - 1.1 whenever a payment of a surviving spouse pension under s 38 of the [DFRDB Act] becomes payable to [the widow] by reason of the death of DRH, [the former wife] is entitled to be paid a specified percentage of that payment with a corresponding reduction in any entitlement of [the widow] to that pension;
  - 1.2 whenever a payment under s 41A of the [DFRDB Act] becomes payable to [the widow] in commutation of a portion of any surviving spouse pension payable to her under s 38 of the DFRDB Act by reason of the death of DRH, [the former wife] is entitled to be paid a specified percentage of that payment, with a corresponding reduction in any entitlement of [the widow] to that payment;
  - 1.3 whenever a payment of productivity benefit under Clause 6(1) and (4) of [the Determination] becomes payable to the deceased’s estate, [the former wife] is entitled to be paid a specified percentage of that payment, with a corresponding reduction in any entitlement of the deceased’s estate to that productivity benefit.”

13. Sub-sections 79(1) and (8) provide:-

In proceedings with respect to the property of the parties to a marriage or either of them, the court may make such order as it considers appropriate altering the interests of the parties in the

property, including an order for a settlement of property in substitution for any interest in the property and including an order requiring either or both of the parties to make, for the benefit of either or both of the parties or a child of the marriage, such settlement or transfer of property as the court determines. (s 79(1))

Where, before proceedings with respect to the property of the parties to a marriage or either of them are completed, either party to the proceedings dies:

- (a) the proceedings may be continued by or against, as the case may be, the legal personal representative of the deceased party and the applicable Rules of Court may make provision in relation to the substitution of the legal personal representative as a party to the proceedings;
  - (b) if the court is of the opinion:
    - (i) that it would have made an order with respect to property if the deceased party had not died; and
    - (ii) that it is still appropriate to make an order with respect to property;
- the court may make such order as it considers appropriate with respect to any of the property of the parties to the marriage or either of them; and
- (c) an order made by the court pursuant to paragraph (b) may be enforced on behalf of, or against, as the case may be, the estate of the deceased party. (s 79(8))

14. Section 90MS of the Act provides:-

**Order under section 79 may include orders in relation to superannuation interests**

- (1) In proceedings under section 79 with respect to the property of spouses, the court may, in accordance with this Division, also make orders in relation to superannuation interests of the spouses.

Note 1: Although the orders are made in accordance with this Division, they will be made under section 79. Therefore they will be generally subject to all the same provisions as other section 79 orders.

Note 2: Sections 71A and 90MO limit the scope of section 79.

- (2) A court cannot make an order under section 79 in relation to a superannuation interest except in accordance with this Part.
15. Clauses 6 (1) and (4) of the Determination provide:-
- When benefit payable
- Where, on or after 1 January 1988, a member retires or dies, a productivity superannuation benefit becomes payable in respect of the person. (cl 6(1))
- Where a productivity benefit is payable in respect of a person following the death of the person, the benefit shall be paid to the person's personal representative. (cl 6(4))
16. As will be seen, it is appropriate to consider questions 1 and 2 together. If question 1 is answered in the negative, question 2 must also be answered in the negative. It is difficult to see any basis upon which question 2 could be answered in the negative if question 1 is answered in the affirmative. Question 3 gives rise to no dispute between the parties and presents no difficulty for this Court.
17. The parties agree that question 3 should be answered in the affirmative. There is no doubt that the productivity benefit is payable to the estate of the deceased member. As such it is "property" of the estate and able to be the subject of an order under s 79(8) of the Family Law Act if, in the exercise of its discretion, the Court considers so doing to be just and equitable. No more need be said about question 3.

## **SUBMISSIONS IN RELATION TO QUESTIONS 1 & 2**

18. In oral submissions with respect to questions 1 and 2, learned Counsel for the former wife suggested the narrow question to be whether the deceased member's superannuation interest "died with him", as the DFRDB Authority submits, or continues until the duties of the Authority, as "trustee" pursuant to the provisions of the DFRDB Act, are completed. It was further submitted (in writing) on behalf of the former wife that:-

