7 Harrington St
CHAMBERS

GRANT LAZARUS

PENSIONS ON DIVORCE


UNDERSTAND
THE BENEFITS

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

Against a backdrop of recent and live cases, how are judges treating the PAG's report?

What is the position over capital versus income, the "pension gap", and pre-acquired pensions?

A Guide to the Treatment of Pensions on Divorce

The Report of the Pension Advisory Group

July 2019

https://mk0nuffieldfounpg9ee.kinstacdn.com/wp-content/uploads/2019/11/Guide_To_The_Treatment_of_Pensions_on_Divorce-Digital_2.pdf

What is the position over:

1 Capital versus Income

2 The "pension gap", and

3 Pre-acquired pensions?

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


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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 of 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.

W v H [2020] EWFC B10

https://www.bailii.org/ew/cases/EWFC/OJ/2020/B10.pdf

"57. A useful starting point here is to remind myself of the principle set out above, i.e. the proposition that fairness and equality usually ride hand in hand and that this applies to the division of pensions as much as it applies to other assets.

58. Beyond this basic principle, there seem to me to be three relevant issues arising here for consideration:-

(i) The first issue is 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.

(ii) The second issue is 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).

(iii) The third issue is the extent to which the court should disaggregate the pensions in the case and promote a discrete and equal division of the pensions as opposed to attempting to execute an offset against other assets. "

W v H [2020] EWFC B10

Para 60

"(i) 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. For example, where the CEs are relatively small in themselves or as a portion of the assets overall. For example, 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. For example, 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. For example, where the sole pension involved is a non-uniformed public sector defined benefit scheme offering internal transfers only."

W v H [2020] EWFC B10

“(ii) There are, however, scenarios where a simple division of CEs may well not represent a fair solution. For example, where the pensions are medium or large, both in themselves and as a portion of the assets overall, but needs issues still arise. This is particularly the case 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). This is particularly the case where the parties are no longer young and retirement issues are on the horizon. “


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The “Pension Gap”

Period of deferral that results from ability of pension holder to take early ‘retirement”, (and begin to enjoy pension benefits, whilst actually still working in replacement employment) whilst pension creditor has to wait until age 60-65/67.

Most obvious examples:
Police
Armed Services
Fire Service

Can be compounded by age difference , eg where H is already truly and fully retired, and entirely dependent upon pension income that will be lost as soon as PSO is made, even though W cannot access pension credit for many years.

Issues are identified at PAG section 10 page 50.

Available mechanisms to remedy:

1. Spousal Maintenance (not for need, but for fairness)
2. PAO as well as PSO (if fund rules permit)
3. Increased percentage PSO, such that when W pension income eventually begins, it is higher than H's to compensate for having had to wait for 'equality' to begin
4. Extra capital, being a form of offsetting calculation.
   What capital figure is required today to compensate W for not sharing equally in H's residual pension income during the 'pension gap' or 'deferral gap'?

No definite solution that suits all situations.
No reported cases, but a very very real risk of extreme unfairness.

Pre Acquired Pensions

Back to W v H [2020] EWFC B10 and HHJ Hess, paras 61 (i) – (iv), and (vii)

"*61. In dealing with the question: i**s 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."

W v H [2020] EWFC B10

"(ii) In considering the merits of this approach it is worth noting that the inspiration for this approach is sometimes said to be the judgment of Thorpe J (as he then was) in H v H [1993] 2 FLR 335, notwithstanding that a close analysis of what Thorpe J said in that case does not in fact provide clear support for this approach……"

(NB H v H pre-pension sharing and Thorpe J actually speaking about excluding ***future*** contributions when addressing 'offsetting')

W v H [2020] EWFC B10

"(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."

W v H [2020] EWFC B10

"(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"

W v H [2020] EWFC B10

"(vii) Further, in many cases, and the present case is a good example, the straight-line methodology of calculation, though simpler and easier to apply in practice, conceals an unfairness in that the value of a defined benefit pension scheme based on final salary does not accrue on a straight line basis, especially if the member spouse concerned starts work as a lowly paid junior employee and rises to a highly paid director level many years later. The pension will accrue much more value in its later years when the member spouse has reached the high salary level and this is likely to be, as it is in the present case, firmly during the marriage. Thus, where an apportionment is to be made, the straight line methodology of apportionment may well not be fair and some caution needs to be exercised before using it if other fairer methodologies are available. Other methodologies include inviting the PODE to make a notional calculation of the current CE on the basis that the member spouse's earnings rose only with inflation in the post-marriage period."

Not ‘one size fits all’

Some cases, particularly short marriages after many years of pre-cohabitation accrual, will still justify apportionment

Some cases (however rare) will have facts such that W does not ‘need’ equality of pension income, as her income needs in retirement will already be met. (Low needs; other resources such as inheritance)

Eg. RH v SV [2020] EWFC B23

HHJ Robinson in the Family Court at Medway, gave permission to appeal DJ decision which had ‘ring-fenced’ the pre-cohabitation years of accrual, without properly addressing the question of whether the apportioned PSO would meet W’s income needs in retirement.
BUT
HHJ Robinson went on to dismiss the appeal, as he concluded that the DJ was entitled to have reached the conclusion that he did.

AND……..

What about post separation accrual?

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"*

2 cases:
KM v CV [2020] B22 *HHJ Robinson Family Court at Medway 25 February 2020*

Finch v Baker [2021] EWCA Civ 72 *Court of Appeal 21 January 2021*

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, to the extent of saying 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."

Finch v Baker [2021] EWCA Civ 72

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****."*


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