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Pensions: (Some of) what you need to know

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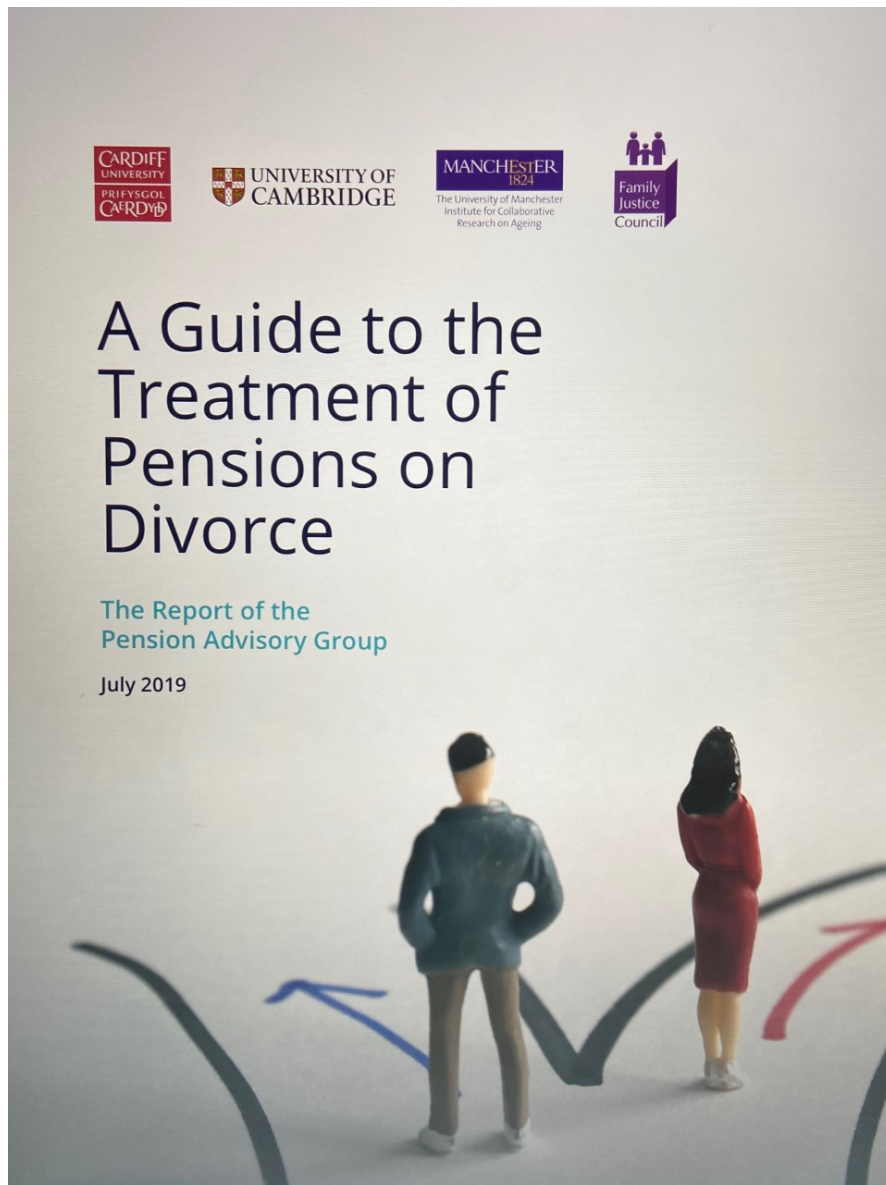
Pensions: (Some of) what you need to know.

