Pre- acquired Pensions: The Court's Approach

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The Court's Powers

- Pension sharing order pursuant to s24B, Matrimonial Causes Act 1973, where the divorce petition filed after 1 December 2000;

- Pension attachment order pursuant to ss25B-25D, MCA 1973 in cases where the divorce petition was filed on or after 1 July 1996 (note that pension sharing orders are available in judicial separation cases, but pension sharing orders are not); and

- Offsetting pursuant to s25B and 25C, MCA 1973.

Non-Matrimonial Contributions

- Pensions contributions made prior to a marriage fall into the category of assets that have not been '*generated by the parties' endeavours during the marriage'* (see *Hart v Hart* [2017]). In the case of pensions, this can be significant, particularly in cases involving second marriages where large final salary/public sector pensions feature.

- It is common to ask SJE actuaries to look at various scenarios in such cases i.e. pension calculations based on the entire fund, and just that part of the fund accrued during the marriage. Practitioners are often left with pension reports with two radically different sets of figures in respect of the net effect of a pension share with or without pre-marital contributions. How to argue that pre-marital pensions should feature?

- As per *White v White* [2000], the Court will look to achieve fairness between the parties after assessing the s.25 criteria, by testing any proposed financial order against the yardstick of equality, with a departure from equality being justified only where fairness dictates that such a result is informed.

- Needs – will disregarding the pre-marital part of the fund impact on needs? In some cases a straight forward needs based argument will apply, for example, where a wife in her early fifties is likely to need ongoing spousal maintenance. This would present a paradigm case for splitting a pension to produce equality of income in retirement regardless of significant pre-marital pension contributions made by the husband (and indeed is likely to be in his interests to do so to achieve an immediate clean break).

- Other cases are not so straight forward. I recently dealt with a case where the parties met and married late in life for the second time. The wife had recently inherited a significant sum of money which she elected to use to purchase a mortgage free matrimonial home in joint names, albeit with minimal contribution from the husband. The marriage lasted 5 years, by which time the parties

were in their late fifties. The wife was earning relatively modestly, and the husband had been made redundant. However, he had a pension with a CETV of around £750K, to which the wife had made no contribution. The husband argued that the house was clearly matrimonial given the wife's decision to mingle it in the way that she had, and sought 50% of the net proceeds of sale, whilst arguing that his pension, which was non-matrimonial, should be 'ring fenced'.

- I argued that the husband's proposed order could not possibly be considered to produce a result which was *White* fair. In essence, he was inviting the Court to approve a situation whereby the wife's decision to mingle her pre-acquired matrimonial capital upon marriage, should place in her a clearly disadvantaged position, just because the husband held a pre-marital asset of a nature *that could not have been mingled even had he wanted to do so*. Put simply, the wife could mingle her capital, whilst the husband could not because it was a pension (whether or not he would have elected to do so). The wife's position won out.

Case Law

- *H v H [1993].* A case that considered the pension accrued post-separation with that accrued during periods of cohabitation, so not specifically pre-marital pensions. Thorpe J (as was) held:

'… in deciding what weight to attach to pension rights it is more important in this case to look at the value of what has been earned during cohabitation than to look at the prospective value of what may be earned over the course of the 25 to 30 years between separation and retirement age'

- Thorpe J applied a 'straight line discount' i.e. simply dividing the period of cohabitation by the period of contributions. This is considered unreliable by many judges:

    i. This will result in an unfair outcome if applied to pension where the pension accrual at the end of the marriage may have a greater value than the pre-marital contributions, and inflationary factors and growth on returns of investment funds may be problematic;

    ii. The case predates pension sharing and *White*;

    iii. Thorpe J later took a different approach in *Harris v Harris* [2001]:

    '.. I think that in deciding what weight to attach to pensions rights it is more important in this case to look at the value of what has been earned during cohabitation than to look to the prospective value of what may be earned over the course of 25 or 30 years between separation and retirement age'.