13. Looking at the DFRDB Act (and Part VI of that Act [“Benefits on death of member of scheme”] in particular) in isolation reveals that the DFRDB Act makes no provision for a member to retain an interest on death that can be gifted by will or which passes to his or her estate by force of statute. Rather, what occurs is that, relevantly, a “spouse” can obtain pension and lump sum benefits if relevant conditions are met. Further, it is true that the spouse benefits do not arise until death of the member at which time they are paid directly [to] the spouse and do not form part of the member’s estate. (Outline of Argument by the Applicant)
19. The apparent conflict between the provisions of the DFRDB Act and the operation of s 79 of the Family Law Act was addressed by learned Counsel for the former wife. It was submitted that s 90MB of the Family Law Act provided that Part VIIIB (which for convenience can be referred to as “the superannuation provisions” of the Act) had effect despite any other law of the Commonwealth; that the DFRDB Act was “part of the law of the Commonwealth when Part VIIIB was enacted”; and that the inclusion of definitions of “reversionary beneficiary” and “reversionary interest” extend the ambit of “splittable payments” to a person other than a member spouse “taking a benefit after the death of a member spouse”.
20. Section 90MC provides:-

**Extended meaning of *matrimonial cause***

A superannuation interest is to be treated as property for the purposes of paragraph (ca) of the definition of *matrimonial cause* in section 4. (s 90MC)

21. In reliance upon the decision of the Supreme Court in Queensland in *Australian Alliance Assurance Co. Ltd. v Attorney-General of Queensland and John Goodwyn* (1916) St R Qd 135, it was submitted that the Court should construe the statute in a way that “produces the greatest harmony and least inconsistency” (per Cooper CJ at 161). It was argued that there was a “strong presumption that the legislature did not intend to contradict itself and both Acts must be given their operation within their respective spheres”. It was thus submitted that:-

18. The greatest harmony and least inconsistency between the Act and the DFRDB Act is produced by an interpretation that the spouse pension is the payment of a superannuation interest to a reversionary beneficiary and is therefore a splittable payment. (Outline of Argument by the Applicant)
22. It was further submitted on behalf of the former wife that the deceased member's interest in the DFRDB Scheme was a "superannuation interest" immediately before his death. There seems little scope for disputing that proposition. The more relevant question is whether, immediately after his death, the deceased member had a superannuation interest. It was further submitted that payments to the widow were "property" for the purpose of paragraph (ca) of the definition of "matrimonial cause" in s 4 of the Act pursuant to s 90MC of the Act and "splittable payments" within the terms of s 90ME.
23. On behalf of the former wife it was contended that the operation of s 90ME(1)(d) and s 90MD lead to the conclusion that, notwithstanding any contrary provisions or implications arising from the DFRDB Act, the widow was a reversionary beneficiary. The more significant issue in our view is whether the benefits she received, whether or not they were with respect to her late husband's "superannuation interest", were her "property" or the property of her late husband. In addressing that apparent difficulty learned Counsel for the former wife emphasised the words "in respect of a superannuation interest of a spouse" in ss 90MD and 90ME, submitting that such expression meant "related to" or "emanating from" or "deriving from".
24. Sections 90MD and 90ME provide:-

**Definitions**

In this Part, unless the contrary intention appears:

...

*interest* includes a prospective or contingent interest, and also includes an expectancy.

...

*member*, in relation to an eligible superannuation plan, includes a beneficiary (including a contingent or prospective beneficiary).

*member spouse*, in relation to a superannuation interest, means the spouse who has the superannuation interest.

*non-member spouse*, in relation to a superannuation interest, means the spouse who is not the member spouse in relation to that interest.

*operative time*:

- (a) in relation to a payment split under a superannuation agreement or flag lifting agreement—has the meaning given by section 90MI; or
- (b) in relation to a payment flag under a superannuation agreement—has the meaning given by section 90MK or paragraph 90MLA(2)(c) as appropriate; or
- (c) in relation to a payment split under a court order—means the time specified in the order.

...

*payment split* means:

- (a) the application of section 90MJ in relation to a splittable payment; or
- (b) the application of a splitting order in relation to a splittable payment.

*percentage-only interest* means a superannuation interest prescribed by the regulations for the purposes of this definition.

...

*reversionary beneficiary* means a person who becomes entitled to a benefit in respect of a superannuation interest of a spouse, after the spouse dies.

*reversionary interest* has the meaning given by section 90MF.

...

*splittable payment* has the meaning given by section 90ME.

*splitting order* means an order mentioned in subsection 90MT(1).

*spouse* means a party to a marriage.

*superannuation agreement* has the meaning given by section 90MH.

