To what extent has the Pension Advisory Group's '*A Guide to the Treatment of Pensions on Divorce*' effected actual change in the division of pensions and can legal practitioners confidently advise their clients on its application to their individual cases?

EXECUTIVE SUMMARY

This report will consider the extent to which the PAG's report has effected actual change in the division of pensions on divorce and the extent to which legal practitioners can confidently rely upon it to advise their clients. In order to assess this, topics including the practice of offsetting, instructing experts, post-report case law and the perspective of practitioners will be considered. The conclusion of this essay will suggest that the report has codified previous knowns and that on its own it does not equip legal practitioners to be able to independently and comprehensively advise clients on all factors to be considered regrading pension division. However, as a factor in a broader range of developments the report provides foundation for change. As a result of this, provided that the further developments referenced in the penultimate section of this essay come to fruition, the report may be seen to have effect actual change in the division of pensions upon divorce in the future.

INTRODUCTION AND AN EXPLORATION OF THE HISTORICAL POSITION OF THE TREATMENTS OF PENSIONS UPON DIVORCE

Today there are several different methods of pension division upon divorce. Bearing in mind the restrictions on lawyers offering financial advice to their client, selecting and employing the correct method can be a minefield to say the least. It was on this basis that the Pension Advisory Group ("PAG") was created to produce a working report which could be used as a 'go-to-guide' for practitioners, experts and judges which offers a uniformed approach in order to reduce confusion and disparity between those tasked with determining pension division.

The PAG was formed in June 2017 and is a body of individuals ranging from members of the judiciary, legal practitioners such as solicitors and barristers as well as pension experts, for example actuaries. Their 2019 report, entitled '*A Guide to the Treatment of Pensions on Divorce*' ("the Report") took two years to prepare and found shortcomings in the quality of decisions relating to pension division in financial remedy proceedings. In its recommendations

it has sought to target those divorcing who are not overtly wealthy but who may have pensions of considerable value that should be considered within the proceedings. The PAG studied a total of 396 cases of which 80% included at least one pension but only 14% of the cases ended in a final order that considered the pension. The Report found that the practice of offsetting, which will be analysed in more detail below, was heavily favoured but that in the majority of cases there was little agreement as to how the practice should actually be undertaken. Whilst the Report is not statute, since its publication it has been endorsed by HHJ McFarlane as 'formal guidance' to be relied upon by judges, practitioners and experts[1].

Prior to 1996 the English and Welsh courts did not have any power to interfere with a spouse's rights under a pension scheme upon divorce[2]. Change was effected through a trifecta of *Brooks v Brooks* ("*Brooks*")[3], The Pensions Act 1995 ("PA 1995") and The Welfare Reform and Pensions Act 1999 ("WRPA 1999").

Before *Brooks*[4] the courts were restricted in terms of their powers relating to pensions in so much as being able to only have regard to the resources and needs of the parties in the foreseeable future[5] (usually ten years[6]) as well as any benefits which either party may have stood to lose as a result of the divorce[7]. There were generally four types of order that the courts could make when a pension played a significant role in the division of the parties' assets. The court could refuse to dissolve a marriage on financial grounds unless it could be shown that compensation would be made to the non-member spouse[8], a lump sum order could be made against a commuted pension, a periodical payments order could be made or offsetting of other assets could be employed.

In *Brooks*[9] the House of Lords found that the subject husband's pension scheme could be classified as a matrimonial asset capable of variation by the court in ancillary relief

[1] Sarah Jane Lenihan, 'Pensions on Divorce – An Introductory Guide for Family Lawyers', (15 January 2021), <https://mymbl.mblseminars.com/course/view.php?id=2071&section=1> accessed 22 March 2021.
[2] Douglas Allen, 'Pensions on divorce: evolution of the court's powers' (Practice Note, Practical Law) <uk.practicallaw.thomsonreuters.com> accessed 15 February 2021.
[3] [1995] UKHL 19.
[4] ibid.
[5] MCA 1973 s25(2)(a) and (b).
[6] *Milne v Milne* [1981] 2 FLR 286.
[7] MCA 1973 s25 (H) MCA 1973.
[8] *Le Marchant v Le Marchant* [1977] 1 WLR 559.
[9] *Brooks* (n 3).

proceedings[10]. In this instance particular features of the scheme, namely the ability to elect a deferred pension for the wife and to nominate her to receive death benefits, were sufficient for the scheme to be brought within the meaning of section 24 (1)(c) of the Matrimonial Causes Act 1973 ("MCA 1973"). The scheme could be treated as a post-nuptial marriage settlement.

The decision in *Brooks*[11] demonstrates progression from the pre-1996 position, however, its application was limited which was emphasised by the House of Lords at the time judgment was given. It was highlighted that the court's power under s24 (1)(c) MCA 1973 would only be extended to property that was part of the "settlement", that jurisdiction would not be exercised where third party interests would be prejudiced and that approval from HMRC and the trustees of the scheme would be required[12].

