



ST JOHNS BUILDINGS

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White Paper Question – Pensions and needs

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



**Family Justice Council's report: Guidance on
Financial Needs on Divorce (2nd Edition; April 2018)**

In small to medium money cases...where needs are very much an issue, a more careful examination of the income producing qualities of a pension may well be required in the context of assessing how a particular order can meet need.

Part 4

- ❖ In a ‘needs’ case, the court can have resort to any assets to meet the parties’ needs; in such cases it is rarely appropriate to apportion the pension based on the length of the marriage and existence of the pension
- ❖ By contrast, in a ‘sharing’ case, the question of whether all or some of the pension assets are to be treated as ‘non-matrimonial property’ and so not ordinarily to be distributed pursuant to the sharing principle is a live one



Part 6

- ❖ It will often be fair to aim to provide the parties with similar incomes in retirement, but equality may not be the fair result depending on needs, contributions, health, ages, the length of the marriage, or, *in non-needs cases*, the non-matrimonial nature of the asset
- ❖ In some cases, an equal division is not appropriate; for example, in a short marriage with no children.
- ❖ On the other hand, an unequal adjustment might be appropriate in favour of a primary carer whose earning and pension accumulation capacity has been significantly impacted by looking after children.



A definition of needs?



Law Commission report No.343
Matrimonial Property, Needs and
Agreements (2012)

*“a very broad concept with no single
definition in family law” [3.8]*



The objective of a needs based order:

...to enable a transition to independence to the extent that that is possible in light of the choices made within the marriage, the length of the marriage, the marital standard of living, the parties' expectation of a home and the continued shared responsibilities (importantly, child care)...

❖ Highly gendered context

- ❖ Many women still have less economic capacity than most men to deal with the economic shock of divorce, due to the distribution of childcare and labour market participation
- ❖ About 1.8 million families comprise a full-time working father and part-time working mother
- ❖ Around a quarter of mothers with dependent children are economically inactive (i.e. are neither in work nor seeking work)



- ❖ Less than half of single mothers of children under 2 are in paid employment
- ❖ Women on average still carry out 60% more unpaid work than men
- ❖ ‘Motherhood penalty’ – reduced earning capacity and savings/pension accumulation
- ❖ The impact of divorce and recovery from it was on average considerably worse for wives than for husbands, whose position *improved* following divorce



Family Justice Council Guidance – Financial Needs on Divorce

- ❖ The needs of the parties are a question of fact (para 21)
- ❖ The ‘key point’ is that in cases involving greater financial resources and standard of living, needs can be met at a higher level that would otherwise be possible (para 23)

❖ **SS v NS (Spousal Maintenance) [2015] 2 FLR 1124**

I would suggest that these swirling considerations cannot be pressed into a formula which provides an answer, and it is right that that should be so, for the assessment of need is elastic, fact-specific and highly discretionary. For as King Lear pointed out, needs are exceedingly hard to reason; even the poor have things superfluous to their basic needs; and most luxuries are strictly unnecessary.

✦ Needs v sharing

WC v HC [2022] EWFC 22 at [21] per Peel J

Where the result suggested by the needs principle is an award greater than the result suggested by the sharing principle, the former shall prevail.

In vast majority of cases the enquiry will begin and end with the parties' needs. It is only in those where there is a surplus of assets over needs that the sharing principle is engaged.



A canter through the authorities...

❖ *GS v L* [2013] EWHC 1759 (Fam) – King J

(10 year marriage; 2 children; £4m assets)

[85] *There is no doubt that the husband came into the marriage with substantial assets, which assets are capable of being the subject of forceful arguments in favour of their being excluded as non-matrimonial property. In my judgment however, for the reasons set out in my consideration of the s 25 factors set out below, those assets are (with the exception of the pension) required in order to satisfy both the immediate and long-term needs of the wife and children (and indeed the husband).*



[86] *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.*

❖ *SJ v RA* [2014] EWHC 4054 – Nick Francis QC

[83] *...The wife says that there should be a pension sharing order to provide her and the husband with an equal income. Given that the wife is younger and female, this would provide her with a greater share of the combined fund values. I would regard such an approach as unfair and anachronistic in a case where assets exceed the parties' needs...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...*



W v H (Divorce: Financial Remedies) [2020] EWFC B10 – HHJ Hess

Issues considered:

- ❖ whether it is right for the court, in dividing pensions with a view to promoting equality, to target capital equality (i.e. equal CE or other definitions of capital value) or to target the promotion of equal incomes.
- ❖ whether it is 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).

