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PENSIONS AND INTERNATIONAL FAMILY LAW

An Organisation for Economic Co-operation and Development (OECD) Report from 2018 found that the United Kingdom Government pays the lowest state pension in the developed world, while The Netherlands pays the highest.

The UK falls way below the average across the OECD. Not surprisingly therefore private pensions and occupational pension schemes have for many years been commonplace in the United Kingdom. Indeed, it is now compulsory for all employees subject to certain criteria to contribute to workplace pension.

Against this background, family lawyers in the United Kingdom have been accustomed to dealing with pension assets as part of the financial landscape on divorce. Related to this is the increasingly international dimension to many families who routinely step from one country to another through a working career. This is not just the province of international financiers and airline pilots. Others are equally likely to have pensions in foreign schemes as well as within the United Kingdom.

English law enables pensions to be dealt with on divorce, as a result of the Welfare Reform & Pensions Act 1999 which introduced with further amendments and additions, pension sharing orders. The liberalisation of pension rules brought about by George Osborne's reforms in 2015 further developed the use of pensions as an asset, not only to provide for income in retirement, but also to provide more immediate needs.

Historically, issues have always arisen in terms of the valuation of pension assets and the apples and pears' arguments of a pound in a pension being quite different from a pound in a bank account. Whilst this remains true, the position is now slightly modified as a result of the 2015 reforms.

Substantial problems however still remain if for example a divorcing couple based in and domiciled in the United Kingdom, filing for divorce in England, have assets held in pensions which could be of substantial value but are located outside of the jurisdiction. It remains to be seen and understand how, if at all, the impact of Brexit will play out in this area of law.

The published Guide to the Treatment of Pensions on Divorce (July 2019) "the Guide", highlights the difficulties faced by practitioners in England and Wales when dealing with assets held in pensions abroad. This is also backed up by recent case law, in particular, see the decision of Mostyn J in Goyal v Goyal [2016 EQFC 50] in which the learned judge confirmed that a pension sharing order under the Matrimonial Causes Act 1973 is not possible in relation to a foreign pension asset unless there is strong evidence that an English pension sharing order would be enforced abroad. This is highly fact specific and no general approach can be gleaned or indeed set out given the differences in approach in different jurisdictions.

Indeed, it is worth considering that the very nature of a pension asset varies from country to country. Largely, countries in which state pensions are low, such as in the United Kingdom and who have a developed economy have a thriving private pension/ investment industry. However, that is not the case where state pensions are themselves substantial to some degree meet an individual's needs. Additionally the perennial question of valuation raises its head with even greater force when comparing the value of assets held in funds abroad with those held in this country. Perhaps more comparing apples with donkeys than with pears.

The Guide recommends a variety of options to deal with this problem. Again, much will depend on the specific facts of the case and on whether the order is in relation to making provision within an English divorce or in dealing with orders made in foreign jurisdictions. Different considerations apply depending on which direction of travel the pension order is moving in.

Further, the Guide makes it clear that there may well be specific jurisdictional issues which must be taken into account. For example, in Germany, pensions on divorce are shared according to a prescribed formula irrespective of where the divorce took place. Great care must be taken therefore to ensure that a party is not essentially awarded twice due to specific jurisdictional rules.

The Guide also highlights the possibility of offsetting although that in and of itself creates a whole raft of other issues: valuation and the basic problem that there are no hard and fast rules in offsetting one asset, a pension, against another non-pension asset.

Plainly if called on to advise in relation to a financial settlement with multi-jurisdictional issues and pensions in several countries, the costs are likely to be substantially higher than would otherwise be the case. Assuming it is proportionate to engage in a process of instructing what may be a number of different experts and lawyers in different jurisdictions, this is a task which must be undertaken as soon as possible to advise a client fully.

While at the one end of the spectrum it may be relatively straightforward, for example, it is generally the case that orders made in England and Wales are enforced in Scotland; when dealing with other jurisdictions the problem will be far more vexed.

For all these reasons, it is vital to obtain clear expert advice as soon as possible to assist clients in making appropriate choices.

Brexit has unsurprisingly, affected this area. Previously, it was possible to make claims following an overseas divorce in relation to pension sharing orders utilising EU law in the English courts, with certain provisos, but essentially to give effect to the terms of pension sharing orders made elsewhere relating to English funds.

Brexit ended this option and to date the Government has not proposed anything to fill this gap.

This is a potentially significant problem for some couples, but emphasises the need to take early, comprehensive advice before proceedings are started.

To find out more about how we can help you, or for further information on any of our services, please contact us.

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