

# The pension split

Twenty years on from the introduction of pension sharing on divorce, the issue remains a hugely complex area that can spark highly emotive battles with no guarantee of equality. Yet there are signs that practitioners and the courts are starting to change their approach to the division of pensions to ensure a fairer outcome. [Grania Langdon-Down](#) reports

Last year the Pension Advisory Group (PAG) published its seminal report: 'A Guide to the Treatment of Pensions on Divorce', amid warnings that family lawyers risked negligence claims unless they got to grips with the true values of a couple's pensions. Since then, the massive economic fall-out from the pandemic—with Brexit and its uncertainties still to come—have accentuated what a volatile area pensions on divorce can be.

A year on from the PAG report, a Brewin Dolphin/Mathieson Consulting survey of family lawyers looks at the impact its recommendations have had on the way the courts and practitioners approach the division of pensions. It also looks at whether the recommendations will be used as a benchmark in future negligence claims and the pressures practitioners come under from clients wanting financial advice.

Of the 101 lawyers who responded to the survey, half are highly experienced with 15 years-plus PQE, with 80% spending at least half—and some more than three quarters—of their time on matrimonial finance. A

third work in family teams which generate between £500,00 and more than £1m in fee income.

Over 90% said they had either read the whole report, which runs to 156 pages, or had 'dipped in and out', with just seven admitting they hadn't read it—giving their reasons as 'too long' or 'no time'.

James Copson, partner in Withers' family department, is co-author of the report and says awareness of the recommendations is growing among judges and practitioners.

'What was of particular use was the reporting of the case of *W v H* (divorce financial remedies) [2020] EWFC B10, [2020] All ER (D) 199 (Feb) this year in which HHJ Hess gave a textbook judgment on pension sharing mirroring the recommendations of the PAG,' he says, adding: 'This is no surprise as he was a leading figure in the framing of the PAG report.'

Pauline Fowler, partner at niche family law practice Hughes Fowler Carruthers, is chair of Resolution's pensions, tax and financial remedies committee. She says *W*

*v H* was a middle money case where the judge analysed all the pension issues in detail, including the division of pensions to target capital or income inequality, pension contributions made outside the marriage, the lifetime allowance and offsetting: 'It is a good read and gives you a canter through judicial thinking, while helpfully plugging the PAG report.'

Jane Craig, head of the family department in Penningtons Manches Cooper's private wealth group, says the case was a welcome sign that the PAG recommendations are starting to change the way the courts are approaching the division of pensions.

In a second 2020 case, *KM v CV* [2020] EWFC B22, [2020] All ER (D) 202 (Feb) where the wife had a police pension, Craig says the district judge at first instance had clearly not read the PAG recommendations. The judge declined to make any pension sharing order and decided the case on contributions. The husband successfully appealed on the basis that the failure to make a pension sharing order meant the husband's needs could not be properly met.

'We don't yet know what the final outcome of the case will be,' says Craig, 'because the circuit judge who heard the appeal indicated that he first had to give directions to ascertain how to obtain the necessary information to calculate how the wife's pension should be shared. There had been no pension expert's report, but the judge said one was needed.'

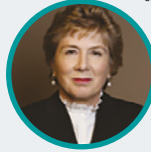
Mena Ruparel, is a solicitor, arbitrator, trainer and consultant. She says courts should take on board the PAG recommendations on when pension on divorce expert (PODE) reports are needed. The parties may be concerned about

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the cost but failing to get one can have devastating results.

'The uptake of the PAG recommendations is dependent on which judge is dealing with the case and often the geographical area,' she says. 'I am hopeful that the reported cases which mention the PAG report and endorse its recommendations will encourage other judges to read the report, understand the recommendations and apply them.'

Family barrister Grant Lazarus, of Liverpool-based 7 Harrington Street Chambers, says it was 'unsurprising' that HHJ Hess, as co-chair of the PAG and deputy lead judge of the Financial Remedies Court (FRC), used the opportunity of a financial remedy claim that included pensions to add judicial weight to the recommendations within the PAG Report.

He says the decision in *W v H* in February has now been well reported. 'It emphasises the futility of trying to "ring-fence" pre-co-habitation/marriage pension accrual in the vast majority of cases,' he says. 'If this is recognised early on, it will save a lot of angst for the parties.'

