

# 1GC | Family Law

## Pensions Landscape post-W v H (Divorce Financial Remedies)

Simon Sugar

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# **W v H (divorce financial remedies)**

## **[2020] EWFC B10 HHJ Hess**

- W 50
- H 48
- Cohab. 1999
- Married 2005
- Separation 2016
- Long marriage
- Three children of the marriage 18,16,10

## Liquid Capital Assets

Joint (FMH equity)	£240,000
H net assets	(£53,000)
W net assets	(£64,000)
<b>Total net assets</b>	<b>£123,000</b>

## Income

- W earning capacity £14,200 pag rising to £18,000 pag
- H £144,000 pag basic plus quarterly bonus that averaged c. £37,000

## Pensions

### W

DB CE £139,000 and DC CE £14,000

**Sub-total      £153,000**

### H

DB CE £2,155,000 and DC CE £59,000

**Sub-total      £2,214,000**

**TOTAL              £2,367,000**

## Main Issues

- Target capital or income when dividing pensions equally?
- Appropriate to exclude a portion of member spouse's pension if earned prior to marriage or seamless cohabitation?
- To what extent should court aim to treat pensions discretely c.f. attempting offset

## Excluding pre-marital pension?

- H sought to exclude 58.3% of his pension rights on basis non-matrimonial
- Outcome = PSO over all pension rights
- Why was H's argument rejected?

## PODE CALCULATIONS

- Agreed W take 25% tax free lump sum at 55
- All pension rights £331,000 and £27,000 pag
- Excluding non-matrimonial £200,000 and £16,500 pag



## Rationale

- W's needs would not be met if PSO applied only to matrimonial pension rights
- Doubted whether W's needs met even with PSO applied to all pension rights
- Conventional needs argument to invade non-matrimonial pensions

## Straight-line discounts

- *'undoubtedly been established practice in some courts...**regardless of needs**'*
- make a straight line deduction from CE by reference to fraction

length of marriage

years pension generated

# Straight-line Discounts

16.5 years of marriage

28.4 years service

58.3% H's pensions to be taken into  
account

## Straight-line Discounts

- In modern parlance no more than identification of non-matrimonial property
- Pension accrued prior to marriage = non-matrimonial
- Apportionment logical extension esp. since pension funds rarely intermingled

## Straight-line Discount

- Difficult to see exclusion of any portion justified if needs required to be met
- *‘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’* **White**

# PENSIONS ADVISORY GROUP

PAG report 'A Guide to the Treatment of Pensions on Divorce' should be treated as p.f. persuasive in areas it has analysed

## LITERATURE

‘Pension sharing in a needs case – W v H (divorce financial remedies)’ [2020] Fam Law 918 Sarah Higgins

‘Probably the most important pension case of 2020?’ [2020] Fam Law 1352 Simon Sugar

## Post-W v H

- More references being made to PAG report in correspondence, skeleton arguments, judgments
- Recommend a re-read - some gems including draft letter of instruction



## Post-W v H

- PAG also published 'A Survival Guide to Pensions on divorce' Jan 2021
- Target market couples divorcing not necessarily lawyers
- Easy to read / jargon free
- Free download
- Recommend to your clients?

## Post-W v H

- Straight-line discounting argument used less or deployed with a degree of trepidation
- More considered approach to decision whether to equalise pensions by CEV or income on retirement

## KM v CV (Pension Apportionment: Needs) [2020] EWFC B22

- 25 February 2020 - HH J Robinson
- Long period cohabitation/marriage
- Needs case
- W 49 H 59
- W a serving police officer
- H didn't work, living on benefits and problems with mental health

## KM v CV (Pension Apportionment: Needs) [2020] EWFC B22

- Separation 2011 CEV £43,000
- Final hearing 2017 CEV £131,000
- Modest capital
- W argued against a PSO on basis that exclude post-separation accrual and offset argument in respect of the 2011 CEV
- No PSO made

## KM v CV (Pension Apportionment: Needs) [2020] EWFC B22

Appeal allowed

- Wrong to ring fence post-separation accrual
- Too much weight on contributions c.f. needs
- Correct approach should have been to conduct a comparative analysis of income and needs on retirement and s.25 factors before deciding on apportionment

