

**IN THE FAMILY COURT AT MEDWAY**

**Before: HIS HONOUR JUDGE RICHARD ROBINSON**

Between:

**KM**                      **Appellant**              and

**CV**                      **Respondent**

**Both parties attended in person, the Appellant with his McKenzie friend**

**Judgment delivered 25<sup>th</sup> February 2020**

1. This is an Appeal by Mr KM against the decision of District Judge Thomas, made in Financial Remedy proceedings against Mrs CV on the 8<sup>th</sup> February 2019. I heard the Appeal on the 7<sup>th</sup> February 2020, having given leave to appeal on limited grounds on the 11<sup>th</sup> October 2019. Both parties attended in person, Mr KM with the assistance of his McKenzie friend.
2. **The Background**  
The parties started a relationship in 1988. They had a son, C, who was born in 1993 and is now 27 years old. They were married on the 26<sup>th</sup> August 2008. They separated in 2011, and the Husband remained in the matrimonial home. Decree nisi was pronounced on the 20<sup>th</sup> December 2016. There is correspondence on the file which suggests that there were cross petitions and that the wife's application for decree absolute was not granted as she had not been the Petitioner; checks must be made to ensure that decree absolute has in fact been made at Bury St Edmunds.
3. The history of the financial remedy proceedings is complicated. It seems that on the 5<sup>th</sup> December 2017, before DDJ Rahman, it was agreed that the home would be sold, the wife's mother repaid £20,000 and the remaining equity divided equally, but listed for a final hearing before DDJ Pithouse on the 26<sup>th</sup> June 2018. The Husband did not attend and an order was made striking out his application for a pension sharing order and for sale of the home. On the 16<sup>th</sup> August 2018 HHJ Backhouse set aside this order.
4. This history figured in the hearing before DJ Thomas on the 11<sup>th</sup> February 2019. He dealt first with the Husband's application for an adjournment and refused it. He then dealt with the Agreement made before DDJ Rahman in relation to the home, and refused to vary it, so that the only issue before the court was whether or not to make a pension sharing order.
5. The hearing was obviously not easy. The Wife was represented by Mr Christopher Rice, a direct access barrister and the Husband assisted by his McKenzie friend, Ms WS. There was no trial bundle; it was difficult to locate relevant documents; statements were not signed;

authorities were provided by email during the hearing and were not provide to the husband; The husband was described as unable to focus on the issues the court was charged with determining and made lengthy submissions. DJ Thomas considered adjourning the hearing as a result, but concluded that he was able to come to a fair and just conclusion.

6. I should record that although some of the same issues were plain before me, when both parties were litigants in person, in fact the hearing was conducted effectively, and I am grateful to the Wife for her helpful summary and to Ms WS for her help to the Husband. I do not have a single Appeal Bundle. I have large numbers of documents on either side which have accumulated over time; I have done my best to disentangle them and refer to the salient points.

## **7. The Issues**

The Appellant's Notice raised two issues, the payment of £20,000 to the wife's mother from the sale of the home and the lack of a pension sharing order. After an oral hearing on the 11<sup>th</sup> October 2019 I did not grant permission in respect of the £20,000, which was agreed before DJ Rahman. I did give leave, limited to two grounds, namely:

1. Whether the Husband in fact made contributions to the mortgage of about £11,000 in cash to the Wife's account as shown by bank statements which were before the court but not considered, and whether this would make any difference;
2. Whether the Learned Judge used the right approach to the valuation of the Wife's pension, and whether it would have made any difference in the light of the parties' respective needs and contributions.

The Husband was unable to point to any bank statements which were not considered and show any material which differed from the Judge's findings at paragraph 26 of his Judgment:

*"On the balance of probabilities I accept that the Husband may have paid some monies during this period towards general household expenditure. But I do not accept that he made any payments towards the mortgage".*

Accordingly, I do not consider that there is any merit in the first ground.

8. The second ground, in respect of the Pension, is more substantial and I need to go into more detail as to the history and background.
9. The Wife is now 49 years old. She is a serving Police Officer; she started that employment in about 2004. Her gross income last year was £43,213,41, net £35,058. She is a member of the Police pensions scheme with a Cash Equivalent Transfer Value of £131,554.59 as at 31<sup>st</sup> December 2017. DJ Thomas used a figure of £131,677, but the difference is not material. The Wife argues that the CETV in 2011, at the date of separation, was £43,000, half of which would be £21,500. However, she argued against any pension sharing order on the grounds that she alone had made contributions to the pension over the last 7 years, and that the Husband had accrued mortgage arrears on the home of £15,440.57, and that in effect that should be set against any claim he might have.

