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Newsletter

RIP – "West and Green" – born 1985, died 2006

specialising in superannuation valuations for family law purposes since 2003

Abstract – Your client brought super into the marriage. How do you quantify this? The West and Green formula was often used. You represent the other side. How do you counter the West and Green approach, which you always knew to be rough justice? This newsletter is particularly relevant to those family law practitioners who need to quantify the amount of super accrued during the marriage. There is also a summary of a report on the financial impact of divorce.

Two recent cases have addressed the appropriateness of using the "West and Green" formula to quantify the amount of superannuation referable to a marriage. These were:

- Justice Watt's first major superannuation case (2006_FamCA_207 T & T - click here to view) delivered in March 2006, which, incidentally, presents an excellent summary of all contemporary considerations required for superannuation cases.
- Full Court decision in M & M [2006] FamCA 913 (click here to view) handed down on 20 Sep 2006.

Why the excitement? The decisions represent a major step in rationalising the methodologies appropriate for superannuation. These will form one of the cornerstones in superannuation case law. The demise of the West and Green approach means that practitioners will need to provide more considered evidence to substantiate the amount of superannuation referable to marriage.

Past Use of West and Green

West and Green (1993) FLC 90-647 was used extensively in orders from 1985 when superannuation had to be treated as a financial resource. The intent of the formula was to give the spouse an amount of money payable once the member had retired for it was not possible to split the superannuation interest.

The West and Green formula was often expressed as follows:

$$\frac{\text{After tax value at retirement}}{1} \times \frac{\text{yrs in fund during cohabitation}}{\text{number of yrs in fund}}$$

The above was then apportioned to the non-member spouse, generally the wife, at a rate of 50%. The formula is a straight arithmetic apportionment and is sometimes referred to as a time served approach. It gives the wife, an amount of superannuation based on fixed and variable factors. The fixed factor is the number of years of cohabitation and the variable factors emerge on retirement and are:

- The number of years in the fund
- The value of the retirement fund

Inherent in the formula is an assumption that it will produce a fair and equitable outcome. Yet, the formula is a combination of lineal (the time or number of years aspect) and geometric fac-

tors (the compounding effect of interest and post separation contributions). The final outcome is a lottery.

Present Use of the West and Green Formula

Today, the West and Green formula is no longer used in orders to give the spouse a share of the superannuation because superannuation can now be split. However, practitioners commonly use it to calculate the amount of superannuation brought into the marriage. Typically, the member may have had 10 years in a super fund prior to marriage. If the marriage had lasted 10 years it was then argued that based on the West and Green approach, only half of the superannuation should be referable to the marriage. This simplistic approach always leaves one side a loser. It is the most unsophisticated approach possible. Now with the Full Court ruling, more considered approaches would be required. These are discussed later.

The Full Court case and T & T are interesting as both cases rejected the use of the West and Green formula, yet one was in respect of the wife's claim and the other was the husband's claim.

The T & T case involved an invalid NSW Police Officer whose superannuation interest was valued at $1.9m. The main issue was how to account for the value of the superannuation that was brought into the marriage. The period of fund membership was 23 years compared to the period of marriage of 10 years. The husband thought 10/23 by ½ or 21.7% of the superannuation should be the wife's entitlement.

Justice Watt's conclusion, at paragraph 170 is;

"…In my view, the West and Green approach does not fit comfortably with how the court assesses contributions in relation to other property and assets."

Analysis

The husband' best position was the West and Green approach being 21.7%. This outcome would have minimised the amount of superannuation referable to the marriage. In a defined benefit scheme, the majority of the benefit accrues towards the end of the working life. The West and Green approach gives equal weight to each year therefore the husband was contending that superannuation accrues equally, which would have been to his benefit. The superannuation accrued prior to marriage would not have been valued at any where near the average value so the husband was deducting a much larger amount for the prior marriage period thereby minimising the amount going to the wife.

The wife, on the other hand, did not tender any evidence on the value of superannuation at the commencement of marriage. It would have been substantially less than that implied by the West and Green formula and this would have resulted in a greater amount of superannuation going into the property pool.

Without evidence, Justice Watts had no alternative but to make a considered judgement as the amount of superannuation referable to the marriage. Could the wife have done better? Without tendering evidence as to the likely value of super at marriage, there is no way of knowing. Her options are discussed later.

To summarise, the fact that the West and Green approach was rejected is proof that the extreme solution that clearly favours one party at the expense of the other is now no longer appropriate. The final word on this topic belongs to Justice Watts. "Probably the West and Green debate will be revisited by a future Full Court." A few months later, this in fact occurred.

