



Financial Planning on Separation Conference 2024

Pensions on Divorce – What's new?



#ResFAConf

Agenda and learning outcomes

- Recent case law – to understand the significance of some recent case law and how this can be applied in day-to-day practice
- PAG2 guidance – to understand some of the key changes from the original PAG1 guidance, where you can make a difference and how this knowledge can be used to benefit client outcomes

Recent case law

- Joanne Lewis v Cunnington Solicitors [2023] EWHC 822 (KB)
- SY v Personal Representatives of the Estate of DY (Deceased) [2023] EWFC 280 (B)

Joanne Lewis v Cunnington Solicitors [2023] EWHC 822 (KB)

Key Facts

- 2014 divorce and financial order
- W (claimant) negotiated with H directly, without full disclosure – no Pension Sharing Order
- H's MOD Police Pension disclosed prior to Order finally being signed – CEV £540,712
- Claimant W later complains she was not properly advised, even though she negotiated her own settlement
- Defendant relied on signed disclaimer, due to lack of proper disclosure and W's refusal to pursue it
- Defendant claimed they "could not advise on whether the settlement was fair or reasonable" absent full financial disclosure
- HHJ Coe KC considered solicitors nonetheless had a 'duty of care' and it was obvious a PSO would have been awarded had it gone to court. The lawyers should have told their client that

Joanne Lewis v Cunnington Solicitors [2023] EWHC 822 (KB)

Found

- Claimant was an unsophisticated and vulnerable client and the Defendant knew, or ought to have known [184]
- Defendant knew that the Claimant was being bullied, intimidated or pressurised [185]
- All of which should have informed and increased the Scope of Duty to her [190]
- Clear advice should have been given on the basis of information they had, and ensure it was understood [190]
- Failings in drafting of Disclaimer – lead client to believe solicitors couldn't advise her and she couldn't seek their advice [193]

The Disclaimer: [194]

"I.. confirm that I have been advised that there should be an exchange of full and frank financial disclosure before my solicitors can give me any advice in relation to suitable financial settlement options.

I have instructed my solicitor that I do not wish for there to be an exchange of full and frank financial disclosure and I accept that I have not been given any advice in relation to possible settlement options...

I understand that I am going against my solicitor's advice and confirm that I wish to proceed in the absence of full financial disclosure."

Joanne Lewis v Cunnington Solicitors [2023] EWHC 822 (KB)

Found

- The contents of this disclaimer do not accurately reflect the position between the parties at this date [196]
- The attempt to limit the defendant's responsibilities with a "one-size fits all" disclaimer was not appropriate at this stage [196]
- Equal division of the pension fund would have probably been the finishing point had it gone to court (23 year marriage and no property ownership) [197 & 220]
- Claimant should have been advised in clearest possible terms that this was the course she could pursue [258]
- Defendant's billing suggested its retainer related to "divorce and financial matters" not just drafting of Order [199]

Joanne Lewis v Cunnington Solicitors [2023] EWHC 822 (KB)

Found

- Form P should have been served in case a PSO became relevant based on information available [220 & 248]
- Full disclosure was not required to advise client that court would likely make a 50-50 PSO as a starting point [220]
- Client autonomy does not remove the need for appropriate advice to be given [233]
- They could have advised her and they should have done [235]... a clear breach of duty [242]
- Defendants had enough information to advise in general terms as to reasonableness of settlement [242]
- Had claimant been advised that she not only could, but should apply for a PSO and that that was a likely outcome and that it would prima facie be a 50% share, she would have followed that advice [257]

Joanne Lewis v Cunnington Solicitors [2023] EWHC 822 (KB)

Found

- Telling the claimant that a PSO was “possible” was inappropriate advice [259]

Claim succeeds with judgement in the sum of £400,000 [274]

SY v Personal Reps of the Estate of DY (Deceased) [2023] EWFC 280 (B)

Key Facts

- 40.8% Pension Sharing Order in W's favour against H's 2 x NHS pensions dated 14.9.2022
- W (DY) tragically died at age 50 on 9.3.2023
- H (SY) appealed out of time against the PSO, not Set Aside per FPR 9.9A, although that was also an option
- Permission to appeal not disputed
- Set aside of PSOs not disputed, subject to condition being met
- Respondent required a further lump sum payment from SY to estate of £51,480.51 i.e. the loss to the estate from the benefits awarded to DY under the PSOs
- H would benefit from pension increase of £18k p.a. + lump sum of £36k if PSOs set aside

