

# Pension Advisory Group Update

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A large orange circle containing the text "What is the report about".

What is the  
report about

*"For too long the division of pension assets, which may often be of significant value, has been confused by jargon, complicated structure and changing provisions; for too long, also, tales of divergent approaches to pension sharing in different court centres have brought the integrity of the system into question."*

Sir Andrew McFarlane  
President of the Family Division

## Pension Advisory Group (PAG)

- What we know about pensions is limited due to lack of reported cases, those cases that are reported are HNW.
- We have guidance from the Family Justice Council in its papers on financial needs on divorce, addressing litigants-in-person (V2 2018) and the Judges (v2 2018).
- PAG lead by Mr Justice Francis and HHJ Hess.
- Members are judges, academics, actuaries, financial experts, family and pension lawyers and a family mediator.
- PAG has now produced an interdisciplinary review of pensions in divorce and produced a guide for the profession. A public guide will follow in due course.
- Final report:  
<https://www.nuffieldfoundation.org/news/new-good-practice-guide-addresses-shortfall-understanding-how-treat-pensions-divorce>.
- A book can be purchased from Class Legal.

# Overview



- Very important to read the report, there are key recommendations that all practitioners will need to understand.
- It is aimed at all practitioners, specifically relevant in needs cases.
- It is important to understand what needs cases are and how they should be dealt with.
- Sharing cases will inevitably be dealt with differently.
- The 2 types of cases should not be mixed up as the approach will always be different.

- ? What type of pension are you dealing with? Gather all information first.
- ⚠ Not getting a report when you need one to advise the client (possibly leading to negligence claims)
- 🗨 Getting a report when you don't need one (simple DC pensions with no guarantees)
- 🗨 Not knowing what to ask when drafting a LOI for an offsetting report
- 🗨 Not understanding the value of the defined benefit pension when dealing with an offsetting case
- 💡 What to do with pre-marital and post separation pension growth

## Common problems – the basics

# Apportionment

- Should pre or post marriage pension contributions ever be “ring fenced”? A matter for judicial discretion.
- Where the case will be needs based in retirement/long marriage then this is “rarely appropriate”.
- In sharing cases the issue of apportionment is appropriate, Appendix S helps with those cases.
- “In needs cases issues of potential for income streams, tax consequences, loss of value on pension sharing, and the detailed consequences of orders may be more important, and often require expert pension evidence.”

# What type of pension?

The apples and pears dilemma



## Apples and Apples

- Both Defined Contribution (DC) pensions.
- The pensions are the same “type”.
- Neither has a guarantee.
- Fairly safe to rely on CEV if there are no unusual features.

# Defined Benefit v Defined Contribution

- These are different types of pension.
- Important to identify the difference.
- Do we need an expert to “translate” the value of a pear \*DB\* scheme to an equivalent “apple” \*DC\* scheme?
- OR do we only need to know about the income (the juice) produced by the schemes?



# Defined Contribution v Uniformed services scheme

- Two different types of pension.
- Important to recognise the difference.
- Do we need an expert to “translate” the value of an orange \*AFPS\* scheme to an equivalent “apple” \*DC\* scheme?
- OR do we only need to know about the income (juice) produced by the schemes?



# DB v Uniformed service schemes

- These are different types of pension.
- Identify the difference.
- Do we need an expert to “translate” the value of a pear \*DB\* scheme to an equivalent “orange” \*AFPS\* scheme?
- OR do we only need to know about the income (juice) produced by the schemes?



**Capital or Income?**

# PAG recommendations

## Capital or income?

### **Part 5 – when to use capital/income to resolve pension issues.**

1. If either party will draw a capital tax-free lump sum then it will be treated as capital.
2. The remaining fund (or whole fund if no capital is drawn) will be income.
3. A pension in payment will be treated as a current income stream.

### **What about pension ‘freedoms’? (Part 8)**

- Not likely to change the assessment of income v capital UNLESS some or all will be drawn to meet the circumstances of the case.
- Specialist advice will always be needed if proposing this as a solution.
- Always use net capital figures.



# Do I need a SJE/PODE

No - if the pensions are the same type and you are using Capital values to offset or share

Yes – where you need to use income streams to equalise

Yes – where the CEV can't be relied on for offsetting or sharing

Yes – where equalisation not the aim

# What do I ask the expert?



TO COMPARE  
“APPLES”  
FOR  
“APPLES”.  
DCFE.

TO  
CALCULATE  
INCOME  
EQUALITY IN  
THE FUTURE

RARELY – TO  
CALCULATE  
APPORTIONMENT  
(NOT  
RECOMMENDED IN  
NEEDS CASES)

# (How) does the report help?

Part 2 – essential action points to keep in mind

Part 4 – Distinguishing between needs and sharing cases – vast majority will be needs cases; *"Apportionment is not usually relevant in a 'needs' case"*

Part 6 - When to instruct a PODE? Examples of when you don't need to and when you really should

Part 7 – offsetting – fertile ground for negligence claims

Using the right value

Adjustments for 'utility'

# Offsetting – 121 references in the report!

- Most widely used settlement (although no statistics to support this).
- Comparing different types of asset (pensions of different types with capital or property).
- PAG – Two Stage Procedure
  - Stage 1 – fair or realistic value on the pension
    - Simple DC scheme – CEV
    - Figure based on equality of income or capital
    - Figure based on retained present or future benefits absent a PSO
  - Stage 2 – Adjust for taxation and maybe utility
    - Taxation – 15% to 30%
    - Utility – 0% to 25%

# LOI and offsetting

Please set out the offsetting valuation options available and an analysis of them, including highlighting any caveats and perceived advantages or disadvantages of a particular option, and state your preferred option on the facts of this case.

- Please consider the issue of how tax may impact upon the calculation.
- We do not require you to give any adjustment on account of any perceived 'utility' as that will be a matter for the parties or the court.
- Please state the factors for and against any approach to be taken if there is to be some pension sharing and some offsetting.
- Any other issues which you feel are relevant or require consideration by either party

# Further offsetting guidance

## Offsetting

If a request for offsetting calculations is to be included within the letter of instruction, then the parties should give thought to the parameters of this investigation in the context of [Part 7](#) of the report of the Pensions Advisory Group on offsetting issues. For example, the expert might be asked to provide a range of outcomes for offsetting purposes (e.g. realisable value, replacement value or net actuarial value). The expert will usually be asked to consider taxation issues, but not 'utility' issues.

# The future

- Ogden style tables could be developed for pension on divorce work.
- Discounting options could be developed in this context.
- Preferred in the pension context to a Duxbury fund.
- A potential basis for these table is set out at Appendix U.

# CM v CM [2019] EWFC 16

- Moor J – recommends the use of using an Arbitrator to settle the letter of instruction to an expert (company valuation).
- Respondent’s solicitors drafted the LOI by the date/time in the directions.
- The applicant solicitors did not respond by the time or date directed.
- When they did respond they significantly amended the LOI, the judge said “I am clear that none of this is appropriate”.
- Wife’s solicitors had provided that she and a shadow accountant be present at any relevant meetings.
- The judge did not allow this but did allow a member of her legal team to be present but only to observe and only to ensure a fair process.

## Mr Justice Moor

“High Court Judges are exceptionally busy. They do not have time to draft letters of instruction or even to determine disputes as to the wording of such letters. .... If, however, in a future case, there is a genuine issue as to drafting, I consider it would be exactly the sort of matter that should be referred to an arbitrator who is accredited by the Institute of Family Law Arbitrators.”

Thank you.