The importance of *Brooks*[13] in terms of this report are that it provides an insight into the mentality of senior courts in the mid-1990's on the topic of pension sharing. It demonstrates the inception of a desire to bring pension division upon divorce within the remit of the law in order to facilitate just financial settlements for affected parties. Throughout this text I will further explore this notion up to the publication of the PAG's Report and through to the present day.

Practitioners should note that for any divorce proceedings commenced by a petition filed on or after 1 December 2000, it is no longer possible to apply for a 'Brooks variation'.

The PA 1995 introduced the concept of pension attachment. Generally, a pension attachment order is a type of maintenance order which places the burden on the scheme provider to pay a certain percentage of monthly pension payments and/or a lump sum to the non-member spouse.

These types of orders are made under s 23 of the MCA 1973 and were introduced by s 166 of the PA 1995 which added sections 25B, C and D to the MCA 1973[14]. At this juncture it is necessary only to recognise the inception of these orders in terms of their role in the

[10] ibid.
[11] ibid.
[12] Lenihan (n 1).
[13] *Brooks* (n 3).
[14] Fiona Hay, 'Pension attachment for family law practitioners' (Practice Note, Practical Law) <uk.practicallaw.thomsonreuters.com> accessed 15 February 2021.

development of the law. They serve as evidence of further progression in terms of broadening the court's remit regarding the types of orders that could be made following on from *Brooks*[15]. Unlike Brooks variations, pension attachments can still be made in the present day. They are used infrequently given their limitations which can be circumvented by using more contemporary types of orders.

The final element of the trifecta, the WRPA 1999, first introduced the concept of pension sharing. The act permits courts to direct scheme providers to divide the rights under the scheme to give each spouse a set of individual rights, termed as a Pension Sharing Order ("PSO"). The inception of these orders removed Brooks variations and apply to proceedings for divorce or nullity, but not judicial separation, commenced on or after 1 December 2000[16]. In 2005, mirror provisions were introduced for civil partners within the Civil Partnership Act 2004. A more detailed consideration of these orders will follow, in particular the interpretation and development of them since the late 1990's.

Courts will have regard to s25 MCA 1973 when dealing with financial remedy proceedings. The court will need to consider quantification of assets[17], the needs of the parties[18], the ages of the parties and the duration of the marriage[19], the health of the parties[20] and the contributions made by each of the parties[21]. Pension assets which can be shown to have accrued prior to the marriage will be considered as 'non-matrimonial' unless it is evidenced that they have been significantly altered during the marriage. On this basis, it is possible for a pension to be excluded from s25 considerations by the court unless they are required to meet the financial needs of the parties.

PENSION SHARING ORDERS

Section 21A MCA 1973 provides that a PSO may be made only in relation to "shareable rights under a specified pension arrangement"[22] or "shareable state scheme rights"[23]. For a

[15] *Brooks* (n 3).
[16] Lenihan (n 1).
[17] MCA 1973, s 25 a.
[18] ibid (2) b.
[19] ibid (2) d.
[20] ibid (2) e.
[21] ibid (2) f.
[22] ibid s21A (1)(a)(i).
[23] ibid s21A (1)(a)(ii).

practitioner to discern whether a PSO will be available to their client they must first be able to determine if a) the pension is capable of sharing and b) if the rights are of a shareable kind[24].

Helpfully, s 27 WRPA 1999 defines the scope of 'shareable pensions' as those rights "under any pension arrangement other than an excepted public service scheme". Subsection 3 of the provision sets out when a public service scheme will be excepted. On this basis practitioners can be confident that the majority of pensions will be shareable.

Exceptions to the general rule include the basic state pension as provided for by s 47 WRPA 1999 and the new state pension which was introduced in 2016. Additionally, some overseas pensions may not be shareable dependant on their characterisation. The case of *Goyal v Goyal*[25] provided that "unless there is compelling evidence that a pension sharing order will be implemented in a foreign jurisdiction, pension sharing orders should not be made against an overseas pension."[26]

The scope of 'shareable rights' are reflected in the statutory provisions of s27 and 46(1) of the WRPA 1999, again, applying to a large majority of rights. Exceptions to this are rights which are owned by virtue of being a widow or widower, those resulting from death or disablement by accident of a person during service and an early leaver's right to a return of contribution or cash transfer sum[27].

The court has discretion when making financial orders and should have regard to s25B MCA 1973 in doing so. A full exploration of this provision is beyond the scope of this essay, however, it should be noted that this discretion includes assessing benefits available under a pension scheme. SS 24B(3), 25B(7B) and 25C(4) MCA 1973 place further limits on the courts discretion in terms of making what are known as 'double orders'.

