

Pensions on Divorce & Pension Advisory Group

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Agenda

- What is the Pension Advisory Group (“PAG”) all about?
- When can you rely on the CE?
- Is there a conventional approach to pensions?
- Offsetting
- Regulation of experts
- Letters of instruction
- State pensions
- Pension sharing process and implementation bear traps
- Handy undertakings to consider

What is PAG all about?

- What is the Pension Advisory Group and how did it come about?
 - Apples or Pears [2015] Fam Law 1485 on offsetting
 - Wordsmiths listening to beancounters?
- What are PAG's aims?
 - Good practice guide
 - Encourage more thought about how pensions approached
 - Encourage consistency
- What has PAG done?
 - 3 working groups
 - Blogs, draft reports and consultation
 - Focus groups
 - Online survey

What is the PAG all about?

- <http://www.nuffieldfoundation.org/pensions-divorce-interdisciplinary-working-group>
- Big picture
 - Uncertainty about pensions amongst litigants, lawyers and judges.
 - Experts and judges with different approaches
 - Poor quality letters of instruction
 - Spurious accuracy – pointless arguing about fractions
 - Men hold pension assets very tightly
- Last bastion of unintended discrimination against women in family law?

When can you rely on the CE?

- DC schemes with no implicit guarantees
- Young couple, say under 40 (but not if Short Service Scheme, Police, AF etc)
- Assets exceeds needs. Big money.
- DB Pensions are *de minimis* –
 - Less than £100,000 unlikely to need
 - Over £200,000 very likely to need
 - Between £100,000 and £200,000, it depends
- Sole DB public sector scheme an internal transfer only (not offsetting)

Is there a conventional approach?

- No pointer in s.25
- Pensions are not “a breed apart” and also should not be put in “too difficult” box
- s.25 is “fairness” not “equality”
 - Short marriage may not call for any order.
 - Long marriage, where W has lost earning capacity, may even call for unequal order in W favour.
- Sometimes (as previous slide) simple CE s.25 division may suffice
- If CE does not suffice then majority of cases are determined by reference to “equalisation of income in retirement”
 - What date? Suggest, to Normal Retirement Date of dominant pension & state retirement
- “True/fair/consistent capital value” used less frequently – (required if offsetting)
 - Can sometimes lead to confusion between parties: £400k CE, ‘True’ value £600k, claimant may want £300k, but if PSO annex must simply have % of CE, which remains £400k throughout.
 - Substantial age disparity or retirement on ill health

Offsetting

3 principal schools of thought:

- It's a unique and personal choice how parties strike a deal (or length of DJ's foot). Use CE as a guide.
 - Risk of unintentional discrimination against women?
 - Could it be defended in a negligence claim (G Lazarus [2019] Fam Law 373)?
- Need to properly value the net pension when CE likely to be misleading. Once you know net value, then parties/court applies s.25 to arrive at a deal. (PAG's preferred option)
- Value net pension and then have expert opine on the different ways of how offsetting may work.

Offsetting

Constituent parts:

- Alighting upon a true and consistent valuation of the pension/s
- Adjusting for tax
- Then:
 - (possibly) adjusting (discounting is unhelpful word) for utility
 - Or is that just s.25 discretion?

Regulation of experts

- Expert regulation conundrum
 - Experts drawn from many different professional backgrounds
 - Professional qualifications don't necessarily denote competence with pensions on divorce
 - “PODE” world too small for own regulator
- Problem of even knowing if you have dodgy report before you
- PAG report has range of competencies to self certify with a “Statement of Truth” (small world & lots of SJE shadowing)

Letter of instruction

- Too
 - Long
 - Many variables
 - Late
 - Many arguments about precise wording
- Consider
 - Statement of expert competency (and statement of truth)
 - Limit of expert's purview
 - Some financial input before letter goes off

State Pension – what to check for

New State Pension or Old State Pension?

- Check SPA on .Gov website - state pension calculator
- SPA before 6.4.16 - Old State Pension
- SPA on or after 6.4.16 - New State Pension
- In Old State Pension - Basic State Pension substitution and pension sharing still apply
- In New State Pension - No Basic State Pension substitution and pension sharing only in certain circumstances.....

