

## PENSIONS AND WHAT JUDGES MAKE OF THEM

### A INTRODUCTION

A.1 In financial relief cases the pension is often a very valuable asset, second only to the value of the former matrimonial home (and sometimes surpassing it).

A.2 For many years pensions were ignored by the courts and practitioners alike. More recently, however, and with legislative changes pensions have a much higher profile in the context of divorce proceedings.

A.3 There are, however, very few reported cases and those that are reported have not really given clear guidance about how the court should deal with pensions.

A.4 What follows is a review of some (in fact most) of the reported cases. Included in the review are some of the older cases as they may still have some bearing on the way the court deals with pensions today.

A.5 Here is a list of the cases that are considered :-

<b>H v H (Financial Provision: Capital Allowance)</b>	<b>[1993] 2 FLR 335</b>
<b>Griffiths V Dawson &amp; Co</b>	<b>[1993] 2 FLR 315</b>
<b>Brooks V Brooks</b>	<b>[1996] AC 375</b>
<b>W v W (Periodical Payments: Pensions)</b>	<b>[1996] 2 FLR 480</b>
<b>T v T (Financial Relief: Pensions)</b>	<b>[1998] 1 FLR 1072</b>
<b>Burrow v Burrow</b>	<b>[1999] 1 FLR 508</b>
<b>White v White</b>	<b>[2000] 2 FLR 981 HL</b>
<b>Cowan v Cowan</b>	<b>[2001] 2 FLR 192</b>
<b>S v S (Financial Provision: Departure from Equality)</b>	<b>[2001] 2 FLR 246</b>
<b>Maskell v Maskell</b>	<b>[2001] 3 FCR296</b>
<b>S v S (Rescission of Decree Nisi: Pension Sharing)</b>	<b>[2002] 1 FLR 457</b>
<b>S v S unreported other than in September</b>	<b>[2001] Fam Law 691</b>

## B THE CASES

### B.1 **H v H (Financial Provision : Capital Allowance) [1993] 2 FLR 335**

Facts : W 42 H 39.

Married 12 years.

3 children under 10 years.

H was a Doctor with 13 years of contributions to NHS pension, only 7 of those 13 years had coincided with the marriage.

The value of the pension benefits as at the date of hearing was LS , 9,600 and annuity of , 3,200.

W=s solicitor obtained an accountant=s report as to projected future benefits on the basis that H remained a doctor and became a consultant in 4 years as a result some Abig figures@ were thrown up.

Decision : At p.344 B A..in deciding what weight to attach to pension rights it is more important to look to the value of what has been earned during cohabitation than to look at to the prospective value of what may be earned over the course of the 25 or 30 years between separation and retirement age.@

Comment : This case was decided before Aearmarking@ was introduced. Thorpe J (as he then was) hinted at a compensatory approach to pensions.

### B.2 **Griffiths v Dawson & Co [1993] 2 FLR 315**

Facts : W 63 H 67.

Married 30 years.

H=s petition on 5 years separation.

H offered to nominate W for part of spouses benefit and maintenance.

H applied for DA, W=s solicitors did not oppose and following DA, H withdrew offer of nomination and reduced maintenance.

Final order in ancillary relief, nominal order for maintenance and

nothing offered on pension

W sued solicitors for breach of duty and negligence.

Decision : MCA 1973 s 10 offered some safeguard and first step of competent solicitor was to file such an application.

By holding up decree absolute W would not lose her rights to widow's pension and she would have had more leverage in the negotiations.

If s10 application had been made it was likely in this case that the court would have extracted an undertaking from the H that he would have paid a lump sum from the pension fund on receipt.

### B.3 **Brooks v Brooks [1996] AC 375**

Facts : W 54 H 63.

Married 18 years.

H made pension provision through his building company.

Pension funds total value , 440,000 although because of the rules of the scheme a sum of , 166,000 (included in , 440,000) could be returned to H without affecting benefits of LS , 40,000 and annuity of , 19,396

Decision : Pension fund in this case was deemed to be a post-nuptial settlement which could be varied by the court.

The variation would provide her with annuity of , 2,618 and a deferred pension of , 4,600 payable on H's death. The amount required to provide this was , 76,000.

Comment : A ABrooks@ type order can no longer be made in any proceedings commenced on or after 1.12.00 MCA s.24 (1) as amended by WRPA 1999 Sch 3 para3.

### B.4 **W v W (Periodical Payments : Pensions) [1996] 2FLR 480**

Facts : W 54 H 62

Married 20 years cohabitation 25 years

H=s pension fund worth about , 570,000  
W no independent income  
Decision: Secured periodical payments by way of attachment of earnings order  
, 18,000 out of pension income of , 27,000

**B.5 T v T (Financial Relief : Pensions) [1998] 1 FLR 1072**

Facts : W 46 H 47  
Married 14 years  
no children  
realisable assets , 276,500  
income clean break inappropriate  
pension Wife none  
pension Husband occupational scheme  
Decision : W to have , 193,000 of realisable assets and pp of , 22,000 pa reducing  
to , 17,000  
Only earmarking order made was in respect of death in service benefits.  
Comment : This was the first reported case after the introduction of earmarking on  
1.7.96  
S.25 MCA does not require spouse to be compensated for actual or  
potential loss of pension benefits.  
Complicated calculations to determine loss are unhelpful particularly  
where the H had no means to pay such sum.  
W not given any LS for widows pension but it was suggested that she  
should claim against his estate.