There is some scope for the involvement of an expert in determining the appropriateness of a PSO, in particular where there is an international element at play. Notwithstanding this, it is clear that family practitioners, for the most part, are well equipped by statutory provisions to

[24] Hay (n 14).
[25] *Goyal v Goyal* [2016] EWFC 50 (Fam)
[26] Hay (n 14).
[27] ibid.

be able to assess this option for their clients. For this reason PSOs remain a relatively uncontroversial element of the overarching topic of pension division and therefore little input was needed from the PAG on this topic in the Report. It can be argued that it is the alternatives which create more difficulties for lawyers and these are in fact the matters that received greater consideration from the PAG.

OFFSETTING AND THE CAPITAL VS INCOME ARGUMENT

An alternative to a PSO is offsetting. This is the practice of using other matrimonial assets to be 'traded-off' against a pension in order to allow the member-spouse to remain the sole beneficiary. It is arguable that the relative simplicity offered by this option can result in family practitioners being more inclined to encourage clients to choose it over the alternatives. It is unsurprising then that this is the most common technique employed in practice. However, practitioners must act with caution when advising clients to choose offsetting as this is the area which results in the largest amount of negligence claims[28].

The PAG have dedicated Part 7 of their 2019 Report to pension offsetting, referring to it as 'The dominant practice'[29]. In summary the chapter provides a definition of offsetting, advises practitioners to act with caution before jumping at the first opportunity to opt for this method as opposed to its arguably more complex contemporaries such as PSOs and pension attachments and goes on to provide a three step process for the valuation of a pension for offsetting purposes. In terms of the effectiveness of the Report in assisting practitioners with this method of pension division we must consider the pre and post-PAG Report positions. It is noted above that the practice of offsetting has been in use since before *Brooks*[30] and thus is one of the longest-standing methods of asset division in financial proceedings where pensions are involved.

S25 (2) MCA 1973 provides a list of eight factors that a court can consider when assessing the division of financial assets upon divorce. In order to retain flexibility for the obvious variation

[28] The Pension Advisory Group, 'A Guide to the Treatment of Pensions on Divorce' (2019) Pension Advisory Group <https://www.nuffieldfoundation.org/sites/default/files/files/Guide_To_The_Treatment_of_Pensions_on_Divorce-Digital(1).pdf> accessed 22 October 2020.
[29] ibid.
[30] *Brooks* (n 3).

in the types of scenario that the Act will need to be apply to, it is perhaps somewhat vague on the details. The danger of this however is that it can open each individual factor up to speculation. This is well demonstrated by the approach taken to offsetting and is evidenced by Rhys Taylor's and Hilary Woodward's 2015 article 'Apples or pears? Pension offsetting on divorce'[31].

The article is a useful illustration of the position shortly before the publication of the PAG's Report. It revolves around 14 pension experts being asked to prepare reports relating to three mock pension offsetting problems and then considers the disparity between their estimations. The scenario with the smallest amount of money returned offsetting suggestions ranging between £60,000 and £96,900, the middle scenario received suggestions ranging between £290,000 and £798,000 and the top-end scenario between £886,000 and £1,425,000. The authors conclude that none of the experts were wrong in their recommendations but that the sheer level of methods available for offsetting meant that it had become virtually impossible to reach a uniform calculation of division.

The article highlights issues such as differing mortality and investment assumptions, the application of tax adjustments and estimation of retirement ages to name but a few as factors which contributed to the inconsistencies between final calculations.

Linked to offsetting is the debate as to whether a pension's cash equivalent ("CE") should or should not be amalgamated on a like-for-like basis with other capital, and if not, whether a PSO should be made rather than using offsetting in order to reflect this difference. A cash equivalent is calculated by working out the lump sum that would be required to provide an equivalent pension to the scheme pension at your retirement age before reducing the lump sum depending on how far away from retirement you are[32].

In the 2006 case of *Martin-Dye*[33] a District Judge in the first instance ruled that the husband should be awarded 43% of the assets including his entire pension worth £940,000 which had not been discounted to reflect its CE. This indicated that the pension could make up part of the

[31] Rhys Taylor & Hilary Woodward, 'Apples or Pears? Pension offsetting on divorce', [2015] Fam Law.
[32] Pension Help, 'What is a Cash Equivalent Transfer Value (CETV)?' <https://pensionhelp.co.uk/cetv/#:~:text=The%20CETV%20is%20calculated%20by,from%20retirement%20that%20you%20are.> accessed 15 February 2021.
[33] *Martin-Dye v Martin-Dye* [2006] 2 FLR 901.

capital assets. The order was upheld in the High Court but overturned by the Court of Appeal who ruled that the pension should not have been amalgamated with the rest of the capital and instead should have been made subject to a PSO. The order was amended to give the husband 43% of the pension and 43% of the other capital. Conversely, in the latter case of *J v J*[34] the wife was awarded 46% of the assets but the judge ruled that this should not include a 46% share of the husband's £500,000 pension and that it was right that the pension had been amalgamated with other assets. The judge went as far as to state that he did not feel that he was bound by the Court of Appeal's decision in *Martin-Dye*.