The Full Court case of M & M also involved an invalid police officer. His superannuation was valued at $1.1m. The years of cohabitation were 13 compared with fund membership of 20

years. In contrast to T & T, it was the wife who used West & Green claiming half of 13/20th of the $1.1m. As with the earlier case, no evidence was presented as to the value of the fund at commencement of cohabitation. In fact, by only claiming 13/20th, the wife was not claiming her full entitlement because most of the superannuation would have accrued towards the end of the marriage, not evenly each year as implied in the formula. In the appeal outcome, the wife substantially improved her position but the lack of evidence as to the value of the superannuation at the time of cohabitation gave the Full Court little alternative other to make a judgement without the benefit of the superannuation facts.

The Full Court rang the death bells on the West and Green formula, stating at paragraphs 113 and 121:

> "In our view the ratio of West and Green was of narrow compass and may have been accorded an interpretation that it did not warrant."
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> "We do not find a contributions assessment based on a calculation of years of marriage divided by the years the member had been in the fund to be helpful. In the context of considering contributions pursuant to s 79 it has never been necessary to apply a mathematical formula in the way we have described. All that is required is that the contributions of the parties be evaluated in relation to superannuation as they are of any 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 the membership compared to later years. A formulaic approach does not take account of the years in which greater contributions were made, often later in marriage, nor the effect of contributions over many years of marriage which may have diluted initial contributions."

Where to From Here? In both cases, a "guess" had to be made as to the amount of super referable to marriage. Both cases rejected the West and Green approach even though one was using the formula for the husband and the other for the wife. The West and Green approach was the formula of last resort. In M & M, the wife presumably thought there was no other way of quantifying her claim. Where there really no alternatives?

As a practitioner, what would you do differently today? The first recourse is to obtain a family law valuation (FLV) as at date of marriage. It makes no difference as to whether the fund is an accumulation or a defined benefit. To compare the FLV at the end of the marriage to that at the commencement of marriage, interest has to be taken into account. This is done through an investment index. For accumulation accounts, it is what the money has earned whilst it is in the fund. For defined benefit accounts, a proxy measure of investment is needed such as the one specified in the Regulations. Interest must be considered because of the time value of money and the vast differences in price levels and between the start of the marriage (say when petrol was $0.35 cents per litre) compared to the other end of the marriage.
In many cases, the Trustees do not have the records to enable a FLV at the beginning of the marriage. In most funds, it is possible to go back to the early nineties but beyond that, highly unlikely. Without records, a FLV is still possible.

The second recourse is to recreate the superannuation history of the member. The range of likely salaries could be estimated (some would be on the public record such as the salary of a policeman, the accrual rate and the member's contribution rate) and from this, the required in

puts for a FLV could be estimated. These estimates could then be used to calculate a range of likely FLVs. This would be a substantial improvement over not tendering any evidence as to the value of the super brought into the marriage.

To summarise, the formula of last resort (the West and Green approach) is now no longer available to practitioners and a more considered approach is required to substantiate the quantum of super referable to marriage.

It is interesting to observe that in both cases, the abnormal value of the superannuation reflected the receipt of an invalidity pension. The superannuation was valued at 3 to 5 times its ordinary value as a consequence. There are special considerations for invalidity pensions, which will be covered in a future newsletter.

Financial Impact of Divorce

AMP.NATSEM published a study last year on divorce trends and the financial impact of divorce on men and women. Click here to download the Report or email me for a copy.

The Report estimates that today's divorce rate is as high as 48% and by 2015 over half of all marriages will end in divorce.

The Report also highlights that the average journey for men and women beyond separation is quite different.

Men are more likely to end up in a childless household, even if they enter into a new relationship. Women are less likely to enter a new relationship and are more likely to be a sole parent.

Whilst men will suffer a marginal decline in living standards, for the women, the decline will be sharp.

Women are less likely to accumulate wealth after a divorce and they will enter retirement with negligible superannuation.

Chapter 2 is a good summary of how the Family Court determines who gets what and may be of interest to practitioners who have clients wanting to read further on this topic.

The Report concludes that on average, both sexes are worse off after a marriage breakdown.

NSW SCHEME SPECIFIC FACTORS

The remaining scheme, SSS, is expected to have its application for scheme specific factors approved before Christmas. The ability to create separate interests is still more than 12 months away. Click here to read newsletter on NSW scheme specific factors.

Feedback

Please email me any feedback or topics you would like covered in future newsletters.

The new look to this newsletter is as a result of feedback - thanks.

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