Lazarus says the PAG report does appear to be widely recognised as a useful and authoritative guide. He picks out three recommendations which he would like to see as standard—using Form P to gather information about the cash equivalent value (CEV), as well as future benefits, normal retirement date, and the availability of an internal transfer; an early decision on the advantage of having a single joint PODE; and asking the PODE focused questions in the letter of instruction.

However, his 'overwhelming impression' from speaking at two large conferences in Manchester and London pre-lockdown, is that a very large proportion of the audiences are still 'quite shocked' to

learn that their generalist understanding of pensions on divorce is not nearly sufficient to ensure their clients receive the appropriate expert advice.

Those responding to the survey put the sections of the report on the contrast in the treatment of pensions in needs based and sharing cases; essential actions; and dealing with pensions fairly on divorce at the top of their lists.

### Instruction & feedback

George Mathieson, CEO of Mathieson Consulting, is seeing the impact of the report on the way practitioners are writing their letters of instruction. 'They are much more focused and rifle-like in their approach, which shows a better understanding of pension issues,' he says. 'We see far less frequently the scatter gun approach where practitioners ask every question they can think of and hope that, in the morass of information that comes back, there will be an answer they like.'

He says it was not unusual to be asked to calculate the pension sharing order required to achieve equality of income assuming parties' retirement at 55, 60, 63, 65, 67. Now the instructions ask for calculations 'at age 60 or whatever age the expert thinks is appropriate'.

'That is refreshing,' he says. 'It makes the reports cheaper and quicker to produce and, if the parties have only two or three options to mull over, it lends itself to a quicker solution.'

However, he cannot comment on the approach by the courts because he says they only ever get feedback on how their PODE reports fed into a decision in fewer than 1% of cases, despite feedback being stipulated under the family procedure rules.

The survey found that just over half of those responding did not know they were required to provide feedback. Mathieson says: 'I would love to see more feedback as to how courts are dealing with our reports as it can only help us improve our product.'

Last year, Copson warned that the 'elephant traps' surrounding pensions on divorce could see family lawyers facing negligence claims if they failed to get to grips with pension issues (see 'The pension split: unfair shares?', 169 *NLJ* 7856, p11). He says those risks are likely to be exacerbated by the economic fall-out from the pandemic/lockdown on pension values, given the greater volatility in the values of underlying investments.

'It must be remembered that in England and Wales only a percentage of the CEV can be transferred and that can lead to significant differences between amounts anticipated to be received and amounts actually received by way of pension

credit,' he warns. 'Practitioners are always encouraged to advise clients on this so-called moving target syndrome. A failure to do so can lead to a successful negligence claim against the legal advisers.'

Craig agrees: 'In needs cases in particular, pensions can form a significant part of the asset pot and, if the nature of the pension or its inter-relationship with benefits is misunderstood, the risk of a negligence claim must inevitably be significant.'

The survey asked if the PAG recommendations could become the benchmark for measuring negligence claims, with three quarters of those responding agreeing.

### Self-certification?

When it comes to instructing PODEs, the PAG concluded that just being an actuary or financial planner wasn't necessarily enough to be competent in this field. Appendix D of the report lists suggested experience and qualifications and allows people to self-certify as PODEs. However, Mathieson says this is 'too weak and woolly' and he warns some people have spotted an opening in the market and have self-certified when they don't have the necessary competencies.

But, with only about 20 PODEs in England and Wales, he acknowledges there are too few for a recognised professional body or a central register to be financially viable. 'I would love Resolution to take this on and certify PODEs by examination,' he says. 'But I understand why they are reluctant because it would also involve sanctioning people in an area of work outside their expertise.'

He has seen 'some real horror stories', including a report which didn't understand the most basic premise of how a pension sharing order is made for a public sector scheme.

He warns practitioners to 'check and double check and check again' if they are using a new firm. 'Ask how many reports they have written and if they have the necessary professional indemnity insurance,' he says.

### Triggers for seeking independent advice

So when should practitioners call on independent advice? 'I am quite quick to take pension advice because it isn't very expensive and why not get it?' says Fowler. 'The problem is a shortage of PODEs. It can take 12 weeks from instruction to answers.'

For Copson, the triggers for seeking independent advice should be longer marriages and for those into their forties where the pension pot is valued at over £100,000 or where it is a public service scheme, such as an Army or NHS pension.