**B.6 Burrow v Burrow [1999] 1 FLR 508**

Facts : W 50 H 48  
Married 16 years  
2 children 8 and 13  
fmh , 400,00, company valued at , 275,000, H=s pension fund , 265,000

Decision : DJ had ordered earmarking of H-s pension lump sum and annuity on an equal basis.

The earmarking of the annuity was overturned it was held to be inappropriate where the order was being made years in advance of the payments being due.

Comment : Again it was emphasised that the pension legislation had not altered s 25 MCA it was still a discretionary exercise and not a mathematical or arithmetic calculation.

W did get 50% of the pension LS (total figure was , 67,500), however, the H indicated that he was going to stop contributing to this fund and start another, the court observed that the current fund reflected their time together.

## C REFLECTION

C.1 So we reach the end of 1999 and really the end of earmarking orders. The way the court dealt with pensions continued to be a bit Ahit or miss@. Generally earmarking orders were little used except where the parties were nearing retirement or retired.

C.2 Pension sharing became an option for the courts in all cases where the petition was issued after 1st December 2000.

C.3 At about the same time the case of **White v White [2000] 2 FLR 981** was decided and although not a pension case as such the concept of equality and the reasons for departing for equality may be adapted for use in the pensions field.

C.4 *White* of course was fairly quickly followed by **Cowan v Cowan [2001] 2 FLR 192** again not a case directly relating to pension sharing but a case which emphasises that the rule in financial cases is not that of equality but fairness and that equality is just a cross check. What you really need to do is look at all the s.25 factors. Thorpe LJ also said at para 69

A..the special characteristics of the pension funds held by the husband and the wife respectively require recognition. The husband=s fund is all vested and is no more and no less than a whole life fixed rate income stream. The fact that it would costs , 1.19m to purchase an identical income stream allows capitalisation for comparative purposes. But it is not truly comparable with a cash fund of , 1.19m for the obvious reason that the latter is replete with options as to deployment, investment, and spending as well as having the capacity to survive intact the owner=s demise.@

C.5 What about the cases post 1st December 2000.

## D POST DECEMBER 2000 CASES

### D.1 **S v S (Financial Provision: Departing from Equality) [2001] 2 FLR 246**

Facts : W 58 H 60

Married 30 years

2 children

H=s assets were over , 2m of which , 689,000 was in a pension fund

W=s assets were just over , 629,000

Decision : W received a LS which gave her 46% of the total assets

Comment : This case was decided before pension sharing came into force.

The interesting point, however, is that the court did not distinguish between realisable and non realisable assets. The effect of the order was to give the W just over , 1.2m in realisable assets and the H just over , 760,600 and a pension fund of , 689,000

Although the division was on the basis of an income clean break the W put her case on the basis that she needed a Duxbury fund of , 650,000.

### D.2 **Maskell v Maskell [2001] 3 FCR 296**

Facts :           W    H 41  
 Married (no date given but it was described as a long marriage)  
 3 children under 14 (there was a shared care arrangement between the H  
 and W alternating weeks with each parent)  
 Pension CETV , 32,000  
 Net equity in fmh , 26,000  
 2 policies total value , 10,000

Decision :       At first instance and on appeal to CJ decided that W should have the fmh  
 and a policy worth , 6,000 and the H should have his pension and the  
 other policy worth , 4,000  
 On appeal Thorpe LJ said that the A.. judge is making the seemingly  
 somewhat elementary mistake of confusing present capital with a right  
 to financial benefits on retirement..... He simply failed to compare like  
 with like. @  
 Appeal allowed and order of lower court set aside Thorpe LJ made no  
 other order other than to invite the parties to go to mediation

Comment :       From a costs point of view this case must be a nightmare and in the end  
 the H and W are still left with no solution other than a suggestion that  
 they go to mediation.  
 This is case is useful if you act for the H who wants to keep the pension  
 fund off the asset sheet.

**D.3   S v S (Rescission of Decree Nisi: Pension Sharing) [2002] 1 FLR 457**

Facts :           P issued 12/98 and DN pronounced 4/99  
                       W applied to rescind DN with support of H

Decision :       DN could be set aside in these circumstances where both parties agree  
 this is the way forward.

Comment :       Singer J said A.. Not a devious attempt to outwit Parliament's  
 determination to restrict pension sharing to divorce petitions issued after  
 1 December 2000, but a practical attempt to arrange family affairs to

best advantage.@

**D.4 S v S September [2001] Fam Law 691**

Facts : P issued by H on 14.11.00

P issued by W after 1.12.00

DJ stayed W's P as an abuse of process

W appealed to CJ

Decision : It was conceded by the W that the P was issued solely so that she could make an application for pension sharing, the parties were nearing retirement age and the H had a very substantial pension.

The W needed leave to issue the P

CJ held that the P was an abuse of process.

Comment : The rationale for the CJ's decision seems to be that where the main motive for the P was to make a pension sharing claim then that was an abuse.

The W was given leave to appeal but she did not.

**E CLOSING REMARKS**

E.1 We await reported cases on how pension shares should be dealt with in practice.

E.2 We await a case on how the court will apply the CETV.

E.3 Can it be said that pension sharing is now more to do with entitlement than needs?

E.4 Can the pension now be dealt with as a discrete issue.

E.5 A recent study carried out for the Oxford Centre for Family Law and Policy (see February 2002 Fam Law 108) found that there was concern among practitioners as to the

relationship between *White* and pension sharing orders. APractitioners were uncertain whether White should be taken as implying an equal sharing of the pension, and if it should, whether this sharing was of the pension CETV, the capital value, or of the income from the pension fund.®

CHRISTINA MORRIS

CORAM CHAMBERS

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