



# PAG 2 AT A GLANCE

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# INTRODUCTION

- The 2019 report has become a comprehensive guide in how to deal with pensions within ancillary relief proceedings pulling together all of the different strands.
- This has now been updated with the new guidance in 2024
- The main differences are in sections 4, 6 and 7
- This lecture is designed to provide a brief overview of the guidance and where to find it within the report

# THE DANGERS OF OFFSETTING

- After the first PAG report there had been consultation exercise and it transpired there had been a large number of negligence claims.
- These centred around offsetting to meet immediate need and were mostly brought by wives.
- Do you require expert advice even if the parties seem to agree?
- Do you have a good note of your client's understanding of what the consequences of any compromise agreement means in the long term

# EXECUTIVE SUMMARY AND PART 1

- These are helpful overviews
- Largely provide a number of pitfalls to avoid
- Signposting to other areas of the report

## PART 2 ESSENTIAL ACTION POINTS

- At the outset information gathering is key – this applies to both sides
- All the relevant evidence early on may save the expense of a PODE
- Consider whether financial advice is also required – PAG 2 suggests this will be prudent in most cases, but proportionality will need to be considered
- Resist the urge to give financial advice

# IMPLEMENTING

- What are the charges for the provision being proposed and who is to pay them?
- When theres a pension sharing order where is it being paid into?
- Getting the pension provider to agree the wording of the order and the annex – best practice on a pension sharing order also a requirement for pension attachment orders
- D81 with pre and post implementation positions
- Prompt implementation – pensions can go up or down – further contributions will be made

# THE CHECKLIST FOR EVIDENCE GATHERING

- Paragraph 2.5 provides a comprehensive list of all of the different issues to be identified for each pension to be considered
- Your client has dutifully given you all of this information, have the other side? Does this need to be raised in the questionnaire or correspondence?
- Form A to be served on pension trustees when proceedings ongoing
- Para 2.8 suggests shadow experts may be appropriate – unlikely to be in the majority of cases – appendix E has a specimen letter of instruction with explanatory notes
- Are there complicating features – do you need an expert to report on these?

# PENSIONS ON DIVORCE EXPERTS

- Appendix C deals with who can be a PODE – anyone with confidence?
- No specific qualifications required
- C.8 sets out the self certification which is suggested and also Appendix D – even if you have a preferred or known expert.
- Xxii in appendix D is additional to the same self certification set out in the 2019 report – a little reminder to all involved who is in the firing line if things go badly



# ADVISING THE CLIENT

- Basic issues to consider
- Type of pension
- Benefits and risk
- Retirement age
- benefits lost on sharing
- Charges
- Time when implementation will occur and the consequences of this
- Keep within your expertise

# CONSENT ORDERS

- Attention to detail
- PSO by percentage only – this will change over time and therefore knowing the timescales for implementation are necessary
- If offsetting pensions explain it – given the concerns raised about negligence claims assume your judge is alive to potential disadvantage
- Pension sharing best practice to get approval from provider – not a requirement
- Pension attachment – need to get approval

# TIMING AND IMPLEMENTATION

- If obtaining a pension share – best practice to ensure this is done before a final order to protect against the unexpected death of a spouse
- Do you want to further serve the pension provider – or can the court be trusted?
- Ensure charges have been paid – consider indemnity for any losses arising
- Consider the pitfalls in 2.24 (the how to guide for sneaky litigants) – what needs to be included in any orders

# COMPUTATION AND DIVISION

- You have CE values – are they reliable and a fair representation
- Defined contribution schemes more reliable – defined benefit likely need a PODE
- Para 3.11 gives a clear example of how this works in practice
- Most likely looking at a pension share or an offset and PAG 2 deals mostly with these
- Para 3.15 – it is clear the parties cannot agree to just ignore pensions for the purposes of settlement
- Disclosure may become easier once the pension dashboard comes online but this is not due till October 2026

# NEEDS AND SHARING

- In a needs case it is rarely appropriate to apportion the pension on the basis of the length of the marriage and the court will likely look to the whole value.
- When looking at apportionment the date of cohabitation is the date to be considered not marriage para 4.6. The new guidance sets this out whereas the old guidance didn't. Asking for both dates to be considered is an unnecessary expense to the parties.
- In a needs case be alive to arguments about the length of the marriage. PAG 2 adds an entire new section on short marriages here.

# DEFERRED INCOME OR CAPITAL

- What is deferred income and what is capital?
- Its is a question of fact and specific to each case
- 5.3 gives 3 examples
- Likely to draw a lump sum –treat it as capital (how likely is likely)
- What will be used as income is deferred income
- Pension in payment a current income stream

## PART 6 – DEALING WITH PENSIONS FAIRLY ON DIVORCE

- The guidance suggests that it may be helpful to get early advice from a financial advisor on whether a PODE should be instructed.
- Defined benefit pensions are unlikely to have an accurate CE valuation attached
- Be alive to the possibility that withdrawing from a pension may affect entitlement later on disproportionately
- Can these questions be answered without a financial advisor or expert?