The inconsistency in judgments continued despite the introduction of The Taxation of Pensions Act 2014 which sought to clarify matters to say that pensions are of a different nature to capital. In *SJ v RA*[35], Nicholas Francis QC suggested that the legislation would mean that pensions would "be treated as bank accounts to people over 55", seemingly failing to acknowledge the tax implications of drawing cash from pension funds and suggesting that pensions *could* be treated as capital. In *M v M*[36] Wildblood HHJ took a much more cautious approach and noted the significant tax implications of drawing down a pension thus intimating that pensions remain different to capital.

We have before us evidence of how prior to the PAG's Report of 2019, legal practitioners, experts and the judiciary were unable to properly understand the correct approach to be taken when using offsetting in financial remedy proceedings. In 'Apples and Pears'[37] we see how the authors, two legal practitioners, outline the several different approaches to offsetting and the lack of clarity on which works best, the same article clearly demonstrates the variance in the approaches taken by experts and case law shows inconsistency amongst judges.

To address the above issue the PAG set out a three step guide to dealing with offsetting, first the pension asset must be valued followed by any adjustments for tax and finally adjustments for utility. The PAG state that adjustments for tax will vary between 15%- 30%, a range of 0% - 25% for utility adjustments and that there are various methods that an expert may employ when valuing the asset, three of which are noted in the Report. Whilst this is a simplistic

[34] [2011] EWHC 101 (Fam).
[35] [2014] EWHC 4054 (Fam).
[36] [2015] EWFC B63.
[37] Taylor & Woodward (n 31).

interpretation of the 10 pages of text produced by the PAG, it can be argued that the 'Key Points' add little clarity to the position pre-Report and that practitioners, experts and judges are not much better equipped to tackle this point than they would have been ten years ago. This is further supported by the article[38] which provides six key factors that should be taken into consideration when considering offsetting. These 'factors' are questions that practitioners and/or experts are advised to ask themselves and cover matters such as the type of scheme and considerations for tax, however, these are simply suggestions of things to be 'borne in mind'[39] and do not provide prescriptive answers to the questions. In comparison, the PAG's three considerations when offsetting are expanded upon in more detail offering some comprehensive advice to users rather than just questions. Nevertheless, the comparison here is made to demonstrate that the PAG's Report does little to expand upon the recommendations made by Taylor and Woodward and arguably leaves some elements out altogether, despite this being something which was expressly sought in the conclusions of the article.

It is possible, if not highly probable, that if the 'Apple and Pears'[40] experiments were replicated post-Report similar variances would be found. We are yet to see a case dealing with offsetting using the three step guide suggested by the PAG and beyond this, we will need to see several cases addressing this topic before consideration can be given as to whether we have edged any closer to judicial uniformity.

Returning to the core question of this essay, whether the PAG's Report has enabled practitioners to be able to confidently advise clients on pension division upon divorce, the comparison of the 2015 article and the 2019 Report would suggest that this has not been meaningfully achieved.

There is always an argument to be had for the fact that when dealing with financial matters there must be flexibility to reflect the individual circumstances of the parties and to cater for the significant financial differences between different cases. This may go same way to justify the vague recommendations of the PAG, however, the underlying recommendation, as will be seen in the rest of the Report, is when in doubt, instruct an expert. Unfortunately this does not

[38] Taylor & Woodward (n 31).
[39] ibid.
[40] ibid.

serve to assist practitioners who are left trying to convince their clients to shell out further thousands of pounds on what are already most likely costly proceedings.

On this basis, Part 7 of the PAG Report has failed to offer the clarification that has been so desperately thirsted for by practitioners since the inception of offsetting.

THE ROLE OF EXPERTS

Part 25 and Practice Direction ("PD") 25D of the Family Procedural Rules ("FPR") addresses the appointment of a single joint expert ("SJE") in financial remedy proceedings. Section 1.1 of the PD outlines the scope of the direction including when it will be appropriate to appoint an SJE, preliminary enquiries of the SJE, the letter of instruction amidst other things. As the PD is intended to be used across financial remedy proceedings it is understandable that it does not offer advice for experts regarding the approach that should be taken when dealing with the divisions of pension on divorce. However, such advice that was published prior to the report is difficult to access does not appear to be made available in a single document in any event. This could offer explanation for the variance in the estimations in the 'Apple and Pears'[41] study and evidences the necessity for the PAG to provide such guidance in their Report.

Appendix C to the Report outlines recommendations for things to look for when instructing what it has branded as a Pensions on Divorce Expert ("PODE"). This includes a list of relevant qualifications to look out for, ensuring that the PODE is a member of an appropriate professional body, that they are willing to endorse what they report by way of a Statement of Truth and that they agree to comply with the FPR Part 25 and PD 25D. Appendix E to the Report provides a template letter of instruction as an alternative to that provided within the FPR.

