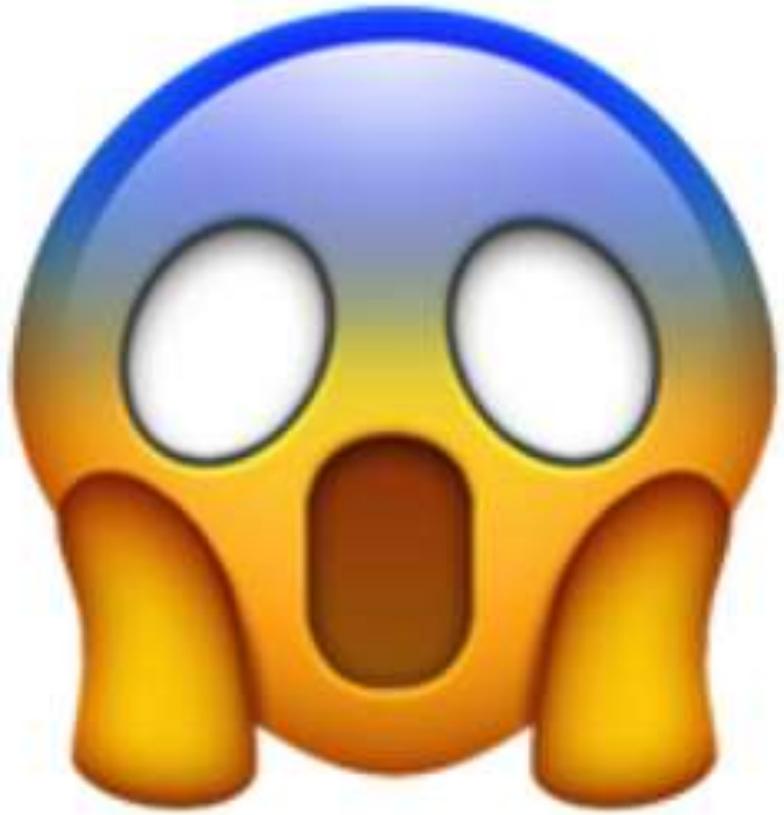




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PENSIONS ON
DIVORCE

WHITE PAPER
2023

“How far can you push "need" in pensions, particularly in short to medium-length and childless marriages or where parties are comparatively young?”



UNDERSTAND
THE BENEFITS

Different types of pensions

DB private or public sector

DC including money market or SIPP

DC GAR

Private Final Salary Pension

CETV - £600,000

DC Personal Pension

CETV - £600,000

Public Final Salary Pension

CETV - £600,000

GAR Pension

CETV - £600,000

Private Final Salary Pension

Income today - £18,750 and no lump sum

Lump sum today - £84,6779

and £12,701 income

DC Personal Pension

Income today - £21,600 and no lump sum

Lump sum today - £150,000

and £16,200 income

Public Final Salary Pension NHS

Income today - £24,000 **PLUS**

Lump sum today - £72,000

Guaranteed Annuity Rate 6%)

Income today - £36,000 and no lump sum

Lump sum today - £150,000

and £27,000 income

TIME TO UPDATE

Private Sector Defined Benefits Pension

Income at age 60: £26,400 per annum with no lump sum or

Lump sum of £128,400 and reduced income of £19,300

Defined Contribution Personal Pension

Income at age 60: £29,100 with no lump sum or

Lump sum of £182,100 and reduced income of £21,800

Public Sector Defined Benefit Pension

Income :£33,500 with no lump sum or

Lump sum of £89,800 and 'reduced' income of £29,900

This is an NHS pension and to compare to others the Actuary has assumed that the lump sum which comes on top has been used to buy an annuity to top up the income

Guaranteed Annuity Rate Pension

Income: £50,900 with no lump sum or

Lump sum of £182,100 and reduced income of £38,200

Capital versus Income

“There is however one area of controversy. I have read with great interest the discussion about the tension between equality of division and equality of outcome when making a sharing order. For my part I am firmly in the former camp as the latter exercise must surely bring into account the inestimable benefit of being actually alive when the other party is dead! In my book it is an equal outcome for the husband to receive £20,000 annually for 10 years and for his younger wife to receive £10,000 for 20 years. But I acknowledge that my view is not shared by all and we may have to await a decision from a higher court to resolve the issue. Both sides of the divide are very fairly put by the authors in this edition.” Mostyn J 2013 Preamble





