

Understanding and Protecting Pension Sharing Orders

25th November 2020

Mena Ruparel

www.menaruparel.com

A blue rectangular box containing the name "Mena Ruparel" written in a white, cursive script.

Rhys Taylor

36 Family

A blue square logo with the number "36" in a large white serif font, and the word "FAMILY" in a smaller white sans-serif font below it.

Michael Horton

Coram Chambers

The logo for Coram Chambers, featuring the word "coram" in a large, bold, blue sans-serif font, with the word "CHAMBERS" in a smaller, blue sans-serif font below it.

FINANCIAL INFORMATION ASSESSMENT MEETINGS FIAMS

MENA RUPAREL

HOW DOES IT WORK?

- Solicitors/barristers/mediator refers couple to financial neutral
- Either they send the disclosure they have already collated
- OR they financial neutral collates information for the couple
- The Financial neutral meets with the parties to explain the finances
- FN explains what options there are with pensions and other financial products regarding settlement
- Advises whether PODE report needed or not/possibly helps the parties to draft letter of instruction
- Parties return to solicitor/barrister/mediator led negotiations

JUST ANOTHER ACRONYM?

Why do we need FIAMS?

- Lawyers are not financial advisers
- Lawyers do not understand pensions and financial products as well as FN's do

Who conducts the FIAMS?

- Financial neutral (IFA/Financial planner)
- Someone who also understands the divorce and FR process
- Can act in a PODE capacity if pensions are involved

Why pay for another professional?

- Easier to negotiate with all information
- Another professional can lift the burden from your shoulders

ROLE FINANCIAL NEUTRAL

FN does/can

- Accept instructions from both parties
- Act in a neutral capacity/is impartial
- Declare any conflict of interest
- Charge for FIAMS on fee basis not in anticipation of work
- Assist the parties to draft the PODE letter of instruction
- Act as SJE if parties are agreeable and FN is able to write report
- Accept work to implement orders only if both parties consent

FN doesn't

- Give advice that benefits one party only
- Have conversations with one party without the other knowing
- Do anything that could disrupt the parties negotiations/process

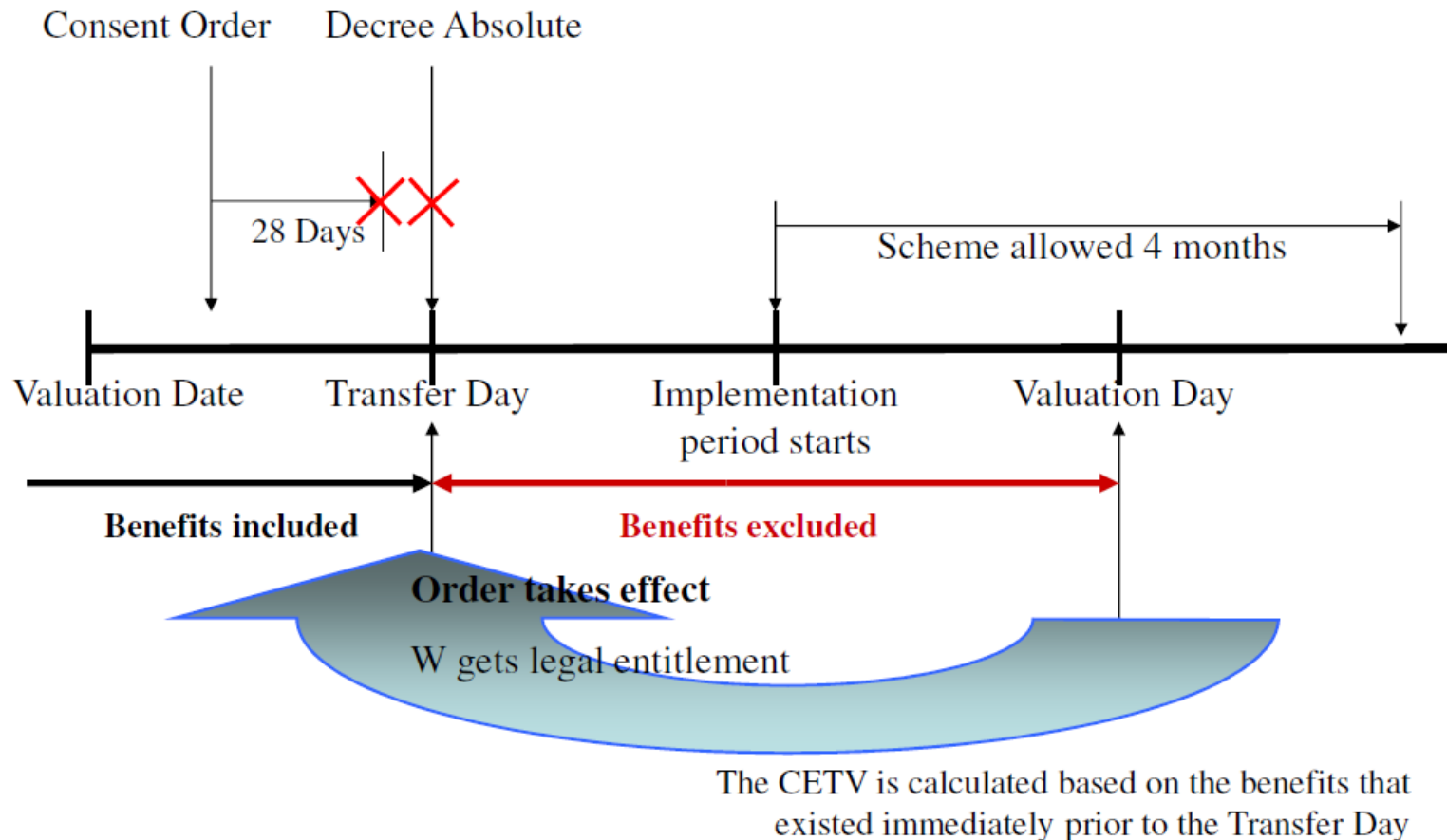
WHAT ARE THE POTENTIAL BENEFITS?

