PUMP COURT

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PRE-ACQUIRED PENSIONS
LESLIE SAMUELS QC

THE QUESTION

Drawing on live cases, what counts and what will sway a court when splitting a pre-acquired pension: e.g. (1) length of relationship, (2) needs, (3) conduct, etc?

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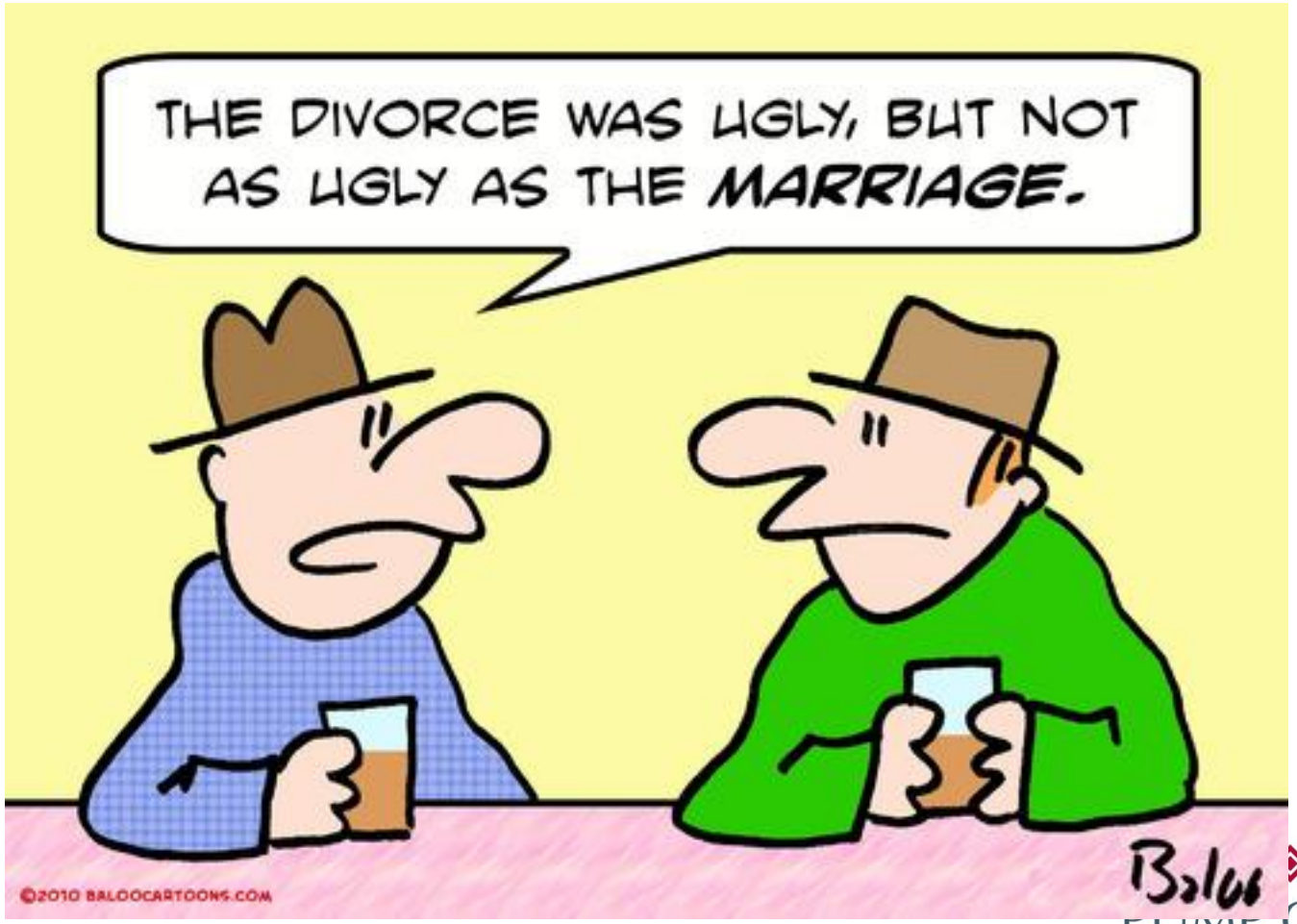

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"Here's our new retirement plan —
At age 65, we'll get divorced then marry
other people who planned better."