Charlotte Tattersall is a chartered

financial planner and assistant director at Brewer Dolphin. She says financial planners should be brought in as early as possible. 'They can help flag up potential areas for further exploration and analysis, as well as help the client contextualise what their future may look like following divorce,' she explains. 'This can be especially beneficial if your client has never dealt with their finances before.'

Craig stresses all pensions are complex to the layman. In substantial asset cases, pension reports will almost invariably be commissioned, particularly if there are multiple, very substantial or foreign pensions.

'However, a PODE report is just as important in a needs case where the assets are limited and the pension components of the assets may be a very significant proportion of the overall assets,' she stresses. 'The PAG recommended that where there are public sector pensions with a value of over £100,000 involved, a PODE report should be obtained. Police pensions are particularly affected as the length of service and benefits are generous and it can be complicated to establish what pensions are likely to be generated on retirement.'

Ruparel says there is a danger that, as clients spend more time and money with solicitors, the more reticent they become on spending money on other professionals. 'But it is important that clients understand solicitors can't give financial advice and that solicitors understand the limitations of their abilities regarding financial products, especially pensions.'

For Mathieson, an increased demand for reports which just cover off-setting has prompted them to launch an off-setting only report which is 'significantly less expensive' than a full blown actuarial report.

'There are a lot more grey areas and horse trading involved in off-setting compared with pension sharing,' he points out. 'But you can achieve a fair outcome providing everyone realises the starting point is not the CEV of the pension.'

'At the moment, we are producing about 1,000 standard pension sharing reports a year. We anticipate we have the capacity to meet demand for an additional 1,000 offsetting-only reports.'

With so much pressure to keep costs down, practitioners can find clients pressing them to cross a line in giving regulated financial advice. The survey found half of those responding had been asked to give advice they thought was regulated.

'Solicitors are under pressure to be all things to all people,' says Ruparel. 'Solicitors try their best to help clients and can be pushed to the boundaries of their knowledge and ability and sometimes beyond, particularly where there are low

value pensions, with no liquid assets, and the parties feel overwhelmed by their complexity.'

Copson's advice is 'always go to the PODE for advice within proceedings and an IFA for advice on what to do with a pension credit. In my experience clients are generally willing to pay for expert advice. What they tend not to like is paying for the administration costs of pension providers. Those costs can vary considerably between a few hundred pounds and figures running to £3,000 and more, depending on which provider you are dealing with.'

Tattersall says practitioners should be careful not to advise their clients on whether certain investments will be suitable for them to retain following settlement, as this is regulated financial advice.

She gives an example where both parties have various pensions with similar CEV values but the benefits offered are very different. While the client may want to keep costs down and resolve the issues quickly, she says, a PODE report is the best way of ensuring the client gets a fair outcome.

Mathieson says when he is providing a report for a litigant in person, he is often asked for advice on how to proceed with the divorce case. 'I know enough about family law to know I am totally incompetent to give advice on it and I always advise them to speak to a lawyer,' he says. 'In the same way, lawyers should know they don't know enough to give advice on pensions. A client may save a few bob not paying for a pensions expert but it will potentially cost far more in what they lose.'

### Training matters

What is clear is the importance of training, given the complexities around pension off-setting, sharing, or ring fencing pre-marital or post-separation pension contributions.

Every family lawyer should be trained on issues on pensions in divorce, says Copson. 'The PAG report is a good place to start, but there are some excellent books available on the topic. Members of Resolution will know that there is a training slot on this at every annual conference. For others there are some fantastic courses available, even in lockdown.'

'You can never have enough training,' agrees Fowler. 'Even if you think you know about an issue, you often learn new things. When I have done the pensions workshop at the Resolution conference, I feel I am saying the same stuff slightly updated but they pack in for them. People worry about it and are keen to educate themselves.'

### COVID-19 & lockdown

Lazarus argues that the economic fallout from the pandemic/lockdown has not yet

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had a particularly significant impact on pension sharing. 'There was a fall in the stock market, which led to an inevitable fall in the CEV value of defined contributions schemes,' he says. 'But that has largely been recovered. There has been no impact on public sector defined benefits schemes, nor will there be unless the Government chooses to change the rules for calculating benefits.'