10. The Husband is not working. He is now aged 59. His current income is made up of Employment and Support Allowance (ESA) £381 fortnightly, Personal Independence Payment (PIP) £58.70 four weekly and Housing Benefit (HB) £150.04 weekly. He has been rehoused in social housing. This equates to £20,765.68 a year or £1,730.47 monthly, substantially taken up with housing costs. He was made bankrupt, as the judge recorded, in October 2017.
11. It was common ground that the parties separated in 2011, but over the next two years the Husband remained in the home. During that period, the Judge's finding was that the wife paid the mortgage, though the Husband made some contributions towards general household expenses. In February 2013, there was an agreement that the Husband would pay the mortgage; the arrears accumulated, to £10,603.52 at the 1<sup>st</sup> February 2017, and I am told that the property is now empty and is unlikely to raise even the £20,000 to pay back the Wife's mother.

### **12. The Husband's Position**

The Skeleton Argument prepared by Ms WS on behalf of the Husband runs to 19 points, some of which deal with payments to the mortgage. To summarise the main submissions, it is said that the Pension is a Matrimonial Asset which was in place at the time of the marriage: that the up to date CETV should be used; that the parties lived together 'seamlessly' 24 years and have a son now aged 27; that he contributed equally if differently emotionally, physically and financially over a 24 year period, he was the main bread winner and supported the wife when working in low paid jobs, and studying which led to her obtaining a police job; and that he will lose the right to benefits from her pension. Factually, it is argued that arrears were the result not of negligence or recklessness but of mental health issues, that the Wife has received £27,000 from the equity to clear debts, the property was in negative equity in 2011. These factual issues are not matters on which an appeal court can make findings. However, it is also said that the Husband has a limited ability to support himself in retirement, as he will lose ESA and have a pension credit of £167 a week. If his PIP is not renewed he will be £84 worse off in retirement. These figures are necessarily speculative as he will not reach retirement age for 8 years. Finally it is said that the formula used by the Judge on the submissions of counsel is one suited to high value cases and a 'needs' based application used often in low value cases may have resulted in a fairer outcome.

### **13. The Wife's Position**

The Wife supported the Judge's decision. She asserts that the post separation 'pot' falls outside the ambit of 'matrimonial assets'; that of her service of 15 years, only 7 of which were pre and during the marriage. Any increase in the value of the assets is quite different from 'passive growth'. She says that her contributions post separation significantly outweigh the Husband's interest in the pensions fund. Her own needs are significant; she does not have any prospect of owning a property, she has debts which are the subject of a debt management plan and will need all the income from what is a modest pension to meet her future needs in retirement. Further she seeks to add information about her own mental health which was not before the judge below.

#### 14. The Judgment

It must have been very difficult for the Judge to separate the various issues in the hearing before him. However, he does not set out a Chronology of the relevant matters or a Schedule of Assets, both of which would have been helpful. He sets out s.25 of the Matrimonial Causes Act 1973.

15. He refers to a passage at page 1205 of the 2018 edition of the Family Court Practice under the heading "Sharing":

*"the concept of sharing ends with the end of the marital partnership or the exit from a marriage. On the exit from a marriage, the partnership ends and in the ordinary circumstances a wife has no right to expectation of continuing economic parity unless and to the extent that consideration of her needs or compensation for a relationship generally disadvantaged so require".*

He also refers to a passage in a Judgment of Singer J in the Court of Appeal which was emailed to him during the course of the hearing (In fact **S v S [2006] EWCA 2339**) dealing with the treatment of non-matrimonial assets at paragraphs 110, in particular at 24.1 when he cited the principles deduced by a Deputy Judge (Mr Nicolas Mostyn QC, subsequently reported as **Rossi v Rossi [2006] EWHC 1482**):

*"Assets acquired or created by one party after (or during a period of) separation may qualify as non-matrimonial property if it can be said that the property in question was acquired or created by a party by virtue of his personal industry and not by use (other than incidental use) of an asset which has been created during the marriage and in respect of which the other party can validly assert an unascertained share. Obviously, passive economic growth on matrimonial property that arises after separation will not qualify as non-matrimonial property".*

