Pensions in ancillary relief

A view from the coalface

O

ur senior Judges rarely come across the sort of cases which occupy most Ancillary Relief practitioners for most of the time. As a result, there is both a lack of reality and a lack of assistance about most of the reported cases concerning pensions. What follows is a personal view of some of the issues, which I encounter, day in and day out in my own practice up and down the country.

Basic pension sharing
In many cases the need for a Pension Sharing Order and its form are not controversial. Where there is a long marriage; where the husband has built up a large occupational pension and where the wife has stayed at home and looked after the children. She is now in her 50s and has a part-time job and no pension provision. There is insufficient capital to offset the PSO.

If the pension is an unfunded scheme the Wife will have to stay within it, becoming a shadow member (the internal option). Otherwise she may be able (if she wants to) to transfer to another provider (the external option).

Both sides will probably agree to instruct an expert to advise as to what percentage share the wife needs in order to achieve equality of pension income in retirement. Typically, where the parties are of similar ages, the wife will need slightly more than 50% in order to buy an annuity now – some parties really want capital now and are prepared to sacrifice even a large PSO for a small amount of capital; others are less attracted and will want more capital to trade for the PSO.

Ultimately the party who most wants to offset, whether they want the capital or the pension, will pay for it, for a court should not impose offsetting (see Martin-Dye v Martin-Dye [2006] EWCA Civ 681).

Too often, it seems, parties and the court become sidetracked by percentages. 50/50 has become the starting-point when dividing the current assets, but one must not forget the future. If the husband’s job is secure and he will continue to accrue pension, when the Wife will not, she may need more than an equal split of the pension if splitting it equally will not enable her to meet her needs. As Lord Nicholls recognised in Miller v Miller [2006] UKHL 24 fairness usually ends with the meeting of needs.

In some cases the parties may agree to offsetting but also agree a joint lives periodical payments order. In these circumstances a husband may find that whereas he thought he had secured his pension, in fact when he retires he will have to apply for the periodical payments to cease or else continue to pay them out of his pension, possibly by way of capitalisation out of his pension lump sum. In this way the Wife may do well both in terms of capital, income and pension.

Marital acquest
Courts should avoid an over-formulaic approach in dividing assets between those which are marital and those which are non-marital – see H v H [2008] EWHC 935 (Fam) – following Miller. In H v H Moylan J refused to give the husband extra credit for bringing into a long marriage (33 years) a restaurant, which prospered during the marriage.

Likewise a pension which one party started before a long marriage is likely to be regarded as amenable to a 50/50 division. H v H [1993] 2 FLR 335, the case often cited as authority for the proposition that there should be a division only of the pension accrued during co-habitation, is in reality no such thing: Thorpe J (as he then was) was contrasting pension accrued during co-habitation with that accrued post-separation; it is pre-White; it is first instance and the same Judge decreed such an approach in Harris v Harris [2001] 1 FCR 68.

Similarly, a pension which has accrued further value since separation is, in my experience, likely to be treated in its entirety as a matrimonial asset. After all, all assets will be valued as at the date of the hearing (see Cowan v Cowan [2001] EWCA Civ 679). Apart from a particularly long period between separation and hearing, or some dramatic change in circumstances, after a long marriage, the parties can expect equality of outcome.

The need for an expert report
Reports from the best-known pensions experts tend to cost about £750 (£375 for each party). This is usually money well spent, not least because no matter how much lawyers think they know, we are not qualified (or insured) to give advice on pensions. The pension provider may permit deferment of some or all of the fee.
How long the report will take depends in large part upon how much information the expert has to obtain for himself – if there is a recent CETV or Form P that will speed the process, as will confirmation of state pension, including Additional State Pension. Starting from scratch a report usually takes 4-6 weeks to prepare, but updates or questions can be responded to often within days, or (as I have often done) over the telephone at court.