Appendix E is a good example of the practical advice that has been offered by the PAG to assist practitioners where such guidance didn't exist beforehand. It should always be remembered that the Report is only guidance and not statute and so users will not be bound to rely upon the recommendations, however, in using a PODE that meets the criteria set out by the PAG a practitioner is more likely to be able to evidence to the court that the PODE is sufficiently

[41] ibid.

qualified and their recommendations justified in the face of any potential argument regarding disparity or miscalculation.

On this basis it can be said that the Report has successfully aided those involved with pension sharing upon divorce to efficiently appoint an expert who should be well equipped to advise on the subject matter where the knowledge of practitioners and judges may not be as developed.

In the alternative it is arguable that the Report's repeated suggestion to instruct a PODE in the favour of offering more prescriptive advice, means that at the bare minimum a suggested criteria for instruction should have been provided. It is reiterated that as has been evidenced when considering offsetting, the Report remains vague on the complexities of pension division thus not necessarily well equipping practitioners to be able to act independently when advising their clients and instead having to seek the counsel of a third party. This creates an issue where the instruction of a PODE may not be 'necessary' as is required by Part 25 of the FPR, an example of this would be where the value of the pensions involved is nominal enough that the thousands of pounds that it would cost to instruct a PODE would not be justified. The PAG advise that a PODE should be instructed where pension assets exceed £100,000. This then runs the risk that for any matters below the £100,000 threshold, practitioners are left only with the vague recommendations of the PAG to advise their clients. In addition to this there is concern as to the lack of sufficiently qualified PODEs available in England and Wales to be able to advise clients. A 2020 article[42] suggested that in fact there were only 20 PODEs available across England and Wales, meaning that lead times for reports could delay proceedings for months if not years. These issues paired with the professional obligation to avoid offering financial advice to clients exposes practitioners to a precarious situation. This would suggest that in reality, little has been done to mitigate the risk of negligence claims as has been pointed out by the PAG themselves.

POST PAG REPORT CASE LAW

Another way to assess the success of the Report is to consider its application in case law post-publication. At the time of writing it has been less than two years since the Report was

[42] Grania Langdon-Down, 'Survey – Impact of PAG Recommendations' [2020] Fam Law 1414.

published meaning that there is only a limited amount of cases available to asses. Nevertheless, three of particular note shall be considered below.

The first case to apply the Report was *W v H*[43], heard by His Honour Judge Hess who is also the co-chair of the PAG. The case focussed on the needs of the parties and the three key considerations were: 1) whether pensions should be divided according to capital value or income, 2) whether or not to ring-fence pensions which were accrued prior to the marriage and 3) whether to treat the pensions separately or offset them against other assets. On the first point HHJ Hess determined that the pensions should be divided according to income, regarding the second point, ring-fencing should not take place and finally that the pensions should be treated separately to other assets. Of particular note is the fact that throughout his judgement, HHJ Hess directly quoted from and actively endorsed the recommendations of the PAG.

A June 2020 article produced by Andrew Smith, Partner at Lupton Fawcett LLP notes 'The details of the case are unremarkable and akin to the type of divorce a family lawyer will see on a day to day basis'[44] and similarly, 'The theories behind the judgement of HHJ Hess are also unremarkable'[45]. Instead, Mr Smith concedes, 'It is the willingness to use and specific mentions made to the PAG report which strike as interesting in this case.'[46] Another legal practitioner, Jonathan Whettingsteel, a solicitor in the Family department of Dutton Gregory Solicitors noted in a July 2020 article that 'it is no surprise that [HHJ Hess] endorsed the recommendations in the report, but it's also helpful that he provided further guidance on this subject.'[47]

In analysing the commentary of the judgement in *W v H*[48] practitioners appear to be agreed on the fact that the outcome did not 're-invent the wheel' per se but that it did emphatically endorse the PAG's recommendations. Based upon this, it can be deduced that the Report itself therefore did not necessarily develop general understanding of pension division and that in actuality it

[43] *W v H (divorce financial remedies)* [2020] EWFC B10.
[44] Andrew Smith, 'Pensions on Divorce and the PAG Report' (Lupton Fawcett, 10 June 2020) <https://www.luptonfawcett.com/about-us/blog/pensions-on-divorce-and-the-pag-report/> accessed 1 March 2021.
[45] ibid.
[46] ibid.
[47] Jonathan Whettingsteel, 'The Treatment of Pensions on Divorce: Where Are We Now?' (Dutton Gregory, 30 July 2020) <https://www.duttongregory.co.uk/site/blog/personalnews/pensions-and-divorce> accessed 1 March 2021.
[48] *W v H* (n 43).

served to codify what was already common practice, thus providing a useful, but perhaps un-revelatory text advising on the division of pensions on divorce. Continuing this line of argument, it may be said that the extent to which the Report has effected actual change is limited.