There may be some funded private sector defined benefits schemes that could struggle, but he has yet to see that.

For Fowler, the pandemic should remind solicitors that 'they cannot run their practice in a vacuum and they must be aware of all the consequences and possible economic fall-out when they negotiate'.

### Pressure points

Divorce puts clients under huge financial and emotional pressures and this has only been exacerbated by the lockdown. Craig says divorce cases already under way just carried on. 'We had a very large number of new cases come in as well,' she notes. 'There were more applications in relation to issues about children and quite a high number of domestic violence cases, but plenty of new financial cases too.'

'I think once people realised that we were not going to return to pre-coronavirus normality anytime soon, they just decided to get on with their lives and if that meant divorce and financial applications, they would get on with those too.'

The lockdown caused problems in ensuring confidentiality. 'I had one call with a client who was sitting in a field to speak to me completely privately,' she recalls. 'Other clients made calls from cars.'

'However, because correspondence was by email and all the paperwork in court proceedings was prepared and filed electronically, it was easier for clients forced to continue living under the same roof to

## Pensions Information Assessment Meetings: a future diary fixture?

The concept of a Pensions Information Assessment Meeting (PIAM) is gaining support among family lawyers as a way of using financial experts early on in a divorce so the couple and their lawyers can focus on live issues around pensions rather than speculation.

Mena Ruparel, who became co-chair of the Law Society's family law committee in September, first mooted the idea in a blog in June with family solicitor Jo O'Sullivan. Ruparel suggested it should be mandatory for divorcing couples to attend a PIAM before any final decisions are made and an order is sent to the court.

'The idea then snowballed on social media,' she says. 'We now have a working party of mediators, collaborative practitioners, arbitrators, PODEs and financial experts discussing how we would introduce the PIAM or even FIAM (Financial Information and Assessment Meeting).'

The idea is for PIAMs to be run by 'financial neutrals'—regulated financial planners and IFAs who may also be PODEs—who would give both parties the same financial information and advice. 'This is so important as it eliminates any knowledge imbalance,' Ruparel stresses. 'If you don't know what is



best for you, you can't make or accept offers to settle as you always think the other person is "winning".'

PIAMs are being discussed at Resolution's online Future of Family Practice conference in October. Jane Craig, head of family team at Penningtons Manches Cooper, says PIAMs are an 'excellent' idea. 'They are not a substitute for a detailed report addressing particular difficulties or issues in a case and would not be sufficient on their own if there were multiple or hugely valuable pensions or foreign pensions,' she says. 'But attending a PIAM will at least mean that the parties have some understanding of how complex the issues are and why a detailed, written report is needed.'

The Brewin Dolphin/Mathieson Consulting survey asked responders if PIAMs should be mandatory for parties with complex pensions. Half said they would need more information about the meetings, while a third agreed. Others commented that it could become a 'tick box' exercise and add to costs.

Ruparel says: 'It is an innovation in the clients' interests which we hope will, ultimately, sit alongside MIAMs as being required in certain cases, though I suspect we are a long way off that point.'

keep correspondence with their solicitors and documents confidential.'

Lazarus says that, at the start of lockdown, the default was 'adjourn, adjourn, adjourn'. Practitioners were encouraged to use non-court dispute resolution methods, such as a private FDRs with a retired judge or senior practitioner giving 'judicial' guidance towards a settlement or arbitration.

'Both have the initial disadvantage of extra expense to the parties,' he says. 'However, both mechanisms have the huge advantage of ensuring expertise—you get to choose your judge—and speed as the hearings are not slowed down by an overloaded court timetable.'

But the courts quickly began holding telephone and video hearings. While issues relating to children were always the top priority, Lazarus says reports suggest practitioners and judges managed to avoid long delays in financial remedy work.

Michael Allum and Stuart Clark, both partners with the International Family Law Group, say lockdown was a mixed experience. There was already a move towards digital solutions with online divorce applications now the norm. From August, financial remedy consent orders

agreed outside ongoing financial remedy proceedings must be lodged online via the HMCTS portal.

But, until lockdown, remote hearings were a 'very rare exception'. But almost overnight, the courts adopted a *Smörgåsbord* approach to staging court hearings remotely so they found the 'wheels of family justice kept moving'.