DJ Thomas comments:

*"And we do not have, as far as the pension is concerned, passive growth".*

16. The Judge then proceeds to deal with his findings of fact, before at paragraph 28 giving his conclusions:

*"Doing the best that I can on the evidence before me I am satisfied that the pension has been in existence for 14 years and that during the last seven years the parties have not been living together. I accept that the appropriate method of valuing the pension is its value in 2011. On a straight forward equality sharing principle that would entitle the Husband to a share which equates to £21,500. I do not know what the percentage of that would be at today's date. I have been told it is about 15 per cent. I accept the Wife's position that the Husband should not be awarded that sum because she initially made the payments towards the mortgage and then the Husband let the mortgage account fall into arrears".*

*"I should also add that since 2011 the Wife has found herself in a position where she has had to pay rent. The Husband on the other hand has had the benefit of accommodating himself in the property. I am satisfied there should be no Pension sharing Order".*

17. This case raises issues as to the definition of non-matrimonial property, in particular with regard to pensions, and the approach to needs and other s25 criteria. The approach to pension sharing has been the subject of the recent important Report of the Pensions Advisory Group published in July 2019, to be fair after the Judgment in this case. The issue of Pension Apportionment was considered and the conclusions set out at Part 4. This contrast the treatment of pensions in needs based cases and those to which the sharing principle applies. At 4.3 the Report says (my emphasis):

*“It is important to appreciate that in **needs based cases**, just as is the case with no pension assets, **the timing and source of the pensions savings is not necessarily relevant** – that is to say a pension holder cannot necessarily ring-fence pension assets if, and to the extent that, those assets were acquired prior to the marriage or following the parties’ separation. It is clear from authority that in a needs case, the court can have resort to any assets, whenever acquired, in order to ensure that the parties’ needs are appropriately met*

*“By contract, in a sharing case, the question whether all or some of the pension assets are to be treated as ‘non-matrimonial property’ and so not ordinarily to be distributed pursuant to the sharing principle is a **live one**”.*

The section goes on to refer to the Family Justice Council Guidance on the different significance of and approach to pension assets in needs and sharing cases. Further at Part 12 the Report summarises the position as follows:

*“Broadly speaking, in needs cases, where the assets do not exceed the parties’ needs, apportionment is rarely appropriate”.*

At part 6, paragraph 12 the Report says:

*“The overall aim in divorce financial remedy cases is to achieve fairness between the parties... it will often be fair to aim to provide the parties with similar incomes in retirement, but equality may not be the fair result depending on needs, contributions, health, ages, the length of the marriage or in non- needs cases, the non-matrimonial nature of the asset”*

18. In an article in Family Law in January [2020] 95, entitled **‘Non-matrimonial pensions: the forgotten discussion’** Joe Rainer discusses the issues raised by non-matrimonial pensions, the methodologies for valuation and accepts the analysis of the Pensions Advisory Group, as pension assets are rarely large enough to meet the income needs of two separated parties in retirement, but refers to the relatively common type of case where apportionment is more likely to be appropriate where a sizeable chunk of pensions was acquired prior to the relationship, and the non-member spouse does not have a strong ‘needs’ claim to equal pension provision (perhaps because they are younger and retirement is some way away).
19. There have been a number of recent authorities which have considered the meaning on non-matrimonial assets, including **Waggott v Waggott [2018] EWCA Civ 727**, **Hart v Hart [2017] EWCA Civ 1306**, **IX v IY (Financial remedies: Unmatched Contributions) [2018] EWHC 3053 (Fam)** and **C v C (Post separation accrual) [2018] EWHC 3186 (Fam)**. None of them specifically deal with the issue of pension sharing in a lower income case. None of them run counter to the guidance provided by the Pension Advisory Group Report.