Interestingly, Mr Whettingsteel outlines in his article that HHJ Hess acknowledged that there was 'no 'one size fits all' solution'[49] in relation to the equality of pensions as capital or income. This alone is unsurprising as it would be remiss of the PAG to have claimed to have been able to address every possible scenario in its Report. However, this does go some way to show the parameters placed on the extent to which the Report can usefully be used as a 'go-to' for practitioners in perhaps more uncertain territories as opposed to having to rely on a PODE.

A further two cases have dealt with the Report in their judgement, both of which were heard by HHJ Robinson on appeal.

KM v CV[50] was also a needs based case. The facts of the case surrounded the division of a Police pension after a long period of separation, of some 6 years. In this case the pension member, who was the wife, argued that pension should be valued at the time of separation. The year of separation was 2011 at which time the CE of the pension was valued at £43,000. By the time the matter came before the court in December 2017 the CE had grown to £131,544. In the first instance the trial judge ruled that the value should be that at the time of separation. This potentially highlights a lack of awareness of the Report's recommendations and shows that its application may not have been as far reaching as was hoped. On appeal, HHJ Robinson took the view that on the basis of this being a needs case, the right date for valuation was the date of the trial and that the trial judge had acted erroneously in focussing on the non-matrimonial accrual between 2011 and 2017, rather than the needs element.

In this instance HHJ Robinson adopted the approach of HHJ Hess in *W v H*[51] and in doing so endorsed the recommendations of the Report. On the one hand it is reassuring to users of the guide to see that in relying upon its recommendations they will be better posed to justify their approach and reasoning to the court. To this effect it gives users greater certainty when advising

[49] Whettingsteel (n 47).
[50] [2020] EWFC B22.
[51] *W v H* (n 43)

clients. On the other hand, the suggestion that pensions should be factored in on needs based cases is not a point conceived by the PAG. This idea instead finds its roots in s 25 of the MCA 1973 which significantly pre-dates the Report. This is further evidence that the Report has not revolutionised the approach to pension division upon divorce but has more so codified it. From this I would suggest that the Report offers greater reassurance and certainty to users but has not greatly affected actual change in terms of the landscape.

The second case before HHJ Robinson on appeal was *RH v SV*[52]. The basic facts were the parties had been married for 13 years at the time of divorce, the husband was aged 58 and the wife 53. The couple shared one child under the age of 18. It was submitted that whilst the wife still held a practicing certificate as a solicitor, she had not worked for some 15 years. In the first instance it was ruled that the wife should receive a share of 28.5% of the husband's pension. In reaching the decision it was noted that the percentage figure was calculated on achieving equality of capital for the period that the couple were cohabiting thus departing from the decisions in both *W v H*[53] and *KM v CV*[54].

The decision was appealed by the wife who submitted that the share did not meet her needs. The appeal was rejected by HHJ Robinson on the basis that the judge had sufficiently exercised their discretion in finding that the wife had failed to maximise her earning capacity and was capable of being financially independent. Importantly, HHJ Robinson directly quoted the Report in judgement regarding the fact that 'contribution based arguments are of less weight when needs take precedence'[55] and that whilst the trial judge's decision had departed from this, it was not wrong or unjust.

Arguably, the case of *RH v SV*[56] departs from the recommendations of the Report, whilst HHJ Robinson still seeks to reinforce its recommendations in the judgement. This may be seen as evidence of the fact that in the words of HHJ Hess in *W v H*[57] there is no 'one size fits all' solution. However, in doing so it also highlights the fact that disparity in judgements remains despite the Report and as a result of this there is an argument to say that we are no further ahead

[52] [2020] EWFC B23.
[53] *W v H* (n 43).
[54] *KM v CV* (n 50).
[55] The Pension Advisory Group (n 28).
[56] *RH v SV* (n 52).
[57] *W v H* (n 43).

in bringing clarity to this topic than we were at the time of the Apple and Pears article[58]. Again, this suggests the fact that the Report has done little to bring about effective and sustained change to the area of pension division.

A PRACTITIONER'S PERSPECTIVE

In November 2020 the Family Law Journal published an article detailing the findings of a survey produced by Brewin Dolphin and Mathieson Consulting to assess the impact of the PAG recommendations for legal practitioners.

Findings appear to suggest that some practitioners are apprehensive of the extent to which the findings of the Report will be endorsed by the courts. Mena Ruparel commented, 'The uptake of the PAG recommendations is dependent on which judge is dealing with the case and often the geographical area.'[59] This relates back to the above analysis of post-Report case law and, in particular the findings of the trial judge in *KM v CV*[60]. In this instance the Report was ultimately recognised upon appeal, however, the apparent lack of understanding / awareness of its recommendations by the trial judge supports the concerns of Ms Ruparel. It should be noted that of course a single case is not representative of the entire judiciary's stance and so we will need to see the outcomes of more relevant cases before this concern can be fully addressed.