State Pension changes on divorce

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- New State Pension replaced the Basic State Pension and Additional State Pension (Old State Pension) for those reaching SPA on or after 6.4.2016
- Sharing of Additional State Pension on divorce still available in certain circumstances
- Basic State Pension substitution still available on divorce in certain circumstances
- Bad news for woman divorced pre 6.4.16 who reach State Pension Age on or after 6.4.2016 and who were relying on Basic State Pension substitution

State Pension changes on divorce

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	Old State Pension	New State Pension
Basic State Pension substitution	Yes	No
Additional State Pension sharing	Yes	See date of petition*
Protected Payment sharing	No	Yes (if applicable)

* If date of petition pre 6 April – Yes, otherwise No

Basic State Pension substitution

- Still available for the ex-spouse who reached SPA before 6.4.2016, where the spouse whose NI record is being substituted has a higher NI record under the Old State Pension
 - When the person whose NI record is being substituted reaches their SPA is irrelevant
 - Where the person whose NI record is being substituted is in the New State Pension, only their NI record up to 5.4.2016 can be substituted
 - Cliff-edge approach* – no transitional rules
- * See Social Security Contributions and Benefits Act 1992, s.48 (as amended by Pensions Act 2014, Sched. 12, Part 2, s.56)

Additional State Pension Sharing

- Sharing of ex-spouse's Additional State Pension remains available on divorce in certain circumstances.
- How much is shareable and how it is shareable depends on:
 - When the Transferor reaches SPA
 - When the divorce Petition was Issued

Transferor reached SPA pre 6.4.2016

- Transferor forever in Old State Pension
- Sharing of Additional State Pension remains an available remedy on divorce to ex-spouse (Transferee) irrespective of when petition is issued or when ex-spouse reaches SPA
- BR20 provides CETV based on Transferor's full ASP entitlement
- Sharing calculation (for pension credit and debit) remains on old basis
- PSO awarded to Transferee based on percentage of CETV
- Ensure '% of CETV' box is completed in annex

Transferor reached SPA on or after 6.4.2016

If 'Transitional rate' of New State Pension applies, i.e. Old State Pension history but now in the New State Pension

- Where the **petition was ISSUED on or before 5.4.2016**, all Additional State Pension can be shared
- CETV expressed in BR20 valuation on 'old' basis (DWP requests the petition Issue date)
- PSO still expressed in Annex as percentage of CETV
- Pension credit/debit still on 'old' basis as DWP is aware of petition Issue date

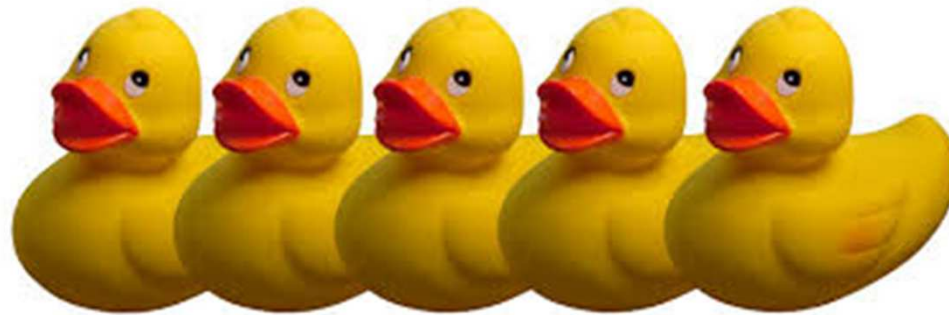
Transferor reached SPA on or after 6.4.2016

If 'Transitional rate' of New State Pension applies, i.e. Old State Pension history but now in the New State Pension

- Where the **petition was ISSUED on or after 6.4.2016**, only the Protected Payment can be shared
- The Protected Payment is the amount of ASP (if any) over and above the full New State Pension amount (currently £168.60)
- CETV values the Protected Payment only
- New PSO Annex specifies the **Percentage of the weekly amount of Protected Payment, not the CETV**
- Pension credit/debit calculation on 'new' basis