*superannuation interest* means an interest that a person has as a member of an eligible superannuation plan, but does not include a reversionary interest.

...

*unsplittable interest* means a superannuation interest prescribed by the regulations for the purposes of this definition. (s 90MD)

### **Splittable payments**

- (1) Each of the following payments in respect of a superannuation interest of a spouse is a splittable payment:
  - (a) a payment to the spouse;
  - (b) a payment to another person for the benefit of the spouse;
  - (c) a payment to the legal personal representative of the spouse, after the death of the spouse;
  - (d) a payment to a reversionary beneficiary, after the death of the spouse;
  - (e) a payment to the legal personal representative of a reversionary beneficiary covered by paragraph (d), after the death of the reversionary beneficiary.
- (2) A payment is not a splittable payment if it is prescribed by the regulations for the purposes of this subsection. The regulations may prescribe a payment either:
  - (a) generally (that is, for the purposes of all payment splits in respect of a superannuation interest); or
  - (b) only for the purposes of applying this Part to a particular payment split in respect of a superannuation interest.
- (3) If a payment is made to another person for the benefit of 2 or more persons who include the spouse, then the payment is nevertheless a splittable payment, to the extent to which it is paid for the benefit of the spouse. (s 90ME)

25. A series of further propositions were advanced on behalf of the former wife:-

38. It is submitted, then, that there is a clear legislative intention and equally clear judicial reasoning which support the interpretation contended for:
  - the moral claims of the applicant to the property of the parties or either of them should be recognised;
  - the contributions made by the applicant both generally and to the superannuation interest of the deceased should be recognised;
  - those claims should survive the death of the other spouse;

- those claims should take priority over the devolution of property upon death;
  - splittable payments in respect of superannuation interests should be capable of being allocated in order to satisfy those claims;
  - the power to order that splittable payments should be so allocated should take priority over any other Commonwealth legislation (or any provision of any trust deed) to the contrary;
  - Because Part VIIIB did not amend s. 79, the power to so order in respect of splittable payments should survive the death of the member spouse. (Outline of Argument by the Applicant)
26. In response to the assertion on behalf of the DFRDB Authority that the interest of the widow pursuant to s 38 of the DFRDB Act was her property rather than property of the parties to the marriage it was argued that:-
- ... the proper interpretation of s. 38 (and, indeed, the whole of Part VI of that Act) is that non-member benefits are simply the mandatory transfer of the member's erstwhile benefit via mandatory formulae and mandatory methodologies in only one circumstance, viz. the member predeceasing the spouse. The Act does not create a new interest; it provides for the mandatory transfer of an existing interest of the member. (Outline of Argument by the Applicant, paragraph 45)
27. In oral submissions, learned Counsel for the former wife referred the Court to provisions of the DFRDB Act, which he submitted were consistent with his submission that the superannuation interest of the deceased member continued after his death. Section 130 of the DFRDB Act was relied upon in that context. That section provides:-

#### **Attachment of benefits**

- (1) Where a judgment given by a court for the payment of a sum of money has not been fully satisfied by the judgment debtor and the judgment debtor is entitled to a benefit under this Act, the judgment creditor may serve on the Authority a copy of the judgment, certified under the hand of the Registrar or other proper officer of the court by which the judgment was given, and a statutory declaration by the judgment creditor stating that the judgment has not been

fully satisfied by the judgment debtor and specifying the amount due by the judgment debtor under the judgment.

- (2) Where a copy of a judgment and a statutory declaration are served on the Authority in accordance with subsection (1), the Authority shall, as soon as practicable, by notice in writing given to the judgment debtor, inform him of the service of those documents and require him, within such period as is specified in the notice and in such manner as is so specified, to notify the Authority whether the amount specified in the declaration is still due under the judgment and, if no amount or a lesser amount is due under the judgment, to furnish to the Authority, in such manner as is specified in the notice, evidence in support of that fact.
  - (3) A person is guilty of an offence if:
    - (a) the person is given a notice under subsection (2); and
    - (b) the person does not comply with the requirements in the notice.
- Maximum penalty: \$40.
- (4) If, at the expiration of the period specified in the notice, the Authority is satisfied that an amount is due under the judgment, the Authority may, in its discretion, authorize the deduction from the benefit, and the payment to the judgment creditor, of such sums as do not exceed that amount, and those deductions and those payments shall be made accordingly.
  - (5) A deduction shall not be authorized from:
    - (a) an instalment of child's pension; or
    - (b) an instalment of any other pension benefit if the deduction will reduce the amount of the instalment payable to less than one-half of the amount that would, but for this section, be payable.
  - (6) If, after a copy of a judgment given against any person entitled to a benefit under this Act, being a judgment in respect of which the Authority is satisfied that an amount is due, has been served in accordance with subsection (1), a copy of another judgment given (whether before or after the first-mentioned judgment) against the same person in favour of the person in whose favour the first-mentioned judgment was given, or in favour of another person, is served in accordance with that subsection, a payment shall not be made in pursuance of this section to the judgment creditor under the other judgment in respect of the amount