Another practitioner, Grant Lazarus noted that 'the PAG report does appear to be widely recognised as a useful and authoritative guide'[61]. Nevertheless, Lazarus states that practitioners are 'shocked'[62] at the fact that their understanding of pensions on divorce is not enough to comprehensively advise their clients. The latter point mirrors that of Ruparel demonstrating a concern that users of the guide may not fully appreciate the recommendations made within it. Despite this, Lazarus highlights the wide recognition that the guide has received. On the face of it these two points seem to contradict one another, however, upon further consideration it can be seen to recognise the fact that the PAG have produced a comprehensive guide on the topic but that through being just a guide, its enforceability will always be limited.

[58] Taylor & Woodward (n 31).
[59] Langdon-Down (n 42).
[60] *KM v CV* (n 50).
[61] Langdon-Down (n 42).
[62] ibid.

George Mathieson of Mathieson Consulting noted that since the distribution of the guide he believes there to have been an improvement in the letters of instruction received from lawyers. He believes this to demonstrate a 'better understanding of pension issues'[63] the result of which is that PODE reports have become 'cheaper and quicker to produce'[64]. There is also consideration of a new type of report which is focussed solely on off-setting and is 'significantly less expensive'[65] to produce. Unfortunately I do not have any statistics to reinforce this point and demonstrate whether there actually has been in a reduction in the cost of expert reports. It is likely too soon after the publication of the Report to be able to effectively test this. However, Mathieson highlights a perhaps unintended positive outcome to the Report. Previously in this essay I have criticised the PAG for avoiding giving more prescriptive advice in favour of recommending the instruction of a PODE. I have followed on from this by noting that in turn the Annexes to the Report provide useful guidance for the instruction of a PODE and here we have evidence of a practitioner noting the positive impact that this has had. The article notes the position of Ruparel that 'as clients spend more time and money with solicitors, the more reticent they become on spending money on other professionals.'[66] Overtime it will be interesting to see whether the reduction in timing and costs for experts will result in clients being more willing to instruct them and in turn this should generate more well considered and fair outcomes in pensions on divorce cases. Of course in order for this to become a possibility there must first be an increase in the number of qualified PODEs available.

Looking to the future, the article considers the role that a Pension Information Assessment Meeting ("PIAM") could have in cases. This concept is noted to be 'gaining support'[67] among practitioners and would involve a financial expert offering advice to clients in the early stages of the divorce in order to narrow and address key issues in an attempt to avoid protracted proceedings to deal with these. Family practitioners will be aware of the requirement for parties to attend a mediation appointment in children act proceedings; it is being mooted that the PIAM become a similar requirement in financial remedy proceedings. This idea was not proposed by the PAG but by the Law Society's Family Committee. If this were to become a reality it may serve to alleviate some of the concern around legal practitioners not being pension experts who are sufficiently equipped (or professionally able) to advise their clients on these financial

[63] ibid.
[64] ibid.
[65] ibid.
[66] ibid.
[67] ibid.

matters. This in turn would allow for the Report to be relied upon solely for its intended purpose as a guide and remove the expectation that it should provide precise answers for every potential issue that could arise. There is also the consideration of the implementation of the Divorce, Dissolution and Separation Act 2020 which will introduce the concept of 'no fault divorce'. Proponents of the legislation argue that it is hoped that this will reduce the level of acrimony in divorce cases which will help to create a smoother overall process and allow for matters such as financial division to be approached more pragmatically. The extent to which this is true is of course yet to be seen.

The conclusion of the article suggests that there is 'generally more [optimism] about the ability of the practitioners and judiciary to give the parties a fair outcome'[68]. This is on the basis that there are several different developments in this area which are contributing to an overall change. The Report is only one facet of this change. This conclusion will be reflected in that of this essay.

CONCLUSION

Since 1996 and the first significant developments dealing with the division of pensions on divorce there has been an overriding notion that a broad brush approach must be applied to case law, legislation and guidance. It is fair to say that the examples used in this essay to assess the Report have supported this idea and the fact that in many ways it can be deemed as generalist in its approach.

It is important to consider the key aims of the Report, that being to produce a user-friendly guide to better serve a broad range of professions to be able to reach fair outcomes in mid-range financial remedy proceedings which do not generally attract as much commentary as the more high-net worth cases. As far as this aim is concerned the arguments set out above would suggest that in general it has been met. However, the overarching notion of a broad brush approach remains. The reason for this is to produce a body of law that is extensive enough to be applicable to the wide range of financial cases that come before the courts. Nevertheless, this can be seen to serve as a catch-22 whereby generalisations can fall into simply advising

[68] ibid.

users to consult experts for tailored advice in each differing case which in turn does not equip users with the necessary information to further their knowledge and better advise their clients.

