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Goodbye West and Green ... or is it hello?

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Jacqueline Campbell, partner at Forte Family Lawyers examines a recent Full Family Court decision which discredits the *West and Green* formula in the assessment of superannuation contributions.

Before the advent of the super-splitting regime on 28 December 2002, formulas were often used by lawyers to adjust non-superannuation for contributions to superannuation by the non-member. They were simple to apply although they did not easily relate back to the case law on contributions. Formulas were less popular with the court (eg *O and O* [2000] FamCA 1432; *Harrison and Harrison*

(1996) FLC ¶92-682).

The most popular formula, adapted from *West and Green* (1993) FLC ¶92-395, looked at the years of cohabitation and the years of employment. Since super splitting started, the uncertainty about the acceptability of formulas has increased.

In *M and M* [2006] FamCA 913 the Full Court decided that the *West and Green* formula was rarely useful if superannuation was being split. However, in the absence of other evidence, the court used it as a rough guide.

The Full Court considered that the *West and Green* formula had been over-used and interpreted to cover situations far beyond its narrow facts. It was appropriate for assessing contributions to the date of an order which would take effect upon the member's retirement in the future. The formula was, however, more broadly applied to assess contributions to the date of hearing, and the adjustment was made in non-superannuation assets at that time rather than at the time the member became entitled to the superannuation.

The facts of M and M

The parties separated after a 12-year marriage and had three children. About 2½ years after separation the husband was medically discharged from the police force. His fortnightly pension, of approximately \$1,900, was valued at \$1,081,726.

The net non-superannuation assets were \$488,752. The parties' superannuation was \$1,098,071.

The trial judge ordered that the non-superannuation be divided 52.5%/47.5% in favour of the wife. The superannuation was not split.

The judgment was delivered before the Full Court delivered its judgment in *Coghlan and Coghlan* (2005) FLC ¶93-220.

The trial

The trial judge said he was not obliged by *Hickey and Hickey* (2003) FLC ¶93-143 to make a contribution finding with respect to the husband's pension entitlements. Instead, he considered the

husband's superannuation at the third step being s 75(2) and s 79(4) (d) to (g).

Using the *West and Green* formula to assess the wife's contributions to the husband's superannuation, the trial judge found that the wife made an equal contribution to 13/20ths of it. She was therefore entitled to over \$330,000. However, the trial judge only awarded the wife \$80,000 from the non-superannuation. His main reasons were:

- the husband was only entitled to a periodic pension
- the husband was not entitled to a large lump sum for at least 16 years
- a splitting order might be required if the adjustment was larger.

The Full Court

The Full Court used the *West and Green* formula as a rough rule of thumb and concluded that insufficient weight was given to the wife's contributions.

In relation to formulas, the Full Court quoted favourably from the Full Court in *Harrison and Harrison* (1996) FLC ¶92-682:

"The various attempts which trial Judges, in their ingenuity, have made to take superannuation entitlements into account by reference to precise mathematical calculations, although perhaps desirable from a practical point of view, nevertheless do not enable or entitle them to include such sums as part of the property of the parties, however calculated."

The present value of superannuation quarantined for the member under the formula, must also be taken into account as a financial resource.

A mathematical formula was not helpful to assess contributions as:

"All that is required is that the contributions of the parties be evaluated in relation to superannuation as they are to other assets. Further there may be real injustice in doing so as there is frequently far less contributed to a fund in the early years of membership compared to later years. A formulaic approach does not take account of the years in which greater contributions were made, often later in a marriage, nor the effect of contributions over many years of marriage which may have diluted initial contribution."

To illustrate the Full Court's view, consider an example. The actual superannuation at the start of a 10-year relationship is better evidence of initial contributions than assuming, as under the *West and Green* formula, that after 15 years of employment, 1/3 of the superannuation accrued prior to the relationship. The value of contributions made during the first five years of employment before the relationship commenced increased over time. Later contributions are usually greater than earlier ones, as the member's income is higher. Contributions by non-members to superannuation are often undervalued using formula approaches. In long relationships, pre-cohabitation contributions made to non-superannuation are often of little, if any, significance. The *West and Green* formula gives more weight to a pre-cohabitation contribution of \$50,000 to superannuation than is given to a \$50,000 deposit on a home.

The Full Court, following *Coghlan*, said it was preferable to consider actual contributions. However the relationship between years of membership and cohabitation might be relevant in a defined benefits scheme. Actual contributions were more relevant in marriages of short duration.

The Full Court concluded that the ability to split superannuation lessened the need to use formulas. The Full Court also referred to *BAR and JMR* (2005) FLC ¶93-231 and *Trott and Trott* (2006) FLC ¶93-263 in which Young J and Watts J respectively rejected formula approaches.

The parties did not suggest other ways for the wife's substantial contributions to the husband's

superannuation to be evaluated. A further dilemma for the Full Court was that a splitting order was not sought by either party, although it was sought by the wife at trial (*SJM and DJM*, Coleman J, 22 April 2005). In any event, not splitting superannuation was attractive as:

- the husband's income stream was preserved
- the wife's borrowings to retain the home were less
- the level of child support was maintained
- although the husband was unlikely to resume full-time employment, if he did so, the pension split would terminate
- financial relations were severed.

The wife's entitlements could, therefore, only be met from the husband's other assets of \$227,406. He had paid legal fees (\$30,000), a car (\$15,250), household effects (\$10,000) savings (\$5,600) and MLC superannuation (\$8,352).

The Full Court concluded that it was just, equitable and practical for the husband to retain all his non-superannuation and transfer his share of the home (about \$158,204) to the wife.

Conclusion

Formula approaches to assessing contributions to superannuation are attractive for their simplicity, but can result in unfair outcomes. The Full Court in *M and M* tried to close the door on formula approaches. It considered that the cases in which formulas can be usefully applied to an adjustment of non-superannuation assets taking into account contributions to superannuation, were rare.

Unfortunately, the strength of the Full Court's view was diminished by its finding that it could not order a super-split as neither party sought one. It also found other advantages of not splitting superannuation. It adjusted for the husband's pension entitlement by giving the wife a greater share of the non-superannuation. The most the wife could secure for her \$330,000 contribution to the husband's superannuation was about \$158,000 being the husband's equity in the home, about double the amount ordered by the trial judge and less than 50% of the *West and Green* rough rule of thumb.

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