❖ Income or capital? – para 60 *W v H*

“There is no ‘one size fits all’ answer to this question. There are undoubtedly scenarios where the fair solution is probably to divide pensions by CE value...”

- ❖ where the CEs are relatively small in themselves or as a portion of the assets overall
- ❖ where the parties are relatively young and any projections about the future income-producing qualities of the pensions are likely to be speculative or unreliable



- ❖ where all the pensions are simple defined contribution funds so that the CE values can be regarded as reasonably reliable and simple predictor of future income streams
- ❖ where the sole pension involved is a non-uniformed public sector defined benefit scheme offering internal transfers only



“There are, however, scenarios where a simple division of CEs may well not represent a fair solution...”

- ❖ where the pensions are medium or large, both in themselves and as a portion of the assets overall, but needs issues still arise
- ❖ particularly where one or more of the pensions involved is a defined benefit scheme (and income from within the scheme per £ of CE is likely to be higher than annuity income outside the scheme per £ of CE on an external transfer)
- ❖ particularly the case where the parties are no longer young and retirement issues are on the horizon



In a needs-based case, in particular where there is a significant Defined Benefit pension involved, for the parties or 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.



*In bigger money cases, where needs are comfortably met, the courts are now likely to be less interested in drawing a distinction between pension and non-pension assets than hitherto. This is partly because other assets will also be deployed for income production so the distinction is less obvious, but more because the “pension freedoms” introduced by Taxation of Pensions Act 2014... as a result of which those aged 55 or above have the option of cashing in some categories of pension scheme, have blurred the dividing line between cash and pensions and in such cases the trend is now to treat pensions as disposable cash assets, thus disregarding their income producing qualities: see *SJ v RA* [2014] EWHC 4054 (Fam) and *JL v SL* [2015] EWHC 555.*

❖ Apportionment – para 61

- ❖ Straight line apportionment “*carries with it significant risks of unfairness*”
- ❖ Apportionment arguments are akin to those made about the distinction between matrimonial and non-matrimonial property - but pensions are rarely mingled
- ❖ Apportionment may be justified in sharing cases. But in needs cases “*where the pensions concerned represent the sole or main mechanism for meeting the post-retirement income needs of both parties...it is difficult to see that excluding any portion of the pension has justification.*”



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



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

- ❖ H 58; W 53. 13-year marriage; 1 child
- ❖ Judge at first instance gave W more capital to meet her needs but a smaller share of the pension to reflect to being largely pre-marital
- ❖ Notwithstanding the less generous pension share and likely disparity of living standards on retirement, judge at first instance satisfied it met her needs



On appeal to HHJ Robinson:

HHJ Robinson, citing the PAG Report:

It is important to appreciate that in needs based cases, just as is the case with no pension assets, the timing and source of the pensions savings is not necessarily relevant...



18. It may be possible to question his needs analysis, but it is plain that the Judge did consider the balance, giving the Wife a higher proportion of the capital and the Husband a greater share of the pension assets. It is more important that he did conduct this analysis than whether the source of the pension was determinative.

19. An appellate court will only interfere with a decision of a lower court if it was wrong or unjust because of a serious procedural or other irregularity. Despite my concerns about the apparent ring fencing of the pension pot, I have concluded that the Judge was entitled to reach the conclusions that he did on the evidence that he heard, and that there are no sufficient reasons to interfere with his decision. Accordingly, this aspect of the Appeal is dismissed.

❖ *KM v CV* [2020] EWFC 174 – HHJ Robinson

- ❖ Small money case. W was a serving police officer with a DB pension scheme with CE of £131k.
- ❖ 24 year marriage. 1 child. However, separation 7 years before the first instance decision and 9 before the appeal.
- ❖ On appeal, HHJ Robinson found first instance judge led into error by an over emphasis on the non-matrimonial accrual of part of the pension and of contributions over needs.



[31] The correct approach must be to conduct a comparative analysis of the parties' respective income and needs in retirement, taking into account 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.



KM v CV (No.2) (Pensions and Benefits) [2022]

EWFC 174 – HHJ Robinson

- ❖ The court now furnished with an expert report (albeit two years later)
- ❖ Updating CEV: £137k. H's needs at £255 p/w, £2.44 less than his income
- ❖ In retirement he would be £1,000pa worse off
- ❖ He sought two £10k lump sums
- ❖ Judge ordered W to pay one of the £10k lump sums



[22] I take account of all the section 25 criteria, including the ages of the parties, their contributions, and their health and abilities. The most important single aspect is their respective needs and earning abilities. The wife is not wealthy and will have to continue working until her retirement age. The Husband is unable to do so, and cannot be expected to supplement his income.