1. The Pension Advisory Group's report:
 - What is the report?
 - When is a PODE report required?
 - Offsetting.

2. W v H (divorce financial remedies) [2020] EWFC B10:

3. Two cases post W v H:
 - KM v CV [2020] EWFC B22 and RH v SV [2020] EWFC B23.

Pension Advisory Group's Report ('PAG' report)



- A multi-disciplinary group chaired by Francis J.
- Aims to address inconsistencies in the treatment of pensions on divorce.
- Sir Andrew McFarlane:
"I endorse this report and, in doing so, commend it to all judges and practitioners as formal guidance to be applied when any issue regarding a pension falls to be determined in Financial Remedy proceedings".
- Free to download:
[https://www.nuffieldfoundation.org/sites/default/files/files/Guide_To_The_Treatment_of_Pensions_on_Divorce-Digital\(1\).pdf](https://www.nuffieldfoundation.org/sites/default/files/files/Guide_To_The_Treatment_of_Pensions_on_Divorce-Digital(1).pdf)

When is a PODE report required?
(pensions on divorce expert)



When might it be possible to proceed without a report?

1. Both parties young (say, under 40) – but be aware of DB schemes.
2. Only pensions are defined contributions schemes and the parties are of similar ages – but may need income sharing calculations.
3. Pensions are modest in the context of the overall assets – but be aware of the LTA.
4. Where CEVs are less than £100,000 - but be aware of differing state pensions.
5. Where the only scheme is a non-uniformed public sector scheme offering an internal transfer only.

When is a report necessary?

1. Cases where CEVs exceed £200,000 (£100,000 - £200,000 depends on the facts).
2. When pensions need to be split to produce equality of income.
3. Where there's a substantial disparity in parties' ages.
4. Where there is a defined benefit public sector scheme (especially uniformed services).
5. Older occupational schemes set up before April 2006.
6. Pensions that are difficult to liquidate.
7. Medical conditions.
8. Where offsetting is to be considered.

Offsetting: “The dominant practice”



Offsetting in the PAG report

- “Try, if possible, to deal with each asset class in isolation and avoid offsetting”.
- “Mixing categories of assets runs the risk of unfairness in that valuations issues may become very difficult and, absent agreement, it may be unfair to burden one party with non-realizable assets”.
- *Martin-Dye v Martin-Dye* [2006] 2 FLR 901, pensions should be dealt with separately and discretely from other capital assets.

Valuation issues when offsetting

- 2017 report, *Pension offsetting in Divorce*, published by Jordan's.
- 12 IFAs given 3 hypothetical examples; a small money pension with CE of £100,000, medium money worth £500,000 and a larger pension worth £1.5m.
- All experts came up with different offset valuations. Figures for the small money pension ranged between £60,000 - £96,000, for the medium-sized fund between £290,000 - £798,000 and, for the larger fund, between £886,000 and £1,425,000.



Offsetting continued...

Offsetting is an art, not a science:

1. Defined contribution fund equivalent.
2. Realiseable value
3. Fund account value/cashflow modelling which takes into account the parties' specific attitudes to risk.
4. Fair Actuarial Value.
5. Duxbury or similar.

Then adjust for tax and, possibly utility:

- For tax – between 15% and 30%.
- For utility - PAG report suggests between 0-25% subject to this question...

...Is an adjustment for utility really appropriate?

From the PAG report:

“our anecdotal observation is that in many cases pensions appear to have been excessively discounted for perceived utility.”

1. Pension freedoms mean funds are more flexible.
2. Hard to see the justification in a needs case.
3. Especially where the parties are closer to retirement.

Vs.

Conversely, if the pension holder is subject to an offset which results in long-term or permanent loss of owner occupied accommodation then perhaps a discount is fair?

Tips if offsetting is unavoidable

1. Ask the SJE for a range of calculations (although it is not his/her role to advise on which is suitable).
2. Consider whether a discount for utility is appropriate – the PAG report is useful authority if arguing against this.
3. If necessary, consider a shadow expert.
4. Advise client clearly about the difficulties here, endorse D81?

State pensions

Old state pension:

- Those who reach retirement age prior to 06.04.2016.
- Comprised of Basic State Pension, Additional State Pension and Graduated Retirement Benefit.
- **Additional State Pension can be shared, maybe worth £100,000+.**

New State Pension :

- Can't be shared (unless one party had an Additional State Pension within the old scheme which exceeds the rate of the New State Pension (£168.60 per week), in which case the difference (known as the 'protected payment) can be shared).
- But still relevant for income purposes.

Form BR19 (for an estimate of state pension entitlement) and BR20 (state pension valuation on divorce).

