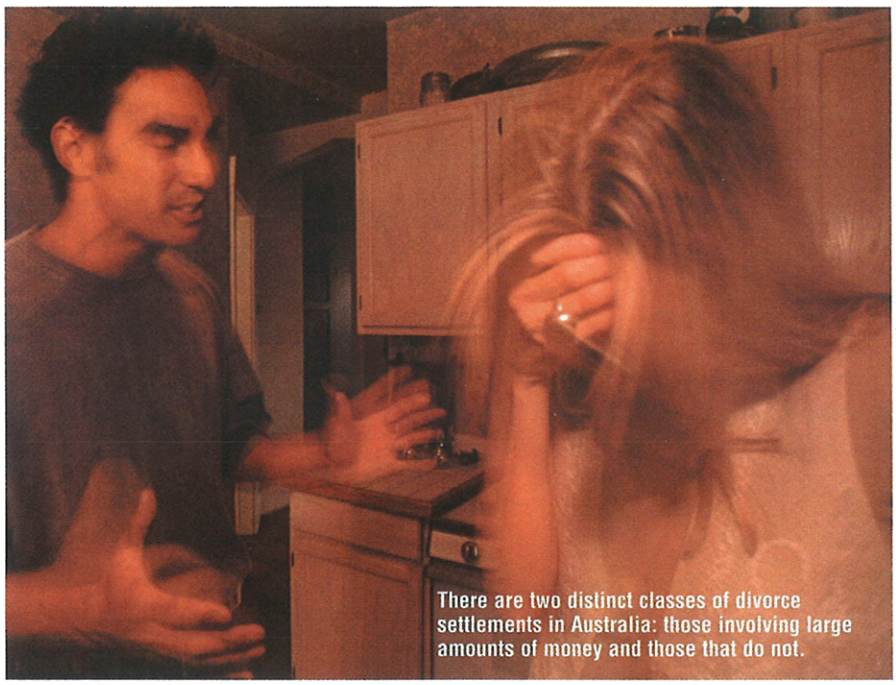
Marriage break-up: a planner's nightmare

Recent amendments to the Family Law Act enabling divorced couples to split their superannuation brings a new level of complexity for financial advisers. NABIL WAHHAB reports on what planners need to know.



There are two distinct classes of divorce settlements in Australia: those involving large amounts of money and those that do not.

Why do so many still believe that the wife in family law cases will always receive more than the husband? It is simply not true, especially for the big money cases.

In house-and-garden cases – where the parties had a long marriage, the husband was the financial activist during the marriage, the wife was the primary carer of the children and the homemaker – the wife's entitlement could be as high as 70 per cent. This is because the family court seeks to balance the ability of the husband (who has employment or work skills) to earn a future income with the lack of skills of the wife, who has endured broken employment and as a result has limited future earning capacity.

The big money cases, however, are dealt with differently. If the financial adviser can understand this, they have the chance to lose one but pick up two clients.

The results from these cases may surprise you. The maximum the Family Court has awarded of the family assets to the non-financial activist is only 37.5-40 per cent.

Family Court judges aim to do justice and equity between warring parties in division of their assets. In house-and-garden cases, unless clearly proven to the contrary, the court simply accepts equal contribution by the parties to the acquisition of their wealth.

The court will notionally divide the assets 50-50 – and then embarks upon adjustments by reason of what is generally known as 'the future needs' of the parties. The effect of the future needs analysis is to examine whether there should be a departure from the 50-50 contribution division because of care of the children, health of the parties, superannuation, earning capacity and many other factors.

There are three aspects relevant to contributions namely financial contributions (each party's income stream throughout the marriage); non-financial contributions; as well as homemaker contributions and contributions to the welfare of the family.

It is relatively simple for the Family Court to evaluate the quality of the financial contributions of the parties. In a recent decision, for instance, the court made a finding as to the exact sum of money earned by the husband from the parties date of cohabitation until the date of the trial.