SY v Personal Reps of the Estate of DY (Deceased) [2023] EWFC 280 (B)

Judgement

- PSOs to be set aside on Barder basis and that NHS pension scheme had not acted to its detriment (MCA 1973 s.40A(2))
- Even though original PSOs were to provide for income in retirement, it would not be fair to set aside and leave estate with nothing
- Lump Sum Order to estate for £51,480.51
- Lump Sum Order to be secured on sale of fmh by way of 'Mesher type' security, or if new property not purchased within 6 months of sale of fmh, to be paid by conveyancing solicitors to the estate

Note

Permission was sought to appeal out of time rather than to set aside, to secure a stay of the implementation of the PSOs. There has yet to be an addition to "The Pension Sharing (Implementation and Discharge of Liability) Regulations, regs 4(1)(a) and (b)", to acknowledge set aside, which has been the standard route of challenge since 3 October 2016

PAG 2

- PAG2 Guide 2nd edition launched in January 2024
- Available on Nuffield website plus summary list of main changes
- Survival Guide (Law for Life) 2nd edition due for launch in May 2024

PAG2 – Needs v Sharing

- When and when not to apportion? [Part 4]
- “Whilst there can be no ‘one size fits all’ approach to the interplay between ‘needs’ and ‘sharing’, it would be wrong to apportion pensions so as to exclude the ‘non-cohabitation/marriage element without first considering the relevant s.25 factors which in most cases will include the income of the parties in retirement” [4.4]
 - If apportionment is justified, “then the date for commencement of apportionment will almost without exception be the date of commencement of seamless cohabitation, and not the date of marriage” [4.6]
 - Post separation accrual – there remains room for debate whilst there are competing cases [4.7]
 - Section added on short marriages [4.8 to 4.11]

PAG2 – PODE report or not

- 'Big cases' in High Court where pensions are relatively modest compared to capital, exemplified by SJ v RA [2014] EWHC 4054 (Fam) and CMX v EJX (French Marriage Contract) [2022] EWFC 136 – rely on CE? [6.10 – Case 3]
- Cases in the Family Court where the value of pension assets may materially affect the balance of fairness, exemplified by HHJ Hess in W v H (divorce financial remedies) [2020] EWHC B10 which allows for expert instruction where necessary, remains influential [6.11 – Case 12]
- Greatly expanded commentary ref equality of income v equality of capital [6.15 to 6.29]
- Percentage PSO must apply to each pension component equally, including crystallised and uncrystallised rights, although some schemes may show flexibility [6.4]

PAG 2 – Offsetting and Taxation

- Inclusion and commentary on Galbraith Tables as an offsetting valuation methodology [7.24 and Appendix U]
- Expansion of guidance for adjusting offset figure for tax [7.31]
- Commentary on changes to the minimum pension age [8.21]
- Abolition of the Lifetime Allowance [9.6] and new allowances post April 2024 [9.7]
- Funding changes for those with Fixed Protections [9.8]

PAG 2 – Age differential ‘income gap’

- Possible mitigation of “age differential and income gap syndrome” with 4 further options added [10.8]
 - Judicial Separation
 - Spousal Maintenance
 - Increased percentage in PSO
 - Consecutive Orders (Pension Attachment Order to Pension Sharing Order)

PAG 2 – State Pensions

- New commentary on reclaiming State Pension credits from 'ex-spouses' – relating to Child Benefit claims [11.3]
- New guidance if considering apportioning State Pension [11.20]

PAG 2 – Applications to Vary

- Significant expansion of Part 13, including new section and commentary on:
 - Applications to Vary [13.10 to 13.17]
 - Applications to Set Aside [13.18 to 13.25]
 - Relevant case law since 2019

PAG 2 – Misc

- Clarification of where the parties' health should be reflected in calculations [12.5]
- Who can be instructed as a PODE – suggest checking PODE is UK resident and expects to remain so [C.8]
- Redrafted Letter of Instruction [App. E]
- McCloud – significant new commentary [I.6 and I.41 to I.54]
- New commentary on apportionment of final salary rights [App. S]
- Addition to expert's self certification of expertise – ref appropriate arrangements in place to cover professional shortcomings

Questions?