Case Law post-PAG: (1) W v H (divorce: financial remedies) [2020] EWFC B10

The facts :

- W 50, H 48.
- Met 1998, married 2005, separated 2016.
- Three children; 18, 16 and 10.
- Pensions: £2.214m H, £152,000 W.



HHJ Hess grapples with three common questions:

- 1) Whether to divide pensions with a view to achieving equality of capital by CV or with a view to achieving equality of income in retirement.
- 2) Whether to ignore pension contributions made before and after the parties' relationship.
- 3) Whether to (partially) offset W's claim to H's pensions against her desire to retain the FMH indefinitely.

(1) Split by Capital vs Income

Situations where division by CE might be permissible:

1. Where pensions represent a small proportion of the overall assets.
2. Where the parties are young
3. Simple defined contribution funds where the CEVs appear reliable.

Situations where division by income likely to be preferable:

1. Where pensions are medium or large, both in and of themselves and as a proportion of the assets.
2. Where one or more of the schemes is a defined benefit scheme.
3. Where the parties are older and nearing retirement.

From the PAG report

*In a needs based case, in particular where there is a defined benefit pension involved, for the parties or the court seeking to identify a fair outcome **the appropriate analysis will often be to divide the pensions separately from the other assets, based on an equalisation of incomes approach, such approach often requiring expert evidence from a PODE.***

***Given that the object of the pension fund is usually to provide income in retirement, it will often be fair** (where the pension asset is accrued during the marriage) **to implement a pension share that provides equal incomes from that pension asset.** This is particularly the case where the parties are close to retirement.*

(2) Non-marital contributions

- The established practice of some (many/most?) courts.
- Per HHJ Hess:
 - This approach carries with it a significant risk of unfairness.
 - In one sense the exclusion of the pre-marital portion of the pension is no more than the identification of non-matrimonial property, so why treat pensions differently to other categories of assets?
 - So, in a sharing case this might be a legitimate exercise, but not where needs dominate.

The PAG Report

It is important to appreciate that in needs-based cases, just as in the case with non-pension assets, the timing and source of pension savings is not necessarily relevant...

...It is clear from authority that in a needs case, the court can have resort to any assets whenever acquired, in order to ensure that the parties' needs are appropriately met.

W v H - Offsetting

- “It needs to be borne in mind, however, that mixing categories of assets runs the risk of unfairness”.
- H pointed out that, absent a sale of the FMH, he would not be able to rehouse until age 60 (absent substantial tax disadvantages) at which time it may be too late to contemplate buying a house.
- HHJ Hess agreed, ordering a sale in 2024.

Cases after W v H

- KM v CV [2020] EWFC B22 and RH v SV [2020] EWFC B23
- Both appeals from District Judges, heard by HHJ Robinson in Medway



KM v CV

- W was a serving police officer, CEV of £131,000. H had no pension.
- At Final Hearing DJ declined to make a PSO on the basis that:
 - (i) the parties separated in 2011 and,
 - (ii) W's contributions during the marriage were offset by arrears run up by H on the mortgage.
- H appealed appealed the decision to make no order.

RH v SV

- Main asset was H's pension with a CEV of £1,462,290.
- DJ made an order that 25.8% be shared to achieve equality of CEVs
- W appealed the decision limit her pension share to equal CEVs

KM v CV

There is a danger of too much concentration on the principles derived from big money sharing cases

The correct approach must be to conduct a comparative analysis of the parties' respective incomes and needs in retirement taking into account all the s25 criteria

RH v SV

The judge would have been perfectly entitled to share the whole of the pension pot if justified by needs, and as the PAG indicated this will frequently be the case where the scale of resources is not large.

The continuing income position must be considered in assessing fairness.

Conclusions

1. The PAG report, whilst not binding, carries significant weight and *is* influencing judicial decision making.
2. These three cases are persuasive despite only being CJ level.
3. The income yield from pensions is more relevant than their CE values in needs cases.
4. Contributions made before or after the relationship can be the subject of sharing in needs case.
5. A PODE report is usually desirable and often essential.



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