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PRE-ACQUIRED PENSIONS – CASE STUDY

John and Jane both 44, 12 year marriage.

Billy 7, Milly 5.

No capital accumulated during the marriage – both John and Jane spent prolifically both during the marriage and in post-marriage litigation.

H working in UAE, earning £150,000 net pa.

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PRE-ACQUIRED PENSIONS – CASE STUDY

Position at trial:

- The parties owed £250,000 in total;
- There was a net equity in John's flat of £750,000 (all pre-marriage accrual);
- The Husband's pension was worth £1m (again, all pre-marriage accrual);
- The Husband's income was £150,000 net pa
- The Wife's income was £0

Milly has mild global developmental delay.

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PRE-ACQUIRED PENSIONS – AUTHORITIES

Surprisingly little authority on division of pensions accrued pre-marriage.

Authority most often cited is ***H v H (Financial Provision: Capital Allowance)*** **[1993] 2 FLR 335**.

In making capital division DJ reduced H's share of assets to 39% taking into account, inter alia, H's NHS pension rights.

H had an entitlement to a pension of £3,200 pa, together with a lump sum allowance of £9,600 built up through 13 years of service, only 7 of which were years of cohabitation.

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PRE-ACQUIRED PENSIONS – AUTHORITIES

H v H (Financial Provision: Capital Allowance) [1993] 2 FLR 335.

W had adduced evidence of his anticipated pension benefits assuming H continued on career trajectory including attaining consultancy status.

Per Thorpe J:

"That projection, of course, throws up big figures. That is hardly surprising since the husband will not attain the age of 65 for 26 years, during which inflation will inevitably have continued to reduce the real spending value of money"

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PRE-ACQUIRED PENSIONS – AUTHORITIES

H v H (Financial Provision: Capital Allowance) [1993] 2 FLR 335.

Thorpe J continued: *"I think that in deciding what weight to attach to pension rights it is more important in this case to look to 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 the 25 or 30 years between separation and retirement age… I do not think that this disparity in their ability to accumulate pension rights over decades post-separation should be given undue weight in the performance of the balancing exercise."*

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PRE-ACQUIRED PENSIONS – AUTHORITIES

Harris v Harris **[2001] 1 FCR 68**

W had sought a lump sum to capitalise her periodical payments under s.31(7A) MCA. At trial the judge had capitalised in the sum of £120,000.

Both W and H appealed. H argued that quantification of W's claim should be cross checked against the proportion of H's earned pension that was attributable to the years of the marriage.

In the appeals Thorpe LJ said: *"I do not myself find the argument on proportionality to the pension earned during the marriage to be an attractive one. It seems to me that that is an ingenious submission but one that, if followed with any sort of confidence, might well lead to unrealistic results."*

OTHER PRE-ACQUIRED ASSETS

Thin pickings perhaps to found an argument as to how the court should deal with pre-marriage pension accrual.

Is there any help from authorities on division of non-matrimonial assets more generally?

What is matrimonial property?

Charman v Charman (No.4) **[2007] 1 FLR 1246**:

"the property of the parties generated during the marriage otherwise than by external donation…"

On this definition, a pension pre-acquired by one of the parties before the marriage is clearly non-matrimonial.

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OTHER PRE-ACQUIRED ASSETS

Jones v Jones [2011] EWCA Civ 41, [2011] 3 WLR 582, [2011] 1 FLR 1723

10 year marriage. Judge at first instance (Charles J) calculated the joint net assets to be £25m. Both parties sought a clean break.

Charles J in 494 paragraph judgment found that a departure from equality was justified because H had brought oil company into marriage.
He determined the pre-marital value of the company to be £15m or 60% of the net assets. He divided the remaining £10m equally leaving W with £5m.

W appealed seeking £10m.

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OTHER PRE-ACQUIRED ASSETS

On appeal Wilson LJ found the approach at first instance had been flawed.

He determined that the value of H's company at the start of the marriage was £2m. This figure had to be moderated to take into account the concept of latent potential and to allow for passive economic growth. Applying both to the £2m figure resulted in a non-marital valuation for the company of £9m.

When £9m was deducted from the total net assets this left £16m which, when divided equally, provided an award to W of £8m.