due under that judgment until the amount due under the first-mentioned judgment has been paid.

- (7) A payment made to a judgment creditor in pursuance of this section shall, as between the Commonwealth and the person entitled to benefit under this Act, be deemed to be a payment by the Commonwealth to the person entitled to benefit.
- (8) A judgment creditor is guilty of an offence if:
  - (a) the judgment creditor serves a copy of a judgment on the Authority under subsection (1); and
  - (b) the judgment creditor does not notify the Authority immediately the judgment debt is satisfied.

Maximum penalty:

- (a) if the offender is a natural person—\$100 or imprisonment for 3 months; or
  - (b) if the offender is a body corporate—\$500.
- (9) If the amounts paid in pursuance of this section to a judgment creditor in respect of a judgment exceed, in the aggregate, the amount due under the judgment, the excess is repayable by the judgment creditor to the judgment debtor and, in default of payment, may be recovered by the judgment debtor from the judgment creditor in any court of competent jurisdiction.

In reliance upon the section, Counsel for the former wife submitted that the deceased member's superannuation interest "continues in some form" as "otherwise the debts could not attach to the new interest".

**note**

- 28. It was conceded on behalf of the former wife that if the former member had died without having remarried, no question of any order under Part VIIIB in favour of the former wife could arise. Such concession, though fairly and properly made, can do little to assist the statutory construction argument advanced by learned Counsel for the former wife.
- 29. The provisions of ss 38 and 41A of the DFRDB Act with respect to members' elections pursuant to s 124 of the DFRDB Act was also suggested to be supportive of the assertion that, rather than a new interest being created, the superannuation interest of the deceased member was "transferred" to the widow.

30. In its submissions, the DFRDB Authority conceded that:

24.2 The pension payable to the Substituted Respondent under s 38 of the DFRDB Act was a benefit “in respect of” Mr H’s contingent superannuation interest in the DFRDB Scheme because the Substituted Respondent derived that benefit by reason of Mr H’s status as a contributing member at the time of his death. (Second Respondent’s Outline of Submissions)

31. It was further conceded that:

25. The entitlement of the Substituted Respondent to a spouse’s pension under s 38 of the DFRDB Act after Mr. H’s death [And any entitlement of the Substituted Respondent to commute a portion of that pension under s 41A of the DFRDB Act.] would be characterised as a “splittable payment” within s 90ME(d) of the FL Act – because payment of the pension would be a payment to a reversionary beneficiary after the death of her spouse (Mr H). (Second Respondent’s Outline of Submissions)

32. And that:

26. Similarly, Mr H had a “superannuation interest” before his death in the productivity benefit payable under the Determination; following Mr H’s death, when that benefit vested in Mr H’s estate, the payment to Mr H’s estate would be characterised as a “splittable payment” within s 90ME(c) of the FL Act – because it would be a payment to the legal personal representative of the spouse (Mr H) after the death of the spouse. (Second Respondent’s Outline of Submissions)

33. It was submitted that notwithstanding such concessions the Court had no power to make a splitting order affecting the widow’s entitlement to a spouse pension pursuant to the DFRDB Act. The contention of the DFRDB Authority that the Court’s power to make orders “derives from, and is limited by” ss 79(1), 79(8), s 90MS and s 90MT of the Act cannot be disputed. It was submitted that such powers do not “extend to making orders with respect to property that is not “the property of the parties to the marriage or either of them””. The crux of the submission of the DFRDB Authority with respect to questions 1 and 2 was that:

- 29.3 Any entitlement of the Substituted Respondent to a spouse pension under s 38 (and to commutation of any portion of that pension under s 41A) of the DFRDB Act is a personal entitlement of the Substituted Respondent; she is not a party to the marriage that is the subject of the current proceeding. (Second Respondent's Outline of Submissions)
34. The entitlement of the widow was thus said to form no part of “the property of the parties to the marriage or either or them”, as:-
- ... any entitlement of the Substituted Respondent to a spouse pension will have vested in her by virtue of her status as a spouse who survived Mr H, through the operation of s 38 of the DFRDB Act, that entitlement cannot be the subject of an order made under s 79(8) read with ss 90MS(1) and 90MT(1) of the FL Act. (Second Respondent's Outline of Submissions, paragraph 29.6)
35. In response to the former wife's contentions it was asserted that there was no conflict between Part VIIIB of the Family Law Act and the provisions of the DFRDB Act as each Act “operates according to its terms”. It was submitted that the present case revealed “limits to the reach of Part VIIIB of the FL Act”, and that the Court's powers under s 79(8) did not “extend to abrogating the independent property rights of third parties”.
36. Unlike the position in *Evans v Public Trustee for the State of Western Australia* (1991) FLC 92-223 it was submitted that the deceased member's superannuation interest under the DFRDB Act did not ever vest as part of his estate. Reliance was placed upon the fact that, but for the operation of the Defence Act, the deceased member's estate would have received nothing, apart from the productivity benefit, had he not remarried prior to his death. Similarly, there was no “devolution of property of a party to a marriage on that party's death” in this case. Reliance was placed upon the fact that the widow's rights under the DFRDB Act “vested in her by reason of her status as the surviving spouse of a contributing member (Mr H), not by reason of any period or quantum of contributions” by that deceased member (Second Respondent's Outline of Submissions, paragraph 30.5(c)).

37. The DFRDB Authority submitted that the 2004 amendments to the DFRDB Act were relevant to an understanding of the interaction of Part VIIIB of the Family Law Act and the DFRDB Act. The impact of the amendments, and particularly those now reflected by ss 49B, 49D and s 49E of the Act, was asserted to be that:-

32.6 ... when Parliament amended the DFRDB Act to take account of the impact of splitting orders on benefits payable under the DFRDB Act, Parliament proceeded on the assumption that a splitting order could not be made where the member spouse (here, Mr H) was not alive at the operative time and where (as in the present case) the splitting order would not affect the entitlements of the member spouse. (Second Respondent's Outline of Submissions)

38. There is force in the submission on behalf of the DFRDB Authority that:

33. The Applicant's contention (Outline, paragraph 45) that the DFRDB Act does not create a new interest but provides for the mandatory transfer of an existing interest of the member does not sit comfortably with the observation in paragraph 13 of the Applicant's Outline, that the DFRDB Act makes no provision for a member to retain an interest on death that can be gifted by will or which passes to his or her estate by force of statute, and that spouse benefits arise only on the death of member, are paid directly to the spouse and do not form part of the member's estate. (Second Respondent's Outline of Submissions)

39. The structure of the DFRDB Act was submitted to be that:

34.1 A contributing member of the DFRDB Scheme cannot be said to have an interest in the Scheme that is capable of transfer on the contributing member's death.

34.2 The entitlement to a spouse benefit vests in the eligible spouse on the death of the member by operation of s 38 of the DFRDB Act – because of the surviving spouse's status as an eligible spouse under the DFRDB Act, not because of the contingent benefits accumulated by the contributing member or the length of the period of that member's contributing membership.

34.3 Although the s 38 pension payable to the eligible spouse is calculated on the basis of a hypothetical entitlement (under s 26 of the DFRDB Act) on the part of the deceased contributing member to invalidity benefit at the maximum

rate (following classification under s 30 of the DFRDB Act), [And the s 39 pension is calculated by reference to the actual entitlement of the deceased recipient member to retirement pay or invalidity pay (or that member's hypothetical entitlement if the member had not commuted a portion of that pay)] the pension is the property of the eligible spouse, not of the deceased contributing member's estate.