W v H (Financial Remedies: Pensions) [2021]
EWFC 63 – Recorder Salter

- ❖ W 46; H 51
- ❖ 23 year marriage. 3 children but only one of which was a minor
- ❖ Modest assets
- ❖ Over £200k/45% of the liquid capital spent on costs
- ❖ H's pension was worth £682k
- ❖ No apportionment for post-separation contributions



[93] *This is a needs case....I am satisfied that the appropriate approach is to equalise pension income from age 60... This approach accords with the approach recommended by the PAG Report...*



Joanne Lewis v Cunningtons Solicitors [2023]

EWHC 822 (KB) – HHJ Coe KC (sitting as HCJ)

- ❖ W successfully sued her solicitors for the negligent advice she received about her potential pension entitlement
- ❖ 23 year marriage
- ❖ H police officer – his pension was by far the most valuable asset
- ❖ Solicitors advised they were unable to advise her absent full disclosure
- ❖ Notwithstanding this, W instructed them to prepare a consent order, with no provision for pension sharing
- ❖ Court found solicitors had enough information to advise



[197] ...a court would almost as a certainty have made a pension sharing order and the inevitable starting point and probably finishing point would have been equal division of the pension fund. The likelihood was so strong that the claimant should have been advised in the clearest possible terms that that was the course she should pursue.

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

- ❖ H 69; W 57
- ❖ 20 year marriage; 2 children
- ❖ First instance (DJ) awarded H 37.5% of non-pension assets by way of lump sum and a 48.6% share of W's substantial pension to equalise income in retirement
- ❖ W appealed against the DJ's order
- ❖ On appeal, Judge reduced both H's lump sum award and pension share to 34%



- ❖ Following receipt of the judge's draft judgment, W contended that an updated PODE should be obtained, because the 34% pension share would provide H with a much higher income than the judge had expected.
- ❖ The Judge decided that it was too late for further evidence to be adduced
- ❖ W appealed (1) the assessment of needs and (2) Judge's failure to order updated report



- ❖ Court of Appeal held that:
 - ❖ The judge's evaluation of the parties' respective needs and the net effect of his order had not been flawed
 - ❖ It had been open to the judge to decide that it was too late to allow further evidence to be adduced
 - ❖ in every case often a delay between making a PSO and that order being implemented



- ❖ Whilst the order might well have a different effect to that assumed by the court...
- ❖ The court's powers had been exercised in a broad, discretionary manner and not necessarily with the expectation of achieving mathematical precision
- ❖ Appeal dismissed



S v S (Conduct: Pensions) [2022] EWFC 176

– HHJ Robinson

❖ H 59; W 61

❖ H police officer

❖ Long marriage case; 3 children

❖ W has MS and is unable to work

❖ H had been convicted of rape of W and perverting course of justice



- ❖ Proceedings delayed because local Police and Crime Commissioner had brought proceedings to penalise H via a reduction in H's pension as a result of his conduct in office
- ❖ In those proceedings, the maximum deduction to H's pension could have been 65%, reflecting the proportion paid by the employer
- ❖ However, tribunal limited the deduction to 1% given that W was his victim and any significant deduction to the pension would give rise to further detriment to her



- ❖ Agreed H's pension would be shared after lump sum draw down
- ❖ W sought a 72.4% of H' pension (lump sum and pension) on needs basis
- ❖ The Judge assessed W's income needs at £20kpa – the PSO sought would give her £23kpa
- ❖ W received a 66% share of H's pension, providing her with a total income of £20.7kpa



Conclusions?



- ❖ Not much case law on approach to pensions in short marriage cases
- ❖ However, pension is simply another asset which the Court will take into account and share if needs require it
- ❖ If it occupied a special place pre-PAG (e.g. *GS v L* [2013]) post-PAG that distinction narrowed
- ❖ Usually axiomatic that the shorter the marriage (especially one that is childless) needs will not be assessed with the same generosity as after a long marriage



- ❖ In a shorter marriage, in any event those needs less likely to be relationship-generated
- ❖ Shortness of the marriage will not affect the sharing principle with regards to marital acquest ($E \nu L$)
- ❖ More likely that, with a short marriage, the *capital* value of a pension will be shared
- ❖ Conversely, unlikely in a short, childless marriage that pension would be shared to achieve equality of income in retirement, especially if significant element of pre-marital



Questions?



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