This method of providing a mathematical calculation became known as the "formulaic approach". It was supported by Mostyn J in *FZ v SZ (Ancillary Relief: Conduct: Valuations)* [2010] EWHC 1630 who expressed the firm view that the non-matrimonial property needed to be identified and quantified in order *"to inform the percentage share"*. Any other approach ran the risk of *"palm -tree justice being applied".*

OTHER PRE-ACQUIRED ASSETS

N v F (Financial Orders: Pre-Acquired Wealth) **[2011] EWHC 586**

Mostyn J suggested a two-stage approach, namely to *"identify the scale of the non-matrimonial property to be excluded, leaving the matrimonial property alone to be divided in accordance with the equal sharing principle".*

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OTHER PRE-ACQUIRED ASSETS

JL V SL (No 2) (Appeal: Non-Matrimonial Property) **[2015] EWHC 36 (Fam), [2015] 2 FLR 1202** per Mosytn J:

In cases involving non-matrimonial property, the proper approach was (i) to identify whether the existence of non-matrimonial property should be reflected at all depending on questions of duration and mingling; (ii) if that reflection was fair and just, the court should then decide how much of the non-matrimonial property should be excluded. Only very exceptionally would sharing non-matrimonial property be fair.

OTHER PRE-ACQUIRED ASSETS

These developments represented, potentially at least, a step beyond Jones where Wilson LJ had said that the court should test the result suggested by the arithmetical calculation against a broader approach which involved identifying *"such lesser percentage than 50% of the total assets as seems to make fair overall allowance for the husband's introduction of his company into the marriage".*

Wall P said *"My own admittedly crude analysis results… in an old-fashioned third".*

Wilson LJ had accepted that *"Criticism can easily be levelled at both approaches. In different ways they are both highly arbitrary".*

HART V HART [2017] EWCA Civ 1306, [2018] 1 FLR 1283

Moylan LJ giving the judgment of the Court of Appeal identified two separate but inter-related issues:

"(a) an evidential issue, namely a factual determination which has been described in terms of identifying whether property is matrimonial or is non-matrimonial but which, in my view, is often more nuanced than this because property can be a combination of the two; and

(b) an evaluative or discretionary issue, namely the manner in which the factual determination is weighed when the court is undertaking the section 25 exercise and deciding what award to make."

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HART V HART

In *Miller* Lord Nicholls had addressed the approach which the court should take under the heading 'flexibility':

"[27] Accordingly, where it becomes necessary to distinguish matrimonial property from non-matrimonial property the court may do so with the degree of particularity or generality appropriate in the case. The judge will then give to the contribution made by one party's non-matrimonial property the weight he considers just. He will do so with such generality or particularly as he considers appropriate in the circumstances of the case."

Moylan LJ held that the court is *"not required to adopt a formulaic approach either when determining whether the parties' wealth comprises both matrimonial and non-matrimonial property or when the court is deciding what award to make".*

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HART V HART

If the court has not been able to make a specific factual demarcation but has come to the conclusion that the parties' wealth includes an element of non-matrimonial property, the court will also have to fit this determination into the section 25 discretionary exercise…. The court has a discretion as to how to arrive at a fair division and can simply apply a broad assessment of the division which would affect 'overall fairness'…"

"Finally, I would repeat that fairness has a broad horizon. I recognise, of course, the need for clear guidance and principles… However, this should not lead to the imposition of constraints which are not needed to achieve, and which deprive the court of the flexibility required to achieve, a fair outcome."

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HART V HART

The approach in *Hart* has been followed in a number of more recent cases e.g:

- *XW v XH (Financial Remedies)* [2019] 1 FLR 481 per Baker J

- *AB v AC* [2018] EWHC 1319 per Nicholas Cusworth QC

- *Versteegh v Versteegh* [2018] 2 FLR 1417 CA – King LJ agreed with Moylan LJ's approach in *Hart*

- *Martin v Martin* [2018] EWCA Civ 2866

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THE LENGTH OF THE RELATIONSHIP

What about the relevance of the length of the parties' relationship in considering the approach to be taken to pre-acquired assets?

In ***Miller & McFarlane*** (at [148]) Baroness Hale said:

"In White, it was also recognised that the importance of the source of the assets will diminish over time (see 611B and 995 respectively). As the family's personal and financial inter-dependence grows, it becomes harder and harder to disentangle what came from where."

