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How Should You Share the Value of Pensions on Divorce or Separation?

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Back to Basics

Section 10 (5) of the Family Law (Scotland) Act 1985:

“The proportion of any rights or interests of either person...in any benefits under a pension arrangement which either person has or may have ...and in the assets in respect of which either party has accrued rights to benefits under a pension scheme which is referable to the period [during the marriage but before the relevant date]

Section 10 (8) of the Family Law (Scotland) Act 1985:

“The Secretary of State may by regulations make provision about calculation and verification in relation to the valuation and for the purposes of this Act of benefits under a pension arrangement or relevant state scheme rights”

Divorce etc (Pensions) (Scotland) Regulations 2000 (previously 1996)

Regulation 3 – complex (tortuous!) reading but “CETV” is the method of valuing pension rights

- Avoids complicated actuarial evidence
- Straightforward and familiar valuation – both the pension providers and, now, lawyers
- CETV = “unfair”?

Stewart – v – Stewart 2001 SLT (Sh. Ct.) 114

- The CETV of a fire brigade pension scheme was £57,422. It was submitted that a fair actuarial value would be £96,355.
- It was held that the CETV was mandatory in arriving at the relevant value and special circumstances arguments were rejected.

What Proportion of Pension Rights is Matrimonial Property?

- $\frac{A \times B}{C}$
- Where (in “paraphrased” terms) –
- A is the CETV
- C is the period of membership of that party in the pension arrangement before the relevant date
- B is the period of C which falls within the period of the marriage, and if there is no such period, it shall be zero

“Membership”

- Active member – continuing service/making contributions
- Deferred member – pension “frozen”
- Pensioner member – member in receipt of pension income

In the days pre McDonald – v – McDonald

- Most looked at active membership – only periods where value was accruing as a consequence of service or contributions would “count”
- “Zero argument” – for B to be zero, membership must mean “active membership”
- Consistent with the principles of the 1985 Act – value accrued during marriage to be shared – Section 10 (4) of the 1985 Act

McDonald – v – McDonald 2017 SLT 837

(SC)

The Facts

- The husband was a miner with British Coal. He joined an occupational pension scheme in 1978. He was married in March 1985. He was medically retired in August 1985. He separated from his wife in September 2010.
- In August 1985 “active membership” ceased and “pensioner membership” commenced.
- The CETV at the relevant date was £172,748
- If “active membership” was applied to “B” the matrimonial property element of the pension was £10,002. If “active membership” and “pensioner membership” was applied for “B” then the matrimonial property element of the pension was £138,534.

The Supreme Court's Reasoning

- The words are not there – regulation 3 talks of different categories of membership but regulation 4 makes no such distinction.
- The regulations apply to occupational pension schemes and personal pension schemes. “Active membership” makes no sense to personal pension schemes. Whilst active membership could be equated to making contributions, what if sporadic contributions?
- The general principle of Section 10 (4) of the 1985 Act is not supportive of the “active membership” argument because discrete provision is made for the treatment of pensions in Section 10 (5) by carving out pensions from Section 10 (4).
- “Zero argument” – does not matter. Egregious circumlocution – look it up!

Important Add On

The Supreme Court specifically confirmed that there was no need to share the relevant value equally. Accordingly, “special circumstances” can be applied to arrive at the unequal division of pension rights constituting matrimonial property.

Summary

- $A = CETV$
- C = the whole time the pension member had his/her pension – active/deferred/pensioner membership
- B = the period from marriage to separation
- Special circumstance arguments can be made for the unequal sharing of the matrimonial property element of pensions

B – v – B 2012 Fam LR 65

- The husband transferred pensions that were acquired entirely prior to marriage into a new pension scheme into which he thereafter contributed during marriage. Actuarial evidence was produced to show that only 11.8% of the CETV at the relevant date was built up from contributions made during marriage.
- Held – actuarial evidence accepted and special circumstances resulted in unequal division.

B – v – B applied to McDonald – v – McDonald

- £138,534 of the husband's pension is matrimonial property. Only a very small period of active membership took place during marriage (5 months). Special circumstances could justify a departure from the equal sharing of the said figure.

Example

- Mr X starts an OPS in 2000. He moves job (and consequently stops accruing pension benefits in the scheme) in 2005. He is married in 2010. He separates in 2015.
- The relevant value will be $CETV \times \frac{5}{15}$
- Special circumstances – appropriate to exclude altogether? What if no other matrimonial property? What if other relevant principles are applicable?

Special Circumstances

“The matter is essentially one of discretion, aimed at achieving a fair and practicable result in accordance with common sense” [Little – v – Little 1990 SLT 785]

“Some areas remain in the application of the principles of the Court to exercise its own judgement on the facts of the particular case so as to achieve a fair result.” [Jacques v Jacques 1997 SC (HL) 20]

The Future

- Further guidance from the Sheriff will follow in McDonald – v – McDonald
- Have we gone full circle and will actuarial evidence be led in lots of cases involving significant pension interests?





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