- Both parties understand the finances, particularly useful for financially weaker spouse
- Parties can ask the questions/answers together
- Cheaper to use one financial neutral
- Empower parties to negotiate realistically
- Relieve solicitors of the burden of explaining finances (badly)
- Eliminate problems of lawyers/mediators not understanding trickier financial issues
- FN can obtain further information if needed
- FN can draft letter of instruction to SJE to be more realistic having met both parties
- Implementation more likely to be trouble free

WHEN IS YOUR PENSION SHARE IN THE BAG?

RHYS TAYLOR

PENSION SHARING PROCESS



WHEN DOES PENSION SHARING ORDER "TAKE EFFECT" (TRANSFER DAY)?

Later of DA or 21 days + 7 days from date of order? As provided for by:

- s.24B (2) of the Matrimonial Causes Act 1973,
- s.24C (1) of the Matrimonial Causes Act 1973, and
- Regulation 9 of the Divorce etc (Pensions) Regulations 2000/1123.

WHEN DOES PENSION SHARING ORDER "TAKE EFFECT" (TRANSFER DAY)?

- Reg 9 Divorce etc (Pensions) Regulations 2000/1123 – actually says “7 days after the end of the period for filing of notice of appeal against order.”
- But – when FPR 2010 came in, time for appeal changed from “date of decision or order” (old Family Proceedings Rules) to “date of decision” (FPR 30.4(2)(b))
- Often the period for appealing will have expired prior to the order being sealed.
- But date of order always on annex and trustee will act on this in calculating Transfer Day.

WHEN DOES PENSION SHARING ORDER "TAKE EFFECT" (TRANSFER DAY)?

- So, if FDR with *Rose* order on 1 March, date of decision is 1 March. Transfer Day (if DA already made) arguably 29 March?
- r.9.35 – pension sharing annex must accompany an order.
- If order then sealed on 14 April (and already have DA) order has arguably already taken effect.
- What if:
 - Pension holder died between 30 March and 14 April. Has the pension order taken effect?
 - What is Transfer Day if pension holder dies on the 17 April?
 - Pension holder withdraws all funds in that timeframe?

WHEN DOES PENSION SHARING ORDER "TAKE EFFECT" (TRANSFER DAY)?