However, in ***K v L (Non-Matrimonial Property: Special Contribution)*** **[2011] 2 FLR 980**
"will" was reinterpreted by Wilson LJ to mean "may"

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THE LENGTH OF THE RELATIONSHIP

K v L (Non-Matrimonial Property: Special Contribution) [2011] 2 FLR 980

"… with respect to Baroness Hale of Richmond, I believe that the true proposition is that the importance of the source of the assets may diminish over time. Three situations come to mind:

(a) Over time matrimonial property of such value has been acquired as to diminish the significance of the initial contribution by one spouse of non-matrimonial property.

(b) Over time the non-matrimonial property initially contributed has been mixed with matrimonial property in circumstances in which the contributor may be said to have accepted that it should be treated as matrimonial property or in which, at any rate, the task of identifying its current value is too difficult.

(c) The contributor of non-matrimonial property has chosen to invest it in the purchase of a matrimonial home which, although vested in his or her sole name, has – as in most cases one would expect – come over time to be treated by the parties as a central item of matrimonial property."

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PRE-MARITAL ASSETS IN THE CONTEXT OF NEED

It is also important to remember that 'need' will have an important part to play in the distribution of assets, even if accrued pre-marriage.

The situation where pre-marital assets come to be considered in the context of need was put starkly by Lord Nicholls in *White:*

"Plainly, when present, this factor is one of the circumstances of the case. It represents a contribution made to the welfare of the family by one of the parties to the marriage. The judge should take it into account. He should decide how important it is in the particular case. The nature and value of the property, and the time when and circumstances in which the property was acquired, are among the relevant matters to be considered. However, in the ordinary course, this factor 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."

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PRE-MARITAL ASSETS IN THE CONTEXT OF NEED

As the CA (Sir Mark Potter P) said in ***Charman (No.4)***

When the result suggested by the needs principle was an award greater than the result suggested by the sharing principle, the former should in principle prevail; when the result suggested by the needs principle was an award of property less than the result suggested by the sharing principle, the latter should in principle prevail.

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PRE-MARITAL ASSETS IN THE CONTEXT OF NEED

As Mostyn J pointed out in *SS v NS (Spousal Maintenance)* [2014] EWHC 4183, [2015] 2 FLR 1124

"the assessment of need is elastic, fact-specific and highly discretionary"

He said that an award (of spousal maintenance) was properly made where the evidence showed that choices made during the marriage had generated hard future needs on behalf of the claimant. The duration of the marriage and the presence of children were pivotal factors.

So need is always critical, although there can be a degree of crystal ball gazing when it comes to future pension need.

IS A PENSION TO BE TREATED LIKE OTHER ASSETS?

The answer to this question is unclear on the current authorities.

The *"special characteristics"* of pension funds was recognised by the CA in *Cowan v Cowan* [2002] Fam 97.

In ***Maskell v Maskell*** **[2001] EWCA Civ 858, [2003] 1 FLR 1138** Thorpe LJ referred to *"the seemingly somewhat elementary mistake of confusing present capital with a right to financial benefits on retirement, only 25% of which maximum could be taken in capital terms. He simply failed to compare like with like".*

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IS A PENSION TO BE TREATED LIKE OTHER ASSETS?

Martin-Dye v Martin Dye **[2006] EWCA Civ 681, [2006] 2 FLR 681**

The DJ had valued the parties' assets at approximately £6.3m, which included W's pension in payment at £100,000 and H's pension in payment at £940,000. The DJ split the assets 57% to W and 43% to H.

H appealed and contended that the pensions in payment should have been apportioned by means of a pension sharing order.

H's appeal was successful.

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IS A PENSION TO BE TREATED LIKE OTHER ASSETS?

Thorpe LJ said *"Our focus is upon pensions in payment and cash equivalent benefits. They are to be characterised as 'other financial resources' within the section 25(2)(a) classification. For they do not sit comfortably in the category of 'property', since they are unrealisable and non-transferable. Nor do they sit comfortably in the category of 'income' because, although purely an income stream, the income does not derive from future endeavour but from past employment or contribution…"*

"The quality of pensions in payment differs so significantly from that of the other property, that a result which left the husband with the vast majority of the former, as a major part of his share of the property, was not fair. A pension sharing approach should have been adopted."