- 34.4 The contingent entitlement of a contributing member under the DFRDB Act is not an asset that is (or can be) passed on survivorship, or by will or intestacy on the death of a party to a marriage. Section 129 of the DFRDB Act provides that no benefit under the Act is capable of being assigned or charged or of passing by operation of law. (Second Respondent's Outline of Submissions)

## DISCUSSION

40. It is apparent from the submissions to which we have considered it necessary to refer at some length, that the critical issue for present purposes relates to the question of essentially whose "property" any payments made pursuant to s 38 or s 41A of the DFRDB Act are. The fact that those payments could fall within the definition provisions of Part VIIIB is not conclusive of the issue. In order to enliven the provisions of s 79(8), the "property" constituted by the payments must, in the circumstances of this case, be the property of the estate of the deceased member. The decision of the High Court in *Fisher v Fisher* (1986) 161 CLR 438, in which the constitutional validity of s 79(8) was upheld leaves no scope for doubt in that regard.
41. If, as is submitted on behalf of the DFRDB Authority, the payments are the property of the widow, then they do not come within the ambit of s 79(8). If those payments are the property of the widow then this Court has no power to make orders affecting them as the High Court has made clear in *Ascot Investments Pty Ltd v Harper* (1981) 148 CLR 337 at 354 (Gibbs J, with whom Stephen, Aickin & Wilson JJ agreed).

41. Whilst, as was submitted on behalf of the former wife, the effect of s 90MC is to classify a “superannuation interest” as “property” for the purposes of s 4(ca) of the Family Law Act, it is in our view significant that when Part VIIIB was enacted, no amendments were made to either s 4(ca) or s 79 of the Act with respect to the requirement that property be the property of “the parties to a marriage or either of them”. There is no question that the relevant marriage for present purposes is the dissolved marriage of the deceased member and the former wife.
42. In our view, the legislative intention evidenced by the DFRDB Act is clear. No part of the Act in our view provides for a former spouse to share in the superannuation interests of a member of the DFRDB Scheme other than during the lifetime of the member. The operation of Part VIIIB of the Family Law Act, and subsequent enactment of Part VIA of the DFRDB Act, enabled a former spouse to seek orders pursuant to the provisions of the Family Law Act with respect to such interests prior to the death of the fund member. The concession made on behalf of the former wife that, but for the deceased member having remarried, no question of an entitlement on behalf of the former wife could arise is consistent with that conclusion.
43. Crucial to the power under s 79 is in our view that there be, in the circumstances of this case, “property” of the deceased member. It is clear that, upon his death, save to the extent of the productivity benefit, nothing became payable by the DFRDB Authority to the estate of the deceased member. The conclusion is irresistible that the widow becomes entitled to payments in her capacity as the spouse of the deceased member. On his death, on the proper construction of the DFRDB Act, the deceased member ceased to have a superannuation interest in the Scheme and new interests personal to those entitled to them arose. Those relevant for present purposes included the entitlement of the widow to a pension under s 38 of the DFRDB Act or a commutation of such entitlement pursuant to s 41A of the Act. Other interests arose in favour of the children to whom we have earlier referred. There is in our view no inconsistency between the legislative

provisions. The general provisions of Part VIIIB of the Family Law Act could not properly operate to impact upon the rights of third parties such as the spouse in this case.

## **ANSWERS TO THE QUESTIONS STATED**

44. We thus conclude that the questions be answered as follows:-

Does a Court exercising jurisdiction under the *Family Law Act* 1975 have power pursuant to s 79(1) and (8) of that Act, to make orders in accordance with ss 90MS and 90MT of that Act to the effect that:

### **Question 1**

Whenever a payment of a surviving spouse pension under s 38 of the DFRDB Act becomes payable to the widow by reason of the death of DRH, the former wife is entitled to be paid a specified percentage of that payment with a corresponding reduction in any entitlement of the widow to that pension?

### **Answer**

No.

### **Question 2**

Whenever a payment under s 41A of the DFRDB Act becomes payable to the widow in commutation of a portion of any surviving spouse pension payable to her under s 38 of the DFRDB Act by reason of the death of DRH, the former wife is entitled to be paid a specified percentage of that payment, with a corresponding reduction in any entitlement of the widow to that payment?

### **Answer**

No.

### **Question 3**

Whenever a payment of productivity benefit under Clause 6(1) and (4) of the Determination becomes payable to the deceased's estate, the former wife is entitled to be paid a specified percentage of that payment, with a corresponding reduction in any entitlement of the deceased's estate to that productivity benefit?

### **Answer**

Yes.

*I certify that the preceding  
44 paragraphs  
are a true copy of the reasons  
for judgment delivered by this  
Honourable Full Court.*

*Associate  
Date: 2 June 2005*