20. The difference between the treatment of pension assets created on either before or after cohabitation as non-matrimonial assets and the relevance of contribution under s 25 (2) (f), contributions may be difficult to judge in practice in needs based cases. As a general rule, courts assume that contribution based arguments are of less weight when needs take precedence, and assets which are strictly non-matrimonial can be taken into account. There is a danger that too much concentration on principles derived from big money sharing cases can confuse the fair results in smaller needs cases.
21. There is also the issue of 'mingling'. To quote from the same passage referred to by Singer J in **S v S** and taken from **Rossi v Rossi** at 24.6:

*“The non-matrimonial property is not quarantined and excluded from the court’s dispositive powers. It represents an unmatched contribution by the party who brings it to the marriage. The court will decide if it should be shared and if so in what proportions. In so deciding it will have regard to the reality that the longer the marriage the more likely non-matrimonial property will become merged or entangled with matrimonial property. In contrast, in a short marriage case non-matrimonial asset are not likely to be shared unless needs require this”.*

22. The classic example is the matrimonial home introduced into a marriage, or retained by a party after separation. It is not likely to be regarded as non-matrimonial property, but the circumstances of the case may justify it being treated as an unmatched contribution from one party.
23. In the present case, there are a number of difficulties with the Judgment.
24. The relevant date for assessing priority to be valued is clearly the date of the trial. This is clear from point 24.1 of the **S v S /Rossi** Judgment, and the Judge was wrong to say that the appropriate method of valuing the pension was its value in 2011. This could be relevant in determining apportionment, but it is not the correct starting point. In fact, there was an argument about whether the CETV provided was up to date, as there would have been a new calculation in December 2018, which was not available.
25. The parties both claim to suffer from health issues relevant to s 25(2)(e). The Judge was aware of the Husband’s and addressed them at paragraph 20 of his Judgment, but then appears to have dismissed them by saying:

*“The Husband does not enjoy good health. I have been provided with correspondence from various clinicians which indicated that he is under the care of, or has been under the care of the psychology services. The Husband made a number of submissions in respect of his mental health. As far as I am concerned the important issue is that of the contributions that each of the parties have made to the marriage”.*

It is difficult to see why this information was not relevant to an assessment of his future needs. There can be little doubt that Husband does have difficulties, as shown by his entitlement to PIP.

26. This is clearly a case about needs. The husband is on benefits, and on the evidence vulnerable. The wife, too, claims needs, as she does not have secure housing and has debts and mental health issues, albeit they do not prevent her from working. While contributions must be considered, the judge appears to have discounted all other factors in the s25 exercise in favour of the contributions point.
27. This is a long relationship, dating back to 1988, with a grown-up child. It is true that they only married in 2008, but this is surely a case where there was a “seamless” relationship moving from cohabitation to marriage. There is no exploration of the historic contributions, but the fact that the Wife joined the police while they were cohabiting and that acquired a part of the pension while they were together is surely an argument for the analysis suggested by the Pensions Advisory Group.
28. In short, the Judge appears to have been led into error by an over emphasis on the non-matrimonial accrual of part of the pension and of contributions over needs.
29. The lack of a report from a Pension on Divorce Expert (PODE) did not make the Judge’s task easy. I can see the difficulty in obtaining such a report, given the parties’ lack of funds to afford one. Nonetheless, the Report recommends that where there are public sector pensions with a value of over £100,000 a Report should be obtained. Police pensions are particularly affected as the length of service and benefits are generous, and the issue will be what pension is likely to be generated on retirement.
30. There is also the difficulty of estimating future needs when the Husband is and will be in receipt of State benefits needs. At Part 11.19, dealing with the interplay with state pensions and needs, the report advises:

*“Lawyers who are advising in lower income cases need to be aware of the potential interaction any pension sharing order or pension offsetting with eligibility for means testing both before and after state pension age in case this is material to the case, and to take specialist advice if this is likely to be an issue for one or both parties”.*

This is exactly the issue in this case, as it is the Husband’s case that he will suffer a loss of income on retirement which would be countered by a modest pension income, and without losing means tested benefits. I note that the Skeleton Argument on his behalf says that based on £137,000 with an annuity of 3% representing 30% of the pension pot he would receive £79 per week which would ensure that his income is maintained at the current level. I have no way of knowing at this stage whether these assumptions are correct, or what effect they would have on her income in retirement.

31. The correct approach must be to conduct a comparative analysis of the parties’ respective income and needs in retirement, taking into account all the s25 criteria, including health, needs and contributions, and the extent to which the Wife’s pension should be apportioned. Only then can a fair decision be reached.

32. It would be excessive to hold a complete rehearing, and the Judges factual findings are not the issue. After handing down this Judgment, I will hold a Directions hearing at which I will consider what steps should be taken to obtain the necessary information, and how, and before whom the matter should be decided.

**Richard Robinson**

**25<sup>th</sup> February 2020**