UNDERSTAND
THE BENEFITS

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'used' to buy an annuity to top up the income*

Guaranteed Annuity Rate Pension

Income: £50,900 with no lump sum or

Lump sum of £182,100 and reduced income of
£38,200

PAG consideration

Para 6.12 – 6.20 at pp 30- 32

Key Points:

1. Majority of cases are needs, where objective is to divide pension assets in order to ensure that income needs in retirement are met.
2. CEVs can be very misleading in that very different incomes will result from identical CEVs if the underlying nature of the pensions differ, BUT
3. There can be (rare) cases where the parties are of such similar age, and there is only one pension to be divided, or the pensions are all DC with no GAR, that simple capital division works.

BUT: THE VIEW FROM ON HIGH

- **TWO MORE HIGH COURT JUDGES WHO PREFER CAPITAL DIVISION**

SJ v RA [2014] EWHC 4054 (Fam) – Nicholas Francis QC sitting as a Deputy High Court Judge (now Mr Justice Francis and co-Chair of PAG)

CMX v EJX (French Marriage Contract) [2022] EWFC 136 – Moor J

SJ v RA [2014] EWHC 4054 (Fam)

“Why should someone receive more just on the basis of gender? There may have been an explanation when rules required the purchase of an annuity. However, to give the wife more than the husband, on account of either age or gender would seem to me to be unacceptable discrimination unless it is a case which is governed solely by needs. If a person should receive more of a pension fund under the modern rules simply because she (or he in the case of a marriage where the husband is much younger) is likely to live longer, then such an approach would logically extend to all capital assets. Moreover, European Union Judgments and rules are rapidly outlawing discrimination on account of gender. In cases where distribution is being made on a basis which is not by need it is, in my judgment, incorrect to distribute the pension fund on the basis of equality of income”

CMX v EJX (French Marriage Contract) [2022]
EWFC 136 – Moor J

“I could not agree more. If assets are to be divided equally, they should be divided equally. In general, there is no justification for awarding more to one party because they are younger or have a longer life expectancy.”

(Quoting Nicholas Francis QC from SJ v RA)

**ASSUMING 'INCOME BASED' RATHER
THAN CAPITAL**

**CAN WE STILL 'APPORTION' THE
NON-MATRIMONIAL ELEMENT**

Four main cases (all Circuit Bench)

W v H [2020] EWFC B10 - HHJ Hess

RH v SV [2020] EWFC B23 – HHJ Robinson

**W v H (Financial Remedies: Pensions) [2021] EWFC –
Recorder Salter**

**KM v CV [2020] EWFC B22 and
[2022] EWFC 174 – HHJ Robinson**

W v H [2020] EWFC B10

“61. In dealing with the question: is it right for the court, in dividing pensions with a view to promoting equality, to exclude a portion of the member spouse’s pension if it was earned prior to the marriage (or seamless pre-marital cohabitation), I have the following observations:-

- (i) There has undoubtedly been an established practice in some courts considering the divisions of pension, regardless of needs issues, to make a straight line deduction from the CE of a relevant pension fund by reference to a fraction where the numerator is the number of years of the marriage (including seamless pre-marital cohabitation) and the denominator is the number of years over which the pension fund in question was accrued, and to include in its calculations and deliberations only the reduced amount of the CE;*

In my view this approach carries with it significant risks of unfairness as the mathematics of the present case undoubtedly illustrate.”

“(iii) In one sense the exclusion of the pre-marital portion of the pension is no more than, in modern parlance, the identification of non-matrimonial property. In other words the pre-marital portion of the pension is non-matrimonial property whilst the remainder is matrimonial property. Where the pension was wholly accrued prior to the marriage then it is easy to identify it as non-matrimonial property: see, for example, King J (as she then was) in GS v L [2013] 1 FLR 300 and Mostyn J in WM v HM [2017] EWFC 25. The apportionment exercise seems a logical extension of this and pension funds are rarely subject to the ‘mingling’ which often occurs in relation to cash assets.”

