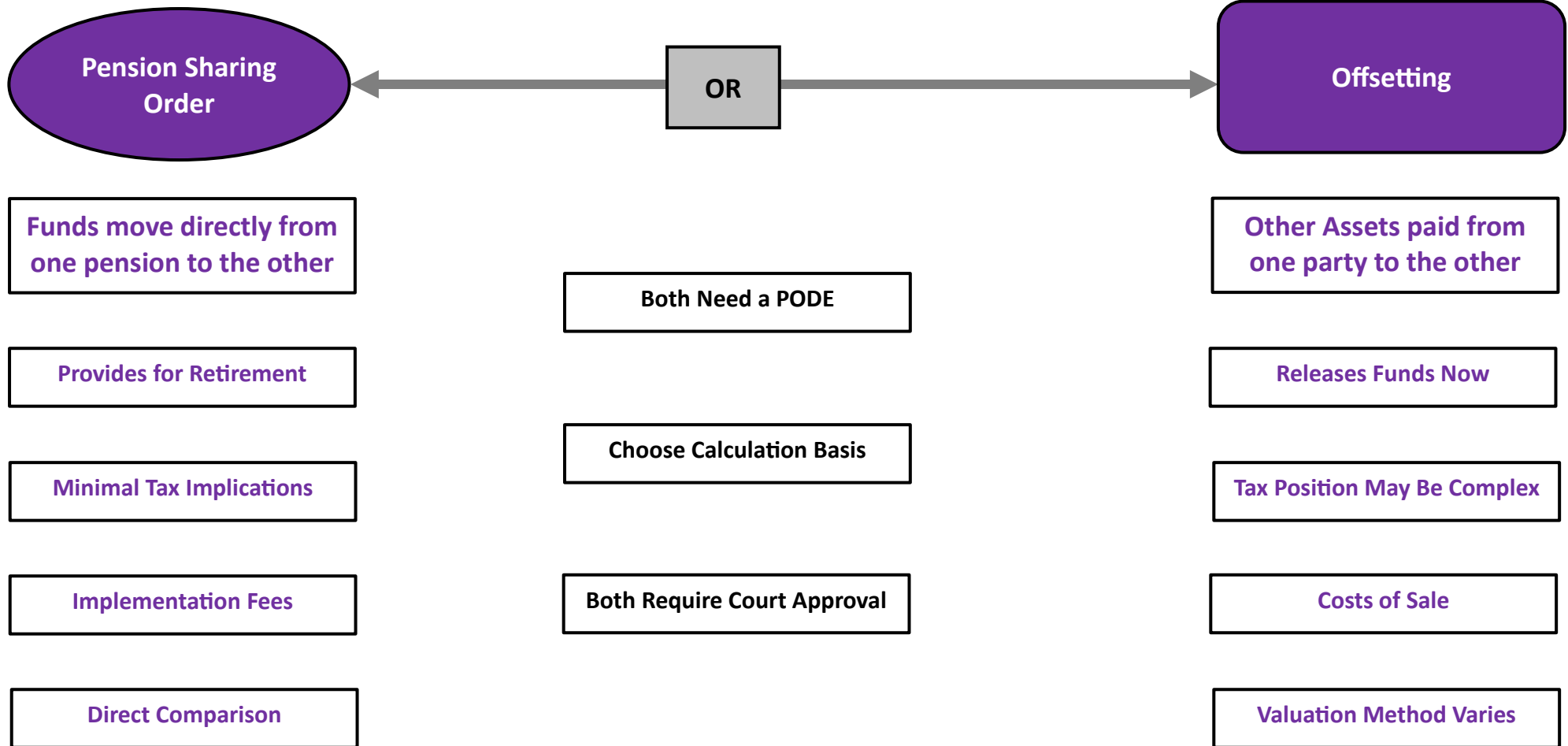


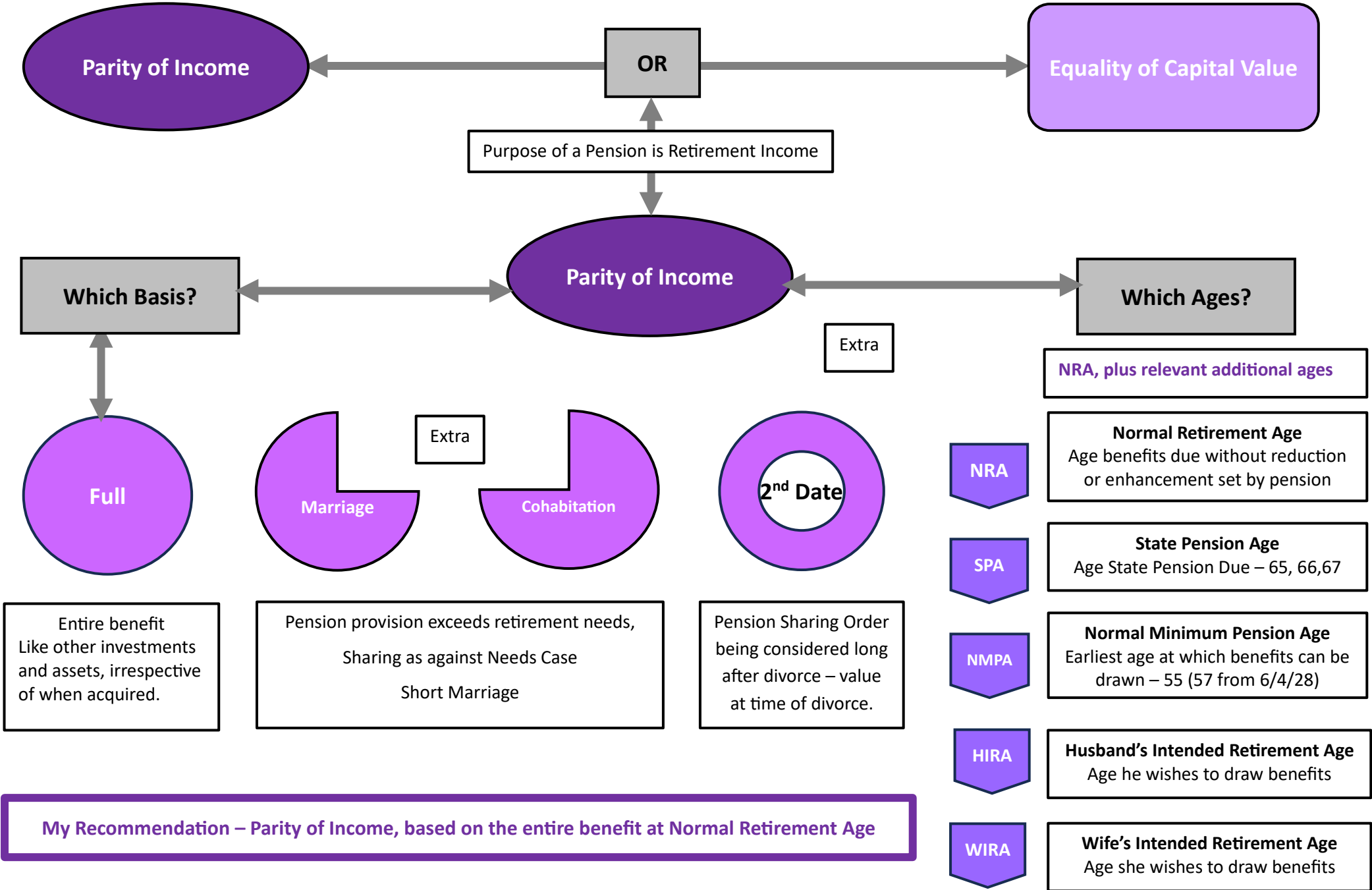
# Pension Sharing Order or Offsetting



## My Recommendation – Pension Sharing Order – Parity of Income at NRA

Only include Offsetting if the exchange of an alternative asset suits both parties' needs. It is also necessary to ensure both are comfortable with the methodology of calculation, which will differ between PODEs.