- Possible solutions:
 - Fill out on the day of FDR i.e. date of decision, or
 - Back/true date? (But what of compulsory retirement dates?)
- Tweaking the 28 day timetable in cases of urgency? FPR 30.4(2)(a)

DRAFTING

- Clean break “upon implementation of PSO”?
- Be clear what pension is being shared. Get annex right.
- What undertakings might you require [PAG Appendix F.9]?
 - Will not knowingly draw, transfer or deal in any way with benefits pending implementation [save as may otherwise be agreed]
 - Will not seek DA until after 28 days and thereafter will then seek DA forthwith
 - Will use best endeavours to implement PSO
 - Will pay share of implementation fee forthwith on written request [PAG Appendix F.22]

PROTECTING PENSION SHARES

MICHAEL HORTON

FREEZING ORDERS AGAINST PENSIONS

- A is 56
- She has a dc personal pension
- CE £400k
- B wants a pension share
- Can he stop A drawing all or part of her pension as cash?
- Does it matter?
- Maybe not – as long as the cash does not go walkies
- But A withdrawing cash means big tax bill
- If B wants a pension, he can get tax relief on putting cash into his pension
- But only up to limit of his UK taxable income, capped at £40k ...

FREEZING ORDERS AGAINST PENSIONS

THE TEST

- To freeze A's pension, and prevent A making withdrawals
- B must show there is a real risk that A is intending to make a withdrawal in an unjustified way with intention of defeating B's pension sharing claim
- Does it make a difference if all of A's pension accrued during the marriage, such that B has a 'sharing' claim to A's fund?
- Probably not – test still same