*“(iv) In a sharing case the exclusion of the pre-marital portion of a pension might well be a legitimate exercise in principle, although, as identified in *M v M* [\[2015\] EWFC B63](#), the court might retain an element of discretion as to the level of sharing. **In a needs case, the approach needs to be treated with more caution.** Where the pensions concerned represent the sole or main mechanism for meeting the post-retirement income needs of both parties, and where the income produced by the pension funds after division falls short of producing a surplus over needs, then it is difficult to see that excluding any portion of the pension has justification. In the words of Lord Nicholls in *White v White* [\[2000\] UKHL 54](#): “in the ordinary course, this factor”..i.e. the factor that the property concerned is non-matrimonial...“can be expected to carry little weight, if any, in a case where the claimant's financial needs cannot be met without recourse to this property”*”

RH v SV (Pension Apportionment: Reasons) [2020] EWFC B23. HHJ Robinson

- 13-year marriage, most of pension was pre-marriage.
- LIP wife had agreed only marital period relevant. DDJ ordered PSO to equalize (CEVs of matrimonial element. (ie **Capital** and **Apportioned**)
- “[13]...in general, courts assume that contribution-based arguments are of less weight when needs take precedence, and assets which are strictly non-matrimonial can be taken into account.”
- “[15] [DDJ] ...would have been perfectly entitled to share the whole pension pot if justified by needs, and as the Pension Advisory Group indicated this will frequently be the case where the scale of the resources is not large and there has been a significant period of cohabitation.”
- DDJ had given sufficient reasons for decision as meeting W needs (and awarding her over 50% of capital), and HHJ did not interfere.

POST SEPARATION ACCRUAL??

- W v H says little, beyond (para 61 (v) quoting p 22 of PAG (para 4.3)
- *“a pension-holder cannot necessarily ring-fence pension assets if, and to the extent that, those assets were accrued prior to the marriage **or following the parties’ separation**. 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”*

KM v CV [2020] B22

Appeal from DJ. Cohabitation from early 90s. Separation 2011. Final hearing 2019. W 49, serving Police Officer since 2004.

H aged 59, and unemployed. DJ apportioned pensions for PSO so as only to share the marital accrual.

HHJ Robinson allowed the appeal, on basis that there had been no consideration of whether the PSO would meet H's income needs in retirement.

“31. The correct approach must be to conduct a comparative analysis of the parties' respective income and needs in retirement, taking into account all the s25 criteria, including health, needs and contributions, and the extent to which the Wife's pension should be apportioned. Only then can a fair decision be reached.”

[2022] EWFC 174 (Judgement on Appeal)

No PODE Report, but correspondence with Mr Richard Nobbs of Excalibur Actuaries. Nobbs had suggested a Pension Attachment Order for a lump sum, on the basis that this would be much cheaper and more convenient than a Pension Sharing Order (deferral gap).

HHJ Robinson concluded that a **lump sum** on H's retirement would make a significant difference to his needs.



Finch v Baker [2021] EWCA Civ 72 Court of Appeal

Appeal from CJ from DJ. Cohabitation from 1991, and marriage 1993. Twins born 2011. Separation 2012/2013.

H no contact with children since then. H now 69, and retired. W 57, and working for BBC with a DB occupation pension with a CEV (per a 2017 actuarial report) of approximately £2.1m. Capital totalled £2.17m.

On a needs basis DJ gave W significantly greater than 50% of capital assets, but decided that it would be unfair “*other than (to) make an order that provides to the parties the same income in retirement*” and made a 48.6% PSO

CJ reduced the lump sum payable by W to H , and also reduced the PSO to 34% (presumably by reference to the years of post separation accrual and H’s needs.

W obtained leave for a second appeal (!)asserting many grounds . CEV of W’s pension benefits by now £2.7m.

Only relevant observation is para 41

“As set out above, the District Judge found that all the assets in this case comprised marital property. I can see an argument, certainly in respect of the wife’s BBC pension, that this might not be right because part of the pension had accrued since the parties separated. However, once the District Judge had determined that conduct was not a relevant issue, the determinative principle in this case was that of needs not sharing.”

W v H (Financial Remedies: Pensions) [2021]

EWFC

23 years of cohab- separation

3 Children, 1 still only 14

W Poor health

Argument re W's mother's interest in property

Deal with Pension element on income basis, and often offsetting is the approach

H wanted to offset pension share by reference to a deferred interest in property

Recorder Salter disagreed and made a PSO

Methodology of Apportionment

1. Identify the benefits that had accrued pre- marriage.
2. CEV at date of marriage
3. Straight Line (chronological)

See Joe Rainer

“Non-Matrimonial pensions; the forgotten discussion”

January [2020] Fam Law

“How far can you push "need" in pensions, particularly in short to medium-length and childless marriages or where parties are comparatively young?”



UNDERSTAND
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