IS A PENSION TO BE TREATED LIKE OTHER ASSETS?

Dyson LJ said *"In my view, it may be appropriate in some circumstances to aggregate the value of pensions in payment with all the other assets of the parties and make a distribution of the resultant value that is fair in all the circumstances. There is no rule of law that prohibits such an approach."*

However, on the facts of this case he said *"it seems to me that a failure to treat the pensions as different in kind from the other assets, without at any rate making a significant adjustment to reflect the difference, was bound to lead to unfairness."*

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IS A PENSION TO BE TREATED LIKE OTHER ASSETS?

***SJ v RA* [2014] EWHC 4054** per Nicholas Francis QC

This was a case with about £29m of assets. The value of the pensions was about £2.6m. W had argued that the pensions should be divided by reference to equality of income. Given she was younger and female this would lead to W receiving a greater share of the fund values.

In rejecting that approach the judge said *"I would regard such an approach as unfair and anachronistic in a case where assets exceed the parties' needs. The well publicised changes to pension regulations will mean that pension investments are virtually to be treated as bank accounts to people over 55, as these parties are. Why should someone receive more just on the basis of gender?"*

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WHAT IS A PENSION?

… And does it matter?

Is it is pension in payment as per *Martin-Dye?*

A money purchase scheme as per *SJ v RA?*

A final salary scheme?
A defined benefits scheme?
A scheme with a guaranteed annuity?

Is it a SIPP? What is invested within the SIPP? The FMH?

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(MY) CONCLUSIONS

(1) Pensions remain sui generis as a class of asset.

(2) Be clear as to the type of pension involved – one pension is not the same as another.

(3) Whether pensions fall under the definition of 'property' or 'other financial resources' is a largely academic argument. However, in the majority of cases (not big money and / or where retirement is not imminent) it would be wrong to treat them as just bank accounts.

(4) Where a pension has been wholly acquired pre-marriage, then it is unlikely to be shared, save in relation to need. But there is no authority which supports excluding pre-acquired pensions as a matter of law from the overall sharing exercise.

(MY) CONCLUSIONS

(5) Where the pension is accrued in part pre-marriage and in part post-marriage, the approach to be taken may depend on the other factors in the case such as the proportion of assets represented by the pension accrual, the length of the parties' marriage and the view the court takes about each party's future earning capacity.

(6) As there is no support now for a purely 'arithmetical' approach with regard to other assets, it is difficult to see now why such an approach is relevant for pensions. The more flexible approach following *Hart* is to be preferred.

(7) The length of the marriage remains an important factor, even where there is no 'mingling'. The longer the marriage and, in particular, the more the parties relied upon the pension for their retirement planning, the less chance of the court excluding the pension from consideration.

(MY) CONCLUSIONS

(8) Establishing ‘need’ in the context of pensions will require a degree of judicial ‘crystal ball gazing’. However, as with periodical payments the length of the marriage and the presence of children are likely to prove important. Where need can be established then the fact that a pension has been largely or wholly built up pre-marriage should be expected to carry little weight.

(MY) CONCLUSIONS

Returning to Jane and John:

(a) However the capital assets of £0.5m are divided, they are unlikely to provide Jane with a firm financial base for the future.

(b) Jane has a limited earning capacity. Although she is only 44, her child caring responsibilities are likely to take her to her mid to late 50s. It may not in those circumstances be difficult for her to establish a relationship-generated need for pension provision.

(c) The fact that the pension was wholly acquired pre-marriage is not irrelevant. It will also be relevant for the court to take into account the length of the marriage and the distribution of other funds e.g. is W's housing need to be met also from pre-marriage assets? What is the income order? Is there to be a clean break?

(MY) CONCLUSIONS

Returning to Jane and John:

(d) It is likely in my view that Jane will achieve a pension share, say 20-40%

(e) But ultimately, it is all a question of achieving a fair balance.

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"I'm leaving you, Gilbert. You can keep the bowl, but I'm taking the water and all the colored stones!"

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"Rough divorce, huh?"

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"It's finally over -- Frank's lawyer got the apartment and my lawyer got the two cars and the beach house"

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