# Pension Sharing Order - Which Calculations?



## **Pension Sharing Order**

In my professional opinion, the right basis is Parity of Income (A pension is designed to provide for retirement) based on the date the benefits are due i.e., Normal Retirement Age (NRA).

As part of the process is to assess what is due in today's terms, the figures are all compared as at now, so they do not all need to be payable at the same point. This then enables me to achieve Parity of Income currently.

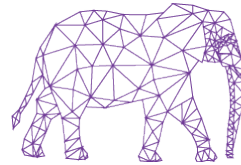
It means that any peculiarities of schemes don't skew the figures. For example:

- The State Scheme benefits cannot be drawn before State Retirement Age, so any estimate of benefits before then is based on a false theoretical reduction for early retirement.
- Some schemes (e.g., Barclays) don't allow late retirement, so using State Retirement Age involves using a false theoretical addition for late retirement.
- The older Public Sector Pensions NHS, Teachers, Armed Forces, Civil Service and the like allow Late Retirement, but pay the pension arrears built up between when they were due and the actual retirement age as a lump sum. This means they effectively treat them as retiring on the due date and don't increase the benefits. The individual receives the same pounds and pence income if they take them at the original Normal Retirement Age (NRA) of 60 or at say 65 (the subsequent section NRA) or the State Retirement Age, which generally applies to the current version of those schemes. If for example the individual were due £10K p.a. at 60, they would be due £10K at 65. If I then discount that into today's terms using inflation, the value based on 65, would be lower, because there is an extra five years of inflation to consider.
- Some schemes don't allow Early Retirement. This is most usual where a large proportion of the benefit allows for contracting out and the cost of the benefits can't be covered by the fund set aside. This tends to affect Defined Contribution Schemes which incorporate a Defined Benefit Element or a Section 32, which is an older type of plan designed to accept a transfer from an old scheme.
- A Defined Contribution Plan which includes Guaranteed Annuity Rates, will generally only offer that guarantee at NRA. So, if the required age differs, that will revert to a Defined Contribution plan, offering an annuity which the fund will buy.
- Additionally, a Deferred Annuity, which is an insurance policy bought to replace a member's defined benefits when a scheme closes, will usually only promise the benefits at the NRA. At any other time, it is more like a Defined Contribution plan and will provide whatever the fund will buy.

## **Offsetting**

An offsetting Calculation is only relevant if the plan is to transfer other assets rather than apply a Pension Sharing Order. It is possible to combine the two i.e., part PSO and part Offsetting and this may be useful in some scenarios.

If the split of the other assets has already been agreed, or the plan is to apply a Pension Sharing Order, it is unnecessary to consider offsetting.



## Explanatory Notes - Fees and Letters of Instruction

I have prepared the following note to supplement and clarify the fee estimate and set out my thoughts in relation to the Letter of Instruction.

### Fixed Fee

My fixed fee for all PODE (Pension on Divorce Expert) reports is £2,280 (£1,900 + VAT), which equates to £1,140 including VAT for each party. I am able to raise fee invoices excluding VAT, when an individual is not resident in the UK. I can reapportion the fees, to ensure both parties benefit from that saving.

I will invoice each party £285 on instruction (£237.50 + VAT) and a further £285 (£237.50 + VAT) each once I have the various pension details and can start work on the computations and drafting. In both cases I will not start that next stage of the work until payment is received.

I will then raise the invoice for the final 50% on completion of the report, which equates to £570 each (£475 + VAT). The report will be issued on receipt of that final instalment.

This offers the individuals staged payments, which assists them. It also gives me some protection and certainty of payment.

### ***Supplemental Fee information***

If I am required to undertake additional calculations after the report has been completed, my standard fee is £360 (£300 + VAT) for each variation required.

If I am required to attend court my fee is £720 (£600 + VAT) plus expenses for each day or part thereof.

My Fees