## KM v CV (Pension Apportionment: Needs) [2020] EWFC B22

- 'There is a danger that too much concentration on principles derived from big money sharing cases can confuse the fair results in smaller needs cases' [20]
- Lack of PODE report didn't make judge's task any easier and noted that PAG report recommends obtaining a PODE report for public sector pensions in excess of £100,000

## KM v CV (Pension Apportionment: Needs) [2020] EWFC B22

30. There is also the difficulty of estimating future needs when the Husband is and will be in receipt of State benefits needs. At Part 11.19, dealing with the interplay with state pensions and needs, the report advises:

*“Lawyers who are advising in lower income cases need to be aware of the potential interaction any pension sharing order or pension offsetting with eligibility for means testing both before and after state pension age in case this is material to the case, and **to take specialist advice** if this is likely to be an issue for one or both parties”.*

## KM v CV (Pension Apportionment: Needs) [2020] EWFC B22

Apportionment on basis of needs in retirement complex

- Income projections inc. state pension
- Evaluating future needs complex and inevitably best guess scenario
- Overlap tax/benefits
- Should there be additional section of FE income needs in retirement?



## RH v SV (Pension Apportionment: Reasons) [2020] EWFC B23

- 9 March another appeal HHJ Robinson
- H 58 and W 53
- W given 60% of non-pension assets mainly represented by house with equity of £410,000
- W 25.8% pension share over H's £1.4m pension equalising CEV during period that parties lived together
- PSO = £13,780-£14,730 pag

## RH v SV (Pension Apportionment: Reasons) [2020] EWFC B23

- Whilst it was possible to question the needs analysis that was conducted the judge did consider the balance giving W more of non-pension capital and H more of pensions
- Appeal dismissed

## RH v SV (Pension Apportionment: Reasons) [2020] EWFC B23

'I do not think that there is anything inherently wrong with aggregating the value of the capital and pension assets for the purpose of comparison, provided that it is recognised that this is not a comparison of equal values. Provided that it is recognised that the orchard provides different types of fruit it is not wrong to look at the division of the total crop. **The continuing income position must also be considered in assessing fairness.**'

## RH v SV (Pension Apportionment: Reasons) [2020] EWFC B23

- Broad assessments of needs difficult to overturn on appeal
- Concentrate on income and income needs analysis on retirement at final hearing to reduce prospect of judge making broad assessments of needs

## CA v DR (Schedule 1 Children Act 1989: Pension Claim) [2021] EWFC 21

- 18 March 2021 Roberts J
- Big money case with F running millionaires defence re disclosure
- M sought provision for her pension in retirement within her periodical payments claim

## CA v DR (Schedule 1 Children Act 1989: Pension Claim) [2021] EWFC 21

- M's claim rejected
- Bound by **Re P (a child) [2003] EWCA Civ 837** 'there can be no slack to enable recipient to fund a pension..'
- Extension required further decision of appellate court

## Lord Chancellor & Others v McCloud and others [2018] EWCA Civ 2844

- 70 pages and 234 paragraphs
- 2018 case but February 2021  
Government published its response to consultation following the outcome in the case
- *Potential* consequences for public sector pensions on divorce coming to light

## McCloud

- New public sector schemes commenced 1 April 2015
- Existing benefits retained in old schemes
- Transitional arrangements to new scheme for those aged between 46.5 and 50+ at 1 April 2015 = tapered transfer between 2015 and February 2022
- Transitional provisions = unlawful age discrimination



# McCloud

- Members given option whether they want to take benefits under old scheme or 2015 scheme
- 2015-2022 treated as being in the new scheme
- CEVs re-valued by 2023 at earliest once choice made

## McCloud

- Public sector scheme CEVs could potentially be lower than their real worth but no-one knows by how much!
- Those affected = joined before April 2012 and still in service after April 2015
- Some PODEs will not provide calculations for possible McCloud implications
- Need to confirm with PODE re pitfalls and whether re-valuation might be material
- Need to draw problem to client's attention

# Questions?

sugar@1gc.com