**“ Courts should take on board the PAG recommendations on when pension on divorce expert (PODE) reports are needed. The parties may be concerned about the cost but failing to get one can have devastating results ”**

The pandemic has thrown up potentially complex consequences for financial remedies as the volatility of the markets has made valuing assets uncertain.

Fowler says: 'When values of pensions and other assets are uncertain, the thinking is to divide by "specie", as Mr Justice Mostyn calls it, rather than offsetting. So you divide your pension, you divide your house, you divide your shares so one person

doesn't get an unexpected advantage by having taken the property and not the shares.'

With the courts under pressure, she is concerned that financial cases have been pressed to find alternative forms of dispute resolution. 'I am worried we are ending up with a two-tier system where those that can afford it go privately and those that can't end up waiting a long time in a list for a court hearing.'

Tattersall says that, if only some of the pension arrangements are shared, market fluctuations may mean the proposed pension equality may not be achieved as intended so new valuations across all individual plans may be required.

Early on in the pandemic, Mathieson says letters of instructions mentioned COVID-19 causing fluctuations in the markets, but that has largely disappeared.

In general, he says they are only asked to review reports in a small number of cases where there has been a time lag. 'In the majority of those cases, the calculations were very robust and, even with depressed values of defined contribution funds, it didn't make that much difference for pension sharing.'

'It is worth getting it done because there will always be the odd one where the figures have changed significantly. But in so many cases the figures will be up or down 1% at most.'

Copson is concerned that it is taking longer to gather information from third parties, such as pension providers, both at the initial disclosure stage and at expert reporting stage.

'The virus has caused some horrendous problems with third party pension administrators,' Mathieson agrees. 'Some got so far behind, they just binned all the information requests to clear the decks.'

Until we chased a request, we didn't know we had to start the whole process again.'

The pandemic has also raised the question whether clients will seek to vary financial orders if their assets have been hit by the pandemic.

For Ruparel, it is too early to say whether this is happening due to listing delays. But she says: 'Historically, decided cases such as *Myerson v Myerson* [2009] EWCA Civ

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282, [2009] All ER (D) 05 (Apr) indicate that volatile markets are not a good reason for re-opening a financial order. But the lockdown is unprecedented and there may be a case where the value of a business was disrupted by the lockdown in a way that couldn't be anticipated.

'This might be a good candidate for a "Barder" style set aside which can only happen if the conditions are fulfilled and an application is made quickly. We wait to see what happens.'

Craig says there was a lot of discussion

in the family law community at the start of the lockdown about whether the pandemic might be a *Barder* event, opening the door to reopening cases. 'The general opinion seemed to be that it could be in theory, but that in reality it would be very, very difficult to establish. It seemed to me that lawyers were much more exercised about this than their clients!'

There is no sign that the pandemic will stop dominating the headlines, forcing even the continuing uncertainty over Brexit to the inside pages. But 2021 also sees the biggest shake up of divorce for over 50 years, when the no fault provisions in the Divorce, Dissolution and Separation Act 2020 come into effect.

'I think it will take much of the initial acrimony out of divorce and start off matrimonial proceedings on a much calmer footing,' says Craig. 'However, people will still be hurt or angry, bitter or anxious about the end of their marriage. I don't believe that being able to sort out the divorce itself without having to make allegations of fault will necessarily make sorting out the finances any easier.'

Ruparel also cautions that it won't be a 'cure-all', with concern that litigants in person will divorce entirely online without

necessarily realising the importance of sorting out finances, particularly pensions, before the final order is made.

However, despite the uncertainty ahead, Lazarus ends on a positive note. 'I can't stop myself from being the "grumpy old man banging on about pensions",' he says. 'But, following the creation of the FRC—and, finally, the allocation of specialist judges at the district judge level—coupled with the PAG report, I am generally more optimistic about the ability of the practitioners and judiciary to give the parties a fair outcome.'

NLJ

**Grania Langdon-Down** is a freelance legal journalist.

**Survey details:** 101 lawyers completed the 2020 Brewin Dolphin/Mathieson Consulting survey, 'Assessing the impact of the Pension Advisory Group report', which was distributed via *NLJ & Family Law* websites and e-newsletters in August and September 2020. Many thanks to all who took the time to take part, to Brewin Dolphin/Mathieson Consulting for working with us, and to Grania for researching and writing it up.



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