- The court will carefully consider the *use* of the pension fund during the marriage. In *FS v JS* [2006], the court looked at the treatment of pre-marital pension assets that had been taken out of the pension fund and liquidated/sold, with the proceeds funding the purchase of commercial properties (SIPP). The parties married in 1997, when the husband was 52 and the wife 20 years younger. The husband had significant pension assets at the time of the marriage, and sought to exclude them as non-matrimonial. Burton J dismissed this argument, holding that:

  *'….*had the pension funds remained as they were, with the seemingly substantial increase in value since 1998 from £435,000 to £972,528, they would, in my judgment, have remained pre-matrimonial, and therefore non-matrimonial, property. However, they were liquidated, just as the other commercial properties were sold, and the respondent entered into the exercise of replacing the sold properties, but above all investing the substantial cash in properties which have, indeed, proved very successful investments.'

- Needs. In *GS v L* [2011], King J excluded the husband's pre-marital pension before he divided the assets equally on the basis that the pension could not meet the wife's needs in the short or medium future, saying:

  ' So far as the pension is concerned, it can and should in my judgment properly be excluded from the division of the assets, a position effectively, although not absolutely, conceded by the wife. The pension cannot be drawn down for many years and was accrued in its entirety before the marriage; the fund cannot be

used to provide for the wife's needs in either the short or medium term. Given the benefit of the capital with which she will leave the marriage and a working life of 25 years ahead of her, fairness in my judgment requires that the husband should retain his pension fund absolutely'.

- *M v M* [2015], a long marriage/sharing case. Sadly, after separation, the wife discovered that she had ovarian cancer. A key issue was treatment of the husband's pension, 80% of which had been accrued during the marriage. The difference between the pre-marital and marital pension was £84,935. The Court concluded that it was not possible to engage an 'uplift' for the pre-marital value per *Jones v Jones* [2011]. Further, the court considered that it was not possible to calculate the pension accrual that would have accelerated during the marriage because there would be a marked increase in pension accrual towards the end period before the pension is drawn. The Court determined that in a case looking at entitlement and not need, the court was able to apply a discount for the pre-marital acquisition using its discretion rather than a mathematical basis. Overall the court divided the assets such that there was a 55/45 division in favour of the husband.

- The onus of proof is clearly on the party seeking to run the re-matrimonial argument. In *B v B* [2012], the husband argued that the entire value of his SIPP had been acquired prior to the parties' cohabitation and was pre-marital. He failed to produce evidence of the value of the scheme at the relevant date, leading to the Judge concluding that he had no means of assessing the value

of the rights at the relevant date. This endorses Mostyn J's view in *N v F* [2011] that:

'if a party is going to exert the existence of pre-marital assets then it is incumbent on him to prove the same by clear documentary evidence'

Summary

- The Court will employ a wide discretion to the treatment of pre-acquired pensions assets as it does to pre-marital assets generally as per Moylan J in *Hart v Hart:*

  *'*Put in simply terms, the court ultimately has to decide, as part of the discretionary exercise, how to weigh or reflect the existence of non-matrimonial property when determining the award. A key question which has emerged, and which is engaged in the current case, is whether this should be undertaken in a formulaic manner or whether the court can adopt a broader approach'.

- In cases that are needs driven, the ring fencing of pre-marital pensions will be hard to justify.

- Sharing cases will be treated differently, and exclusionary arguments are more likely to succeed, although overall the fairness of the proposed exclusion must be examined carefully.

- Other factors that may impact the Court include whether or not the parties drew money from the pension fund concerned, thus changing its status.

- The Court will expect documentary evidence in support.

References:

B v B [2012] EWHC 314 (Fam)

FS v JS [2006] EWHC 2793 (Fam)

GS v L [2011] EWHC 1759 (Fam)

H v H [1993] 2 FLR 335

Harris v Harris [2001] 1 FCR 68

Hart v Hart [2017] EWCA Civ 1306

Jones v Jones [2011] EWCA Civ 41

M v M [2015] EWFC B63

White v White [2000] UKHL 54