When parties are still relatively young (say in their 30s) a report is of dubious value, given the level of uncertainty surrounding actuarial predictions over such a long period until retirement. In those circumstances it may be better to save the cost of the report and simply split the CETVs. Bear in mind, however, that a party who has to take an external transfer may well incur significant setting-up costs in doing so, and therefore receive proportionately less for their money.

The instruction
Asking the right questions is of course crucial. If it is a joint report there will need to be a joint letter of instruction. Typically one party will be seeking to exclude pre- or post-accrued pension. There may be a variety of anticipated retirement dates. Ultimately, however, the important questions are - How much will each party get? When? Which funds should be split to provide the fairest and most economical split? What percentage split is needed to achieve equality of pension income?

Different considerations arise in the case of SiPPs. Some or all of the assets of the SiPP may be in the form of property, in which case they will have to be valued just as any property would. A pension expert and/or an accountant may be needed to advise as to liquidity, namely how much money the SiPP can raise in order to satisfy any PSO.

Actuary v IFA
It is easy to forget that some pension experts (such as David Lockett) are actuaries, some (such as George Mathieson) are IFAs. Both of course are highly respected experts. There is, however, a significant difference between an actuary and an IFA. In many cases either will do. If, however, each side has an expert it makes sense for them to come from the same background so as to provide equality of arms and to facilitate discussions.

RPI v Fixed Rate Annuity
When the RPI dropped sharply towards the end of 2008 (it was 216 in November but 212.9 in December) some pensions experts started to question whether it was appropriate for the beneficiary of a pension credit to invest it in an annuity linked to the RPI rather than an annuity which would rise by a fixed amount (typically 3% per annum). As the latter would be cheaper the Pension Sharing Order required would be a lower percentage.

Although dressed-up as mutually beneficial (the Wife would get more for her money and the Husband could keep more of the pension), this argument was always advanced by the transferor and was self-serving. It also struck me as being a matter for a party (typically a Wife) to take advice about, preferably from an Independent Financial Advisor. After all, if the transferor’s pension is linked to the RPI he is protected from inflation, which tends to go up not down. The transferee should have the same protection. Only if the Wife received advice, which was unequivocally in favour of a fixed-rate annuity, and she refused to take that advice did it seem to me that a court was likely to impose such an outcome on her.

All this may seem obvious, but during the Summer I spent two days resisting exactly this argument.

Asset schedules
Although capital assets and pension assets are different in nature, it is regarded as helpful for the court to be provided with a single table totalling both (see Vaughan v Vaughan [2007] EWCA Civ 1085). In this way the court’s attention can be focussed on the totality of the parties’ assets.

Recent legislation
The Occupational Pension Schemes (Transfer Values) Amendment Regulations 2008 amended the method used to calculate CETVs for public sector schemes from 1 October 2008. Any CETV pre-dating this change is now unreliable.

The Occupational, Personal and Stakeholder Pensions (Miscellaneous Amendments) Regulations 2009 have addressed the inequity which enabled members of certain pension schemes (such as the Armed Forces) to take their pensions much earlier than their former spouses could if they received a pension credit from the same scheme.

Bear in mind the recently announced changes to state retirement ages and the risk that they will go higher still (mine is currently 66 and 10 months but if and when I get there it will probably be 85) and pension tax relief (relevant for those earning over £180,000).

Conclusion
Whilst it is undoubtedly true that pensions are complex, the legal profession is fortunate in having access to experts to guide us through that complexity. Only in the simplest of cases should we eschew that help. If we select our experts wisely, instruct them properly and ensure we understand their advice, the rest is (relatively) straightforward.

Nicholas Sproull

B and L versus the United Kingdom

The right to marry in-laws

I recently came across this little gem relating to the right to marry in-laws. If such a client with this enquiry were to walk into your offices, you can proclaim with confidence that there is now no restriction on marrying your son-/daughter-/father/mother-in-law. Sections 1(5)(a) to (d) of the Marriage Act 1949 recognised a limited right to marry in-laws if both parties are over the age of twenty one ‘and the marriage was solemnized after both former partners were deceased’. Prior to this there had been a complete prohibition on marriages between in-laws. However, the Civil Partnerships Act 2004 Act (a section entitled ‘Minor and Consequential Amendments: General) extended and replaced section 1(5) of the Marriages Act 1949 to include a prohibition on marriage between a person and the parent of a former civil partner of that person save in very limited circumstances, so it seems that Parliament was not any more open minded in 2004 than it had been in 1986, at least as far as recognising a right to marry in-laws.