# WHEN A PODE MAY NOT BE REQUIRED

- Para 6.10 sets out a list for consideration supplemented by 6.11
- All defined contribution pensions and parties of similar age (no benefits attached and no draw downs taken) – but not if income will be insufficient to make later provision
- Parties under 40
- Sharing cases where pensions modest and there are significant other assets (High Court big money cases are unlikely to be of much assistance in a standard case) – but be alive to cases where tax implications will require advice.
- Pension CE combined are below £100,000 – unless there are guaranteed benefits or there is significant disparity in state pension entitlement
- Public sector pensions only – not if on a defined benefits scheme



# WHERE A PODE MAY BE REQUIRED

- Be alive to the fact that this guidance will be persuasive in any action where there is a suggestion advice had been insufficient
- Defined pension benefit cases (a number of examples are given) – guidance says CE exceeding £100,000 but be alive to fact that if below £100,000 PODE may still be necessary.
- Significant difference in ages
- Different benefits attach to transfers
- Uniformed service pensions
- Serious medical conditions which may affect entitlement
- Older pensions with greater draw down provisions
- Pensions are a large part of the available assets in a case

# DIVIDING ON THE BASIS OF INCOME OR CAPITAL VALUE

- Income on retirement is an easy equality argument to make and also one whereby it is easy to make arguments as to what needs are and how they are to be met.
- Income on retirement will generally require a PODE, unlikely it can be dealt with without

# DIVISION ON THE BASIS OF CAPITAL ON RETIREMENT

- The analysis here has been expanded upon significantly since the first report
- It is subjective and differing experts can come to differing conclusions and there is no unanimity between PAG contributors (income seemingly being a preferred calculation)
- *CMX v EJX* - sharing cases – equality of income not appropriate, inequality arises as the younger you are the greater your reward
- This remains a matter which will be case specific and may well need to be argued on the principles at play

# UNEQUAL DIVISION CASES

- Short marriages with no children, both worked throughout
- Provision for primary care of children trumps equality
- Unequal abilities to further contribute to pension pots in future (age being a relevant factor)

# THE RELEVANT APPENDICES FOR THE INSTRUCTION OF A PODE

- Appendix L sets out a list of information the PODE should have
- Appendix M sets out the format and contents which may be incorporated into any letter of instruction
- Appendix M sets out information to be provided within the report
- Appendix O sets out the need for consistency in valuation and of assumptions
- Appendix P sets out methods for calculating equality of income

# PART 7 OFFSETTING

- If there is a defined benefit attached to a pension consider the need for a PODE to provide a more accurate valuation
- Offsetting is not a simple arithmetic calculation
- Consider the actual benefit of valued assets – what are the assets being valued
- What is the utility in the money being realisable now
- What are the tax implications
- What are the benefits realisable on a pension in payment not seen on the CE
- Bear in mind this is an area of increased anxiety raised in PAG 2 following a number of professional negligence claims

# KEY FACTORS

- Understand how the entitlement works in practice on retirement and how this asset is to be valued (and if valued fairly)
- Understand what the potential tax implications are
- Understand how offsetting may affect benefit entitlement
- When lodging consent orders provide the reasoning behind offsetting – the D81 form has been changed following the consultation after the first PAG report for this reason and due to the number of negligence claims

# VALUATION FOR OFFSETTING

- The value to the person receiving the pension must be considered but also if there is a disproportionate loss to the pension holder – an example is given on page 46
- The valuation methodology has been updated since the first PAG report to include reference to the Galbraith tables.
- This is not the preferred method of valuation and these are set out at the beginning of para 7.25
- The Galbraith tables are there as a fudge when a PODE is not instructed – be aware of the risks and the guidance being this is just a starting point
- The report cautions that to do so a practitioner would need an understanding of the complexities of defined benefit pensions
- PAG 2 provides a list of when this is inappropriate, but nowhere when it is appropriate



# ADJUSTMENTS FOR TAX AND UTILITY

- The family justice council suggest a discount of 20% to 40% for tax (dependant on case circumstances).
- PAG2 suggests 15%-30% to take account of the 25 percent tax free component of pensions
- Adjusting for utility is fact specific, but points to bear in mind are the ability now to liquidise pensions and whether this offsetting is needs based
- On non-needs cases an adjustment for utility to more defensible

## PART 8 PENSION FREEDOMS

- When looking at the availability of taking funds from pension assets to meet needs or raise lump sums the tax implications of these need to be fully understood.
- Even though income drawdown is an option, the only reliable comparison between a defined contribution and defined benefit scheme is on the basis an annuity will be purchased.
- If using a pension share to allow an older party to withdraw using their tax free allowance then tax advice should be sought as there is a consequential detriment to the rights of the withdrawing party.

# PART 9 TAXATION OF PENSION BENEFITS

- This sets out the current applicable tax rules
- In essence be alive to and cross check any tax implications of settlement offers

# PART 10 AGE DIFFERENTIAL AND INCOME GAP SYNDROME

- Age differentials need to be considered in every case as do sources of potential income.
- Be alive to how pension shares would materially affect both parties.
- Judicial separation may be an attractive alternative to allow for retainment of benefits under a pension.
- This chapter provides a number of creative solutions to problems each of which will be case specific and there are 4 new solutions added since PAG 1

# PART 11 STATE PENSIONS ON DIVORCE

- These need to be considered in every case
- Consider whether qualifying state pension years should be acquired and whether claiming another partners working tax credit pension credits is an option.
- National insurance contributions should be submitted to the PODE if instructed.