In terms of offsetting, Part 7 of the Report has been assessed to be too generalist to quench the thirst of practitioners for finite guidance on the correct approach to take to the practice. With regards to its recommendations for the instruction of experts, the Report usefully provides more advice then ever previously made available by the FPR which in turn has allowed for lawyers to provide more comprehensive instructions to experts thus reducing the time and expense of reports. However, the notable drought of sufficiently qualified PODEs restricts the extent to which the recommendations can be actioned and effect actual change. Cases which have considered the Report have shown a willingness to endorse the PAG's recommendations signalling a positive reception of the advice by the judiciary. However, this is somewhat unsurprising given that the recommendations set out in the Report reflect the general approach of the courts prior to its publication and as such only codifies previous understanding. Finally, analysis of the Report by practitioners suggests a great amount of support for it as a useful guide, however, its limits are noted in terms of effecting actual change through the fact that it is only guidance rather than legislation.

For these reasons it is concluded that as a standalone factor, the Report has not served to greatly effect actual change in the extent to which legal practitioners can confidently advise their clients on its application to their individual cases. It is accepted that in fact, the professional restrictions placed on legal practitioners not to provide financial advice will always hinder the ability of lawyers to act entirely independently in these cases.

This conclusion is not to say that as part of a wider range of factors the Report does not play an important role in serving the larger agenda of development. It is useful as a 'go-to-guide' for users to refer to when providing general advice. It is hoped that the introduction of tools such as PIAMs and further legislative developments will assist to expand upon this advice by avoiding conduct difficulties for lawyers and allowing experts to provide more thorough guidance in an accessible and affordable fashion. With the support of these other factors, over time the Report may in fact be able to effect actual change in the legal landscape to aid both professionals and clients in relation to pension division upon divorce.

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BIBLIOGRAPHY

Brooks v Brooks [1995] UKHL 19

Goyal v Goyal [2016] EWFC 50 (Fam)

J v J [2011] EWHC 101 (Fam)

KM v CV (Pension Apportionment: Needs) [2020] EWFC B22

Le Marchant v Le Marchant [1977] 1 WLR 559

M v M [2015] EWFC B63

Martin-Dye v Martin-Dye [2006] 2 FLR 901

Milne v Milne [1981] 2 FLR 286

RH v SV (Pension Apportionment: Reasons) [2020] EWFC B23

SJ v RA [2014] EWHC 4054 (Fam)

W v H (divorce financial remedies) [2020] EWFC B10

The Civil Partnership Act 2004

Divorce, Dissolution and Separation Act 2020

The Family Procedure Rules 2010

The Matrimonial Causes Act 1973

The Pensions Act 1995

The Taxation of Pensions Act 2014

The Welfare Reform and Pensions Act 1999

Allen D, 'Pensions on divorce: evolution of the court's powers' (Practice Note, Practical Law) <uk.practicallaw.thomsonreuters.com> accessed 15 February 2021

Hay F, 'Pension attachment for family law practitioners' (Practice Note, Practical Law) <uk.practicallaw.thomsonreuters.com> accessed 15 February 2021

Langdon-Down G, 'Survey – Impact of PAG Recommendations' [2020] Fam Law 1414

Lenihan SJ, 'Pensions on Divorce – An Introductory Guide for Family Lawyers', (15 January 2021), <https://mymbl.mblseminars.com/course/view.php?id=2071&section=1> accessed 22 March 2021

Newbury A, 'Treatment of pensions on divorce' *The Law Society Gazette* (London, 20 July 2020)<https://www.lawgazette.co.uk/legal-updates/treatment-of-pensions-on-divorce/5105050.article> accessed 15 February 2021

The Pension Advisory Group, 'A Guide to the Treatment of Pensions on Divorce' (2019) Pension Advisory Group <https://www.nuffieldfoundation.org/sites/default/files/files/Guide_To_The_Treatment_of_Pensions_on_Divorce-Digital(1).pdf> accessed 22 October 2020

Smith A, 'Pensions on Divorce and the PAG Report' (Lupton Fawcett, 10 June 2020) <https://www.luptonfawcett.com/about-us/blog/pensions-on-divorce-and-the-pag-report/> accessed 1 March 2021

Taylor R & Woodward H, 'Apples or Pears? Pension offsetting on divorce', [2015] Fam Law

Pension Help, 'What is a Cash Equivalent Transfer Value (CETV)?' <https://pensionhelp.co.uk/cetv/#:~:text=The%20CETV%20is%20calculated%20by,from%20retirement%20that%20you%20are.> accessed 15 February 2021

Whettingsteel J, 'The Treatment of Pensions on Divorce: Where Are We Now?' (Dutton Gregory, 30 July 2020) <https://www.duttongregory.co.uk/site/blog/personalnews/pensions-and-divorce> accessed 1 March 2021