On the other hand, domestic contributions, which include homemaker and support for the welfare of the family, are difficult to value. However, keep in mind what the High Court has said on the matter: *Those contributions should be recognised not in a token way but in a substantial way.*

What the Family Court has developed in house-and-garden cases is a *freeing analysis* whereby the Family Court regards domestic contributions as *freeing* the other party to pursue wealth-making activities and thus to be a contribution not just to the welfare of the family but also to the generation of wealth.

However, the big money cases have developed a limit to this approach. This is because if the court adopted the *freeing analysis*, it would have to value the non-working spouse's efforts as equal to the other. But this would then set a precedent for valuing the house-and-garden cases of family contribution. In big money cases, the financial activist (generally the husband), argues that the court should undertake an evaluation of the parties' respective contributions. The husband, therefore, argues that a *freeing analysis* is not appropriate in a case such as his.

The maximum the Family Court has awarded of the family assets to the non-financial activist is only 37.5-40 per cent.

As a result, the Family Court has developed notions such as *special skill*, *business acumen*, *entrepreneurial skills*, and *extra contributions* as a way to recognise the way in which the parties' assets were accumulated. Therefore, as the full court of the Family Court said in one of the big money cases, "equality is a potential outcome in family law cases but not where the special ability and energy of one party has enabled the development of an extensive financial empire".

What is an *extensive financial empire*? Does it have to be assets in the mid range ($3.5-$7) million, the high range (more than $12 million) or could it be argued that even an amount less than $3.5 million represents an *extensive financial empire*? How does one evaluate the quality of the parties' contributions and then compare them in these cases?

There are a number of cases where the Court made a finding that the financial activist's accumulation of the assets was the result of *entrepreneurial skills* or *special skills* and awarded the financial activist accordingly. In the mid-range cases, the homemaker and parent is often awarded about 40 per cent and the financial activist 60 per cent. In the high range cases, the homemaker and parent is awarded in the lower 30 per cent and the financial activist in the 60 to 70 per cent.

It is a very difficult task to evaluate contributions where one party was homemaker and parent and the other party was the financial activist, as the evaluation and comparisons are not conducted on a level playing field. In essence, you are comparing two different matters, one that can be quantified and the other cannot.

In the recent decision of the full bench of the Family Court in *JEL v LEF* where the parties' assets were approximately $36 million, the full court said that special contributions may even be argued in cases where the asset pool does not result in millions of dollars worth of assets but which ought nevertheless to be recognised. The full court also expressed the view that special contributions could also be argued and shown in the role as homemaker and parent or to the welfare of the family.

In *JEL v LEF*, the trial judge found the wife's property settlement entitlement to be 35 per cent. The full court examined whether such an entitlement was outside the wide discretion open to the trial judge. The full court then examined each of the parties' contributions and considered that an appropriate range was between 25 and 30 per cent. There is nothing in the judgment to indicate how the court ultimately decided that the wife's entitlement would be 27.5 per cent, other than to say that it was a mid-point between 25 and 30 per cent.

From such big money cases, it can be concluded that the larger the pool asset the lower the percentage of division of assets will be if it could be shown that the accumulation of assets by one of the parties was unique and involved *special skill* or *business acumen* or *entrepreneurial skills*.

Also, there may be cases where *special skills* or *special contributions* may be recognised in cases where the pool of assets may not result in assets to a value of millions of dollars.

It is possible to argue that homemaker contributions could also be accorded *special contribution*. This is usually so in cases where one of the parties has provided homemaker contributions under difficult circumstances, such as severe domestic violence or in cases where one party cared for a handicapped child or children.

The level of involvement of the financial activist in the homemaker and parental role and the level of involvement of the non-financial activist in making business decisions are very important factors. The more involved the non-financial activist, the more he or she would be entitled to in property settlement and vice versa.

It comes down to if your client is the financial activist/entrepreneur. If your client is a financial activist, advise your client to keep his spouse out of the business. If your client is the non-financial activist, advise your client to get involved in the financial activist spouse's business and decision making as much as possible.

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