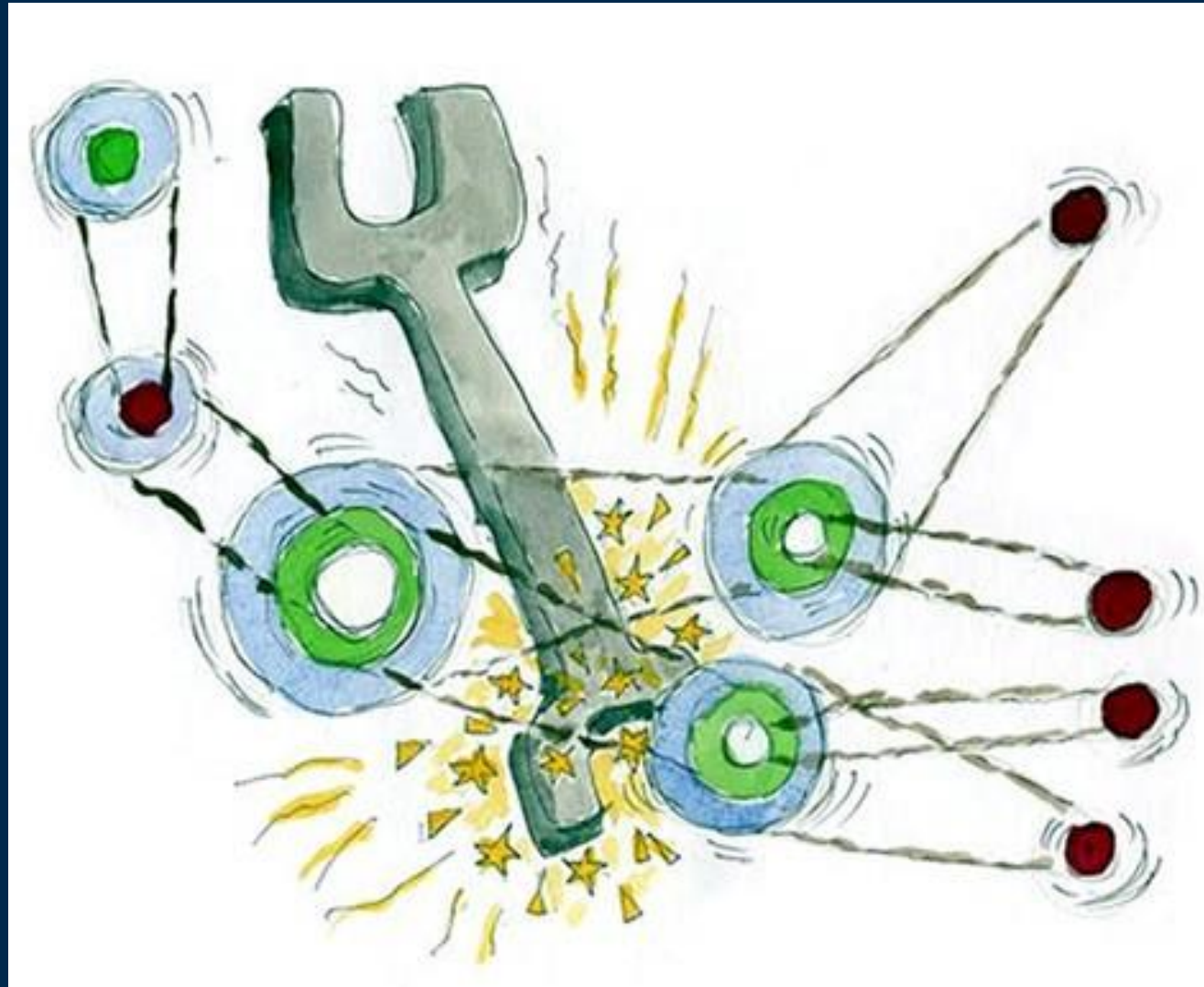
FREEZING ORDERS AGAINST PENSIONS POST JUDGEMENT

- The case goes to trial
- B gets a pension sharing order for 50% of A's pension
- Nothing to stop A withdrawing whole lot to defeat the order
- Once funds out of the pension wrapper, not straightforward to put them back in
- Post judgment, test is whether there is a real risk that judgment will remain unsatisfied if injunction refused: Masri [2009] QB 450
- How does B satisfy this test?
- Immediately ask A for undertaking not to withdraw funds
- If A refuses for no good reason,
- Test is met

FREEZING ORDERS AGAINST PENSIONS POST JUDGEMENT

- NB also pension share is quasi-proprietorial order
- B has now a 'share' of A's pension
- 50% is 'his' – if A refuses undertaking, court should make order
- Freezing orders have extended penal notice
- Bind third parties indirectly – contempt to assist/ permit respondent to breach order
- So include extended penal notice
- Serve on pension trustee

ISSUES WITH CERTAIN TYPES OF PENSIONS



ISSUES WITH CERTAIN TYPES OF PENSIONS

- Occupational schemes (not just DB schemes)
- Guaranteed minimum pension entitlements
- Armed Forces pensions
- For all of these, court cannot make order for payment of benefits into court
- Or into escrow account
- Eg Walker [1983] Fam 68
- But freezing order can be made:
 - allowing for payment of benefits only to specified bank account (owned by member),
 - and freezing that bank account

ISSUES WITH CERTAIN TYPES OF PENSIONS

- Orthodox view re occupational pension and GMP entitlements
- Court cannot make freezing order against such schemes which prevent receipt of future entitlements
- See Pensions Act 1995, s 91
- Pension Schemes Act 1993, s 159
- Armed Forces Act 2006, s 305
- These provisions stop any court making any order which would prevent receipt of benefits
- But armed forces: only stops order which prevents receipt and requires payment to another

ISSUES WITH CERTAIN TYPES OF PENSIONS

- Of course, there are exceptions, including:
 - Pension attachment
 - Pension sharing
- But no specific exemption for freezing or s 37 injunction to protect such claims
- If orthodox view is right:
 - Spouse with occupational scheme can thwart pension sharing order
 - No injunction can touch them
- We seek to challenge orthodox view (Fam Law – forthcoming)
- Purpose of s 91 etc is to protect pensions from ordinary execution
- Not stymy protection of pension shares

TIPS / LAW REFORM

- Tell pension trustees asap that order has been made
- Don't wait for sealed order
- Serve the rule 9.36 docs – don't wait for the court
- Legislative and rule changes asap:
 - Clarifying when pension sharing orders take effect
 - Allowing for freezing orders to protect pension sharing and attachment orders

BACK PAGE

These slides are no substitute for professional advice and should not be relied upon as such.

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