However, the legitimacy of these rather limited circumstances when such a marriage / civil partnership would be permitted was called into serious question by the decision of the European Court of Human Rights in B and L v The United Kingdom. The prospect of being able to marry the dreaded mother-in-law evidently caught the Media’s attention, as the case was given widespread coverage prompting the revival of many mother-in-law jokes. I thought I had to include at least one, ‘A woman woke her husband in the middle of the night and told him “there is a burglar downstairs in the kitchen and he is eating the cake that my mother made for us.” The husband said, “who shall I call, the police or an ambulance?”.’

However, the case of B and L v the United Kingdom did not actually concern mother-in-laws; the application was from L who wanted to marry B, her father-in-law. There was a complicating factor in that L...
and her ex-husband had a child together, W. Consequently, B was the grandfather of and her ex-husband had a child together, W. But would become the child's step-father if and when he married L. Furthermore, W's biological father would then become his step-brother and so it would go on as each member of the family adopted a legal and biological dual role. In this case it was acknowledged that W now called B “Dad” even though W continued to have contact with his biological father, albeit on a sporadic basis.

The Applicants argued that the prohibition on their marriage only prevented the recognition of the de facto reality. They sought legal recognition of their new relationship through the label of marriage with the intention of overriding their previous legal ties, created by L's original marriage to B's son. Of course, biologically, B and L were never related and so between themselves it was simply a matter of re-branding their relationship. However, the question is whether W's permanent and unchangeable biological relationship with B and with L makes this scenario unique. The Respondent sought to make the obvious point that the consequences of a successful application could be 'deeply confusing and disturbing for a child'. One of the arguments in favour of the statutory restriction was the role of this legislation in defining and reinforcing family relationships once and for all, or at least until the other party had deceased. That is an argument that the ECHR evidently did not accept.

The ECHR seem to have glossed over the issue of W's welfare and took a very firm stance by unanimously concluding that B and L should not have been denied the right to marry. The ECHR found the decision of the Superintendent Registrar at Warrington Register Office (that they could not marry until their respective ex-partners die) to be a breach of Article 12 “men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.”

This case directly leads to the creation of The Marriage Act 1949 (Remedial) Order 2007 and is a good example of the impact of ECHR decisions on our jurisprudence. The Order came into force on 1 March 2007 (the judgment had been given on 13 September 2005) but it was not retrospective in its application. Section 2 repeals the relevant parts of the Marriage Act 1949 and Section 3 (Consequential Provisions) repeals the relevant parts of the Marriage (Prohibited Degrees of Relationship) Act 1986 and the Civil Partnership Act 2004.

These restrictions having been removed I am reminded of the following quotation ‘Liberty is the right to choose. Freedom is the result of the right choice’.

Benjamin Jenkins

Isn’t it called something like A and A?

In this edition, a real treat for Ancillary Relief nerds everywhere. Below is the first instalment of a list of what I consider to be the most important case for each letter of the alphabet where the case is reported only as that letter on both sides. A bottle of (very cheap) champagne will be awarded to the practitioner advancing the most well-argued reasons for the inclusion of an alternative case for any letter or the first to get themselves reported as U v U (or even Y v Y or O v O), “whichever shall be the sooner”. Results, and P-Z posers, will feature in the next edition.

