

ATTACKING AND DEFENDING (PENSION) TRUSTS IN DIVORCE



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Pensions can be of huge significance for divorcing high-net-worth couples. The most recent ONS figures show that for the wealthiest 10% of households, private pensions amount to 44% of overall wealth, compared to 30% held in property and 22% held in other investments.

Divorce practitioners will no doubt be familiar with the bespoke tools which have been provided – by amendments to the Matrimonial Causes Act 1973 – in order to allow one spouse to obtain a share of the other spouse’s pension: pension sharing orders under section 21A and pension attachment orders under section 25B.

But what about when those tools are not available, or not convenient? What about, for example, overseas pensions falling outside the definition of “pension arrangement” under the 1973 Act?

Whilst it will often be possible for the Court to “offset” the pension assets against non-pension assets as part of the overall award, that will not always be the case—especially if the non-pension assets are limited, or are themselves held in complex structures.

It will sometimes therefore be necessary or desirable to target the pension benefits directly. And in many cases, those pension benefits will be provided through trust structures.

This article explores how some of the tools used to attack trusts in general might be deployed in the specific context of pensions, and how such attacks might be defended. In the space available, it cannot hope to be exhaustive; rather, it is intended as a springboard for further discussion within the HNW Divorce community.

1 Varying the pension trust as a nuptial settlement

In *Brooks v Brooks* [1996] 1 AC 375, the House of Lords upheld a district judge’s decision to vary a pension trust as a nuptial settlement under section 24(1)(c) of the Matrimonial Causes Act 1973.

Following that decision, the legislature intervened to restrict such use of section 24(1)(c), but only in relation to (onshore) “pension arrangements” as defined in the 1973 Act.

The result is that, where an overseas pension trust falls outside that statutory definition, it is capable – in principle, at least – of being a nuptial settlement and of being varied by the Court.

It is worth noting, however, that *Brooks v Brooks* itself concerned a small pension trust of which the husband was the only member. The husband also controlled the employer and had procured the establishment of the scheme. Lord Nicholls, giving the leading judgment, recognised that the same analysis was unlikely to apply

in the case of a larger “multi-member” scheme.

In addition to denying nuptiality, the trustees of the pension trust could be expected to object that no variation should be made which might prejudice the interests of the other members, and that any variation should be consistent with the applicable tax regime.

Those objections could be expected to carry less weight, though, if the relief sought went no further than to “mirror” the effect of the more usual pension sharing order.

Even a spouse who succeeded in obtaining an order under section 24(1)(c) may still face difficulties at the enforcement stage if the jurisdiction in which the pension trust was established did not recognise or enforce the English court’s order. Before seeking a potentially useless order, the spouse would be well-advised to consider both the general conflict of laws rules and any specific “firewall” legislation applicable in the trust’s jurisdiction.

2 Attacking the pension trust as a sham

Staying with small pension trusts, another weapon in a spouse’s arsenal might be to argue that the trust is a sham. So, for example, where a wife has procured that substantial sums are held in an (onshore or offshore) pension trust, the husband might argue that her

true intention – shared with the trustee – was different from that suggested by the governing documents.

Alternatively, he might make a Pugachev-style argument that the true effect of the governing documents is to leave the wife with beneficial ownership of the pension assets.

Again, however, it is likely to be difficult – if not impossible – to sustain either of those arguments against a large multi-member pension scheme, with well-drafted governing documents and proper independent trustees.

3 Claiming the pension benefits under a constructive trust

In a case where the evidence supports a common intention by husband and wife that their assets should be held jointly – a substantial hurdle in itself – it might then be possible to trace pension contributions into the pension trust itself and so to claim a beneficial interest in the pension rights granted in return for those contributions.

A tracing exercise of this kind is more suited to personal pensions – where a spouse has made contributions from their own assets directly to the pension trust – than to occupational pensions involving employer contributions.

4 Enforcing a lump sum order against the pension trust

Where no substantive order can be sought directly against the pension assets, a spouse might need to wait until the enforcement stage before attacking the pension.

A key difficulty in enforcing against assets held in a pension scheme is that the member can often control when their benefits are paid. So there may be no income or assets against which the usual methods of enforcement can be used.

Even the “nuclear” option of pursuing bankruptcy will not work, as pensions are excluded from the bankrupt’s estate.

There is, however, a mechanism for enforcing against assets held in a pension scheme. In *Blight v Brewster* [2012] EWHC 165, the High Court made an order requiring a judgment debtor to exercise his right to withdraw a lump sum from the pension fund, to be used to repay the creditor. (Importantly – as Chris Pocock QC and Kristina Kicks pointed out in the last issue of this magazine – this mechanism does not apply where the spouse has already been made bankrupt.)

This mechanism is, though, subject to the important limitation that the paying spouse must have a right to withdraw a lump sum from the pension fund—and this may well, depending on the applicable tax regime, mean that it cannot be used until they have reached the relevant retirement age.

5 Finding more amicable solutions?

A less combative approach would be to identify a means of extracting value from the pension trust under its own terms. A husband’s pension trust may well include “levers” which could be used to benefit the wife. For example, if a husband is nearing retirement age and he has the option of taking some or all of the pension benefits as a lump sum, he might agree to do so as a means of meeting her sharing claim.

An even less combative approach – albeit one which the majority of divorcing couples could be expected to balk at – would be for the parties to agree to stay the decree absolute or undergo judicial separation without divorce. This could preserve the wife’s entitlement, if there is one, to a widow’s pension on the husband’s death—but at the expense of being unable to remarry.

As with any divorce where a spouse seeks to attack a trust, in the pensions context there is an arsenal of weapons available but no silver bullet. And whilst this may not be of comfort to our clients, it does at least keep our lives interesting as lawyers.

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