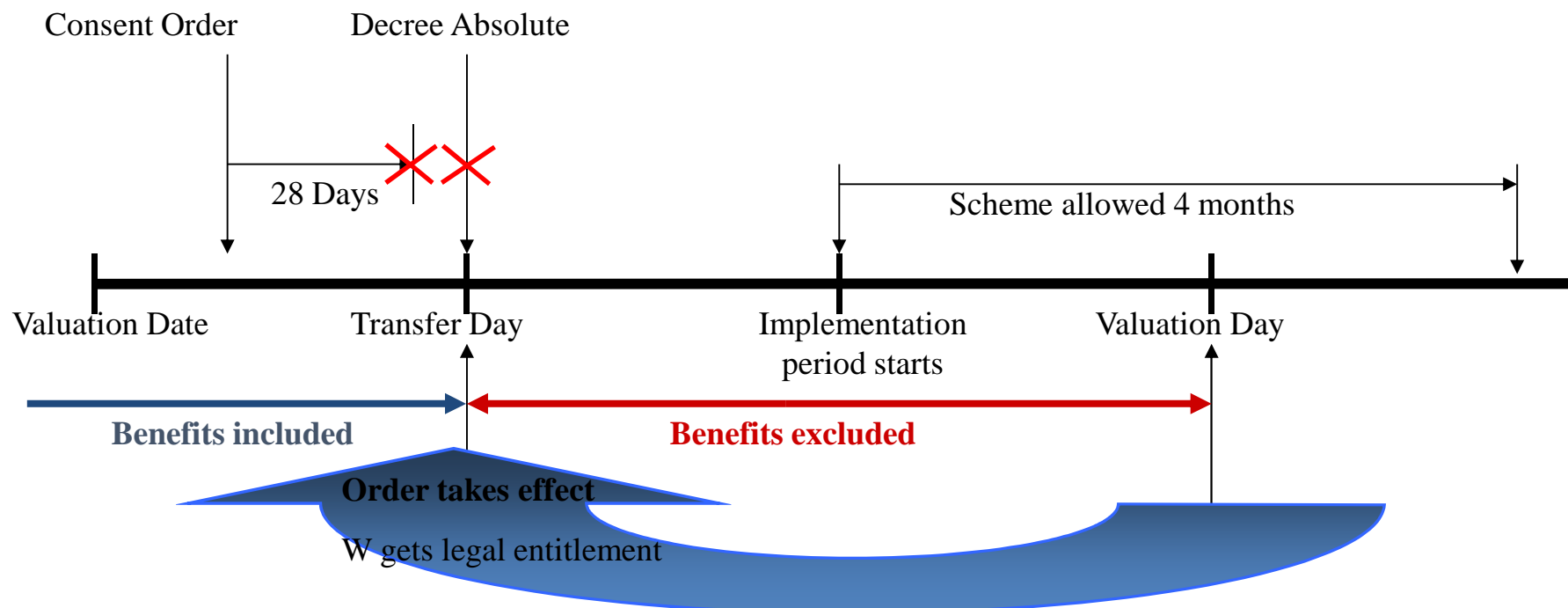
Implementation - what happens and when

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Pension Sharing Process

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The CETV is calculated based on the benefits that existed immediately prior to the Transfer Day

Pension Sharing Implementation

Common bear traps

- Significant events (retirement, early retirement, immediate pension point, promotion)
- Crystallised or Uncrystallised benefits
- Reduced transfer values due to underfunding – scheme can't insist on external transfer
- Lifetime Allowance!
- Incorrect Transfer Day or Valuation Day

Handy undertakings to consider

- Transferor undertakes not to transfer, draw benefits or otherwise deal with the benefits of the 'scheme(s)' (and has not done so to date) until PSO is implemented
- The transferor (NOT transferee) undertakes to pay their share of any implementation fees within 14 days of a request to do so by the xyz pension scheme
- Transferor undertakes not to apply for DA until at least 28 days following the Consent Order being approved by the Court
- The transferor, following the making of this order, within 30 days to complete and return any documentation and any other requirements following request to do so by the xyz pension scheme

Disclaimer and contacts

- These slides are no substitute for legal or financial advice and should not be relied upon as such. No responsibility is accepted for any actions for forbearance taken in reliance upon them.
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