<table>
<thead>
<tr>
<th>A v A</th>
<th>B v B</th>
<th>C v C</th>
<th>D v D</th>
<th>E v E</th>
<th>F v F</th>
<th>G v G</th>
<th>H v H</th>
<th>I v I</th>
<th>J v J</th>
</tr>
</thead>
<tbody>
<tr>
<td>Charles J - be imaginative before getting the business valued</td>
<td>Car washes and the yardstick of equality when no marital acquest</td>
<td>Term periodical payments. Onus on payer to terminate as the one with the greater resources</td>
<td>The only case on adjourned lump sums post White</td>
<td>Variation of a discretionary trust under MCA 1973 s24(1)c</td>
<td>Divorce and insolvency: annulment of bankruptcy orders</td>
<td>Coleridge J on quasi-partnerships and “copper-bottomed” assets</td>
<td>Pension accrual outside cohabitation. Is it good law?</td>
<td>Charles J on supervening events and the credit crunch</td>
<td>(With C intervening) - Trusts and “property which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire”</td>
</tr>
<tr>
<td>B v B</td>
<td>C v C</td>
<td>D v D</td>
<td>E v E</td>
<td>F v F</td>
<td>G v G</td>
<td>H v H</td>
<td>I v I</td>
<td>J v J</td>
<td></td>
</tr>
<tr>
<td>Ending maintenance due to cohabitation</td>
<td>Electronic Hildebrand</td>
<td>Pre-nuptial agreements. A marriage based almost exclusively on a “strong physical attraction”</td>
<td>Pension accrual outside cohabitation. Is it good law?</td>
<td>Charles J on supervening events and the credit crunch</td>
<td>(With C intervening) - Trusts and “property which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire”</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>K v K</td>
<td>L v L</td>
<td>M v M</td>
<td>N v N</td>
<td>O v O</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

1 Or maybe A v A [2001] 1 WLR 605 on MPS for legal fees or does that rather stand in the shadow of Currey now? Or A v A [2007] EWHC 1810 (Fam) on costs?

2 Or should it be B v B (Mesher order) [2002] EWHC 3106 (Fam)? Or even B v B (financial provision: welfare of child and conduct) [2002] 1 FLR 555.

3 Or we might choose C v C (financial relief: short marriage) [1997] 2 FLR 26, CA – short marriage in middle age – if it is still good law post-Miller.

4 Or D v D (financial provision: periodical payments) [2004] EWHC 445 (Fam) or D v D [1995] 2 FLR 497 a very important case on production appointments.


6 Although we shouldn’t forget the leading case on interest on lump sums - L v L [1998] 1 FCR 60.

7 Or M v M [1994] 1 FLR 399 on financial provision after foreign divorces? And we should all be aware of last year’s case M v M [2009] 1 FLR 790 on enforcing MPS on dismissal of the suit.

Daniel Leafe
The court of protection comes to Bristol

“This is human stuff.” That was the call to arms of District Judge Adam at the recent seminar he gave with Claire Wills-Goldingham at Burges Salmon Solicitors on the regional Court of Protection in Bristol. Prior to the implementation of the Mental Health Act in October 2005, the Court of Protection was largely an administrative body. From 1 October 2005 however the Court was given the same powers as the High Court with formal applications and hearings governed by the Court of Protection Rules 2007 and it is now similar to the Family Division in the way it operates.

The Court of Protection now has power to fill the vacuum in decision-making for those who lack capacity in relation not only to matters concerning a person’s property and affairs but also to matters concerning a person’s personal welfare. The judge of the Court of Protection makes decisions, for example, for a person suffering from dementia in relation to an ancillary relief application, where that person should live, who should care for them or what medical treatment they should have.

The Court of Protection at Bristol will attract work from Wiltshire to Cornwall and it is likely that its workload will increase as life expectancy lengthens and property ownership widens. The Court’s arrival provides the potential for interesting and varied work.

Simon Emslie

Any comments made or views expressed on the law within any articles in this newsletter are the views of the writer and are not necessarily the views of any other member of chambers and should not be relied upon as legal advice.

Members of Albion Chambers may only provide advice to an individual on a specific case via a practising solicitor or a member of a recognised professional body as approved by the Bar Council.