

FAMILY COURT AMENDMENT BILL 2022

Receipt and First Reading

Bill received from the Assembly; and, on motion by **Hon Matthew Swinbourn (Parliamentary Secretary)**, read a first time.

Second Reading

HON MATTHEW SWINBOURN (East Metropolitan — Parliamentary Secretary) [10.00 pm]: I move —

That the bill be now read a second time.

I am pleased to introduce to the house the Family Court Amendment Bill 2022, which will allow separating de facto couples in Western Australia to split their superannuation. Presently, in family law proceedings between de facto couples the Family Court of Western Australia has no power to distribute superannuation interests to reflect the relative contributions of the partners of the relationship. This is because superannuation is a matter governed by commonwealth legislation.

Currently, the Family Court of Western Australia may take into account the value of a superannuation fund held by a de facto partner and offset that value by providing the other de facto partner with a greater share of other assets. However, that may not be possible because the superannuation fund may be the only asset of significant value. As members will be aware, superannuation was made compulsory under the Keating government by the commonwealth Superannuation Guarantee (Administration) Act in 1992. Since that time, increasingly, superannuation savings have become a valuable financial asset and may be the largest single asset in the property pool of a separating couple. In those circumstances, the absence of jurisdiction to split superannuation means that the distribution of assets is unfair to the non-member of the fund, although the non-member, disproportionately women, may have made a valuable contribution to the accumulation of that fund as homemaker and by caring for children of the relationship.

The quest by Hon Jim McGinty, then Attorney General of Western Australia, to secure super splitting for separating Western Australian de facto couples in family law proceedings began even before the commonwealth amended the Family Law Act 1975 in 2001 to provide this benefit to married couples. As Hon Jim McGinty advised Parliament in his second reading speech on 20 October 2005 on the Western Australian Commonwealth Powers (De Facto Relationships) Bill 2005, the Standing Committee of Attorneys-General agreed in 2001 that there should be a reference of power by the states to the commonwealth in relation to de facto couples. In the case of Western Australia, the reference of power would be limited to the superannuation interests of de facto couples.

In 2003, the Commonwealth Powers (De Facto Relationships) Bill 2003 was introduced into the Parliament of Western Australia, which effected a compromise—a narrow referral of legislative power in respect of heterosexual de facto couples and same-sex de facto couples. That meant that if the commonwealth changed its attitude, legislation would be in place to facilitate superannuation splitting also for same-sex de facto couples. However, the bill lapsed when Parliament was prorogued and was reintroduced in the next Parliament in 2005. It received royal assent on 26 June 2006 and was enacted as the Commonwealth Powers (De Facto Relationships) Act 2006, by which the Parliament of Western Australia referred state legislative power to the commonwealth Parliament confined to the distribution of superannuation entitlements between separating de facto couples in Western Australia. All other matters would continue to be adjudicated under state law according to the provisions of the Family Court Act 1997.

The commonwealth declined to accept the referral on the basis it was too narrow; evidently, it wanted a complete subject referral of all aspects of a de facto relationship to the commonwealth as the other states had done. However, we have our own state Family Court of Western Australia established pursuant to section 41 of the commonwealth Family Law Act 1975 and our own state legislation, which more than once has proven to be a significant advantage.

It was not until strong advocacy by this government that the commonwealth in 2018 agreed to accept and implement the narrow referral of legislative power from Western Australia. The required federal jurisdiction was vested in the Family Court of Western Australia by the commonwealth Parliament's enactment of the Family Law Amendment (Western Australia De Facto Superannuation Splitting and Bankruptcy) Act 2020, which gives effect to the Parliament of Western Australia's referral of legislative power by the Commonwealth Powers (De Facto Relationships) Act 2006 and also confers jurisdiction in respect of bankruptcy when that is relevant to proceedings.

The narrow nature of the referral in respect of superannuation splitting made the drafting of the bill difficult, for both the commonwealth and for us. The commonwealth implemented the referral of power in respect of superannuation splitting by amending the Family Law Act 1975 to include a new part VIIC, which deals only with superannuation splitting between separating de facto couples in family law proceedings in Western Australia. De facto couples in Western Australia will be able to split superannuation by court order or by agreement. Under new part VIIC of the commonwealth Family Law Act 1975, an agreement on superannuation may form part of a wider agreement made under the provisions of the Family Court Act 1997, the state law. Appeals relating to superannuation will mirror the existing appeal pathways for matters under the property provisions of the Western Australian

Family Court Act 1997. Since the referral of legislative power was restricted to superannuation with all other matters remaining under the provisions of the Western Australian Family Court Act 1997, it means that in the same proceedings the Family Court of Western Australia will adjudicate under the federal provisions of the commonwealth Family Law Act 1975 and the state provisions of the Western Australian Family Court Act 1997.

The limited nature of the referral resulting in the concurrent proceedings under both federal and state law has presented complex issues of constitutional law. The commonwealth Family Law Amendment (Western Australia De Facto Superannuation Splitting and Bankruptcy) Act 2020 also amends the commonwealth Bankruptcy Act 1966 to enable bankruptcy matters related to de facto couples to be heard by the Family Court of Western Australia concurrently with family law proceedings. Presently, when one of the de facto partners is bankrupt, the bankruptcy proceedings must be heard in Division 2 of the Federal Circuit and Family Court of Australia separately from the proceedings before the Family Court of Western Australia. The changes brought about by this bill will mean that the parties will not only incur less expense than if they commenced proceedings in two different courts, but also may allow for a more equitable distribution of assets than is available to the Federal Court under the provisions of the commonwealth Bankruptcy Act 1966 alone. For example, the Family Court of Western Australia will have jurisdiction to take into account the contributions of the non-bankrupt de facto partner to the property that may not be evidenced in formal ownership documentation. Before the Federal Court, the claim of the non-bankrupt de facto partner may have less priority than that of the creditors of the bankrupt. This is unfair to both the non-bankrupt de facto partner who has made a valuable contribution to the acquisition and preservation of the property and to any children of the relationship.

Pursuant to standing order 126(1), I advise that this bill is not a uniform legislation bill. It does not ratify or give effect to a bilateral or multilateral intergovernmental agreement to which the government of the state is a party; nor does this bill, by reason of its subject matter, introduce a uniform scheme or uniform laws throughout the commonwealth.

I commend the bill to the house and I table the explanatory memorandum.

[See paper [1468](#).]

Debate adjourned, pursuant to standing orders.

House adjourned at 10.08 pm
