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Introduction:

There appears to have been some recent interest shown in a decision of HHJ Hess in **W v H (divorce financial remedies) [2020] EWFC B10** on the basis that the judgment sets out some new principles relating to pension distribution. In fact, it does nothing more than repeat the President's endorsement as to what should be now the accepted guidance to the judiciary and practitioners following the **Pension Advisory Group's 2019 Pension Report** on the approach to pensions in financial remedy cases.

Facts:

The facts are not essential and can be broadly stated as the parties' ages 50 (W) and 48 (H) cohabited from 1999 and married in 2005 and separated in 2016 with 3 children aged at trial 18,16 and 10. Their assets were the Fmh c £241k equity, some symmetry of debt in the low (£50/60k) and pension funds of CE value £152k (W) and £2.2m (H). It was common ground that H would have to meet spousal and child support top up orders. The Court ordered a 50/50 Mesher order in respect of the Fmh where W and children resided, **s 28** term spousal and child top up maintenance and pension share orders to equate the parties' income at a future date.

However, the case report publication does provide the opportunity to produce in a tabulated format as below the highlighted aspects:-

CIRCUMSTANCES	GUIDANCE
Needs cases	i) if parties are nearing retirement and defined benefit schemes are involved, pension income equal sharing is more likely to be appropriate than equal sharing of pension capital; ii) excluding pension accrued prior to the marriage may not be appropriate; iii) Offset only where needed.

Equality of income or of capital values	i) Sometimes it can be fair to divide pensions by capital value including e.g:- a) where their value is small compared to the overall asset value; b) where the parties are young and a long period away from potential retirement - ie projections as to income are highly speculative. ii) In some cases dividing by pension capital will not be fair including eg:- a) where the pension value is substantial compared to the overall asset value and needs are a priority; b) where within the pensions there is a defined benefit scheme; c) where retirement is within sight. iii) In general:- a) where the pension is accrued in the marriage and as a pension is for retirement income it will often be fair in a significant number of cases to pension share so as to provide equal incomes – especially if closer to retirement. b) where further from retirement the assumptions used to assess the income equality projection will be less reliable. c) a pension division which pays little attention to income-yield may reduce the standard of living of the less well-off party significantly.

Whether to exclude pre-marital pension accrual	i) The practice of some courts in making a straight-line deduction from the pension value to reflect that element accrued outside the marriage is inconsistent with the case precedent guidance generally towards the treatment of "non matrimonial" accrual outside marriage; ii) Further, a straight-line discount could result in unfairness such as where the pension holder has gained promotion and pay rises later in employment which has resulted in higher pension contributions within the marriage than before it
Offsetting	i) offsetting can be unfair where eg it results in a party being left with an unrealisable asset and the other party with liquid capital; ii) Thorpe LJ's approach in **Martin-Dye v Martin-Dye [2006] 2FLR 901** remains relevant - namely that pensions should be dealt with discretely to the other capital involved; iii) A Court should endeavour where possible to deal with "each asset class in isolation and avoid offsetting". iv) Particularly where offsetting is to be considered an actuary's report should be a prerequisite.
General	i) "In bigger money cases, where needs are comfortably me it is less important to draw a distinction between pension

	and non-pension assets partly because other assets will also be deployed for income production so the distinction is less obvious, but also because the "pension freedoms" introduced by **Taxation of Pensions Act 201** as a result of which those aged 55 or above have the option of cashing in some categories of pension scheme and this has blurred the dividing line between cash and pensions and in such cases the trend is now to treat pensions as disposable cash assets, thus disregarding their income producing qualities: see **SJ v R** [2014] EWHC 4054 and **JL v SL** [2015] EWHC 555. ii) In small to medium money cases, where needs are an issue, a more careful examination of the income producing qualities of a pension may well be required in the context of assessing how a particular order can meet need. The need to avoid the possibly punitive tax consequences of cashing in a pension may be more important in these cases and the mathematical consequences of making a Pension Sharing Order (for example because of an external transfer from a defined benefit scheme to a Defined Contribution scheme or the loss of a guaranteed annuity rate) can be unexpected and often justify expert actuarial assistance: see **B v B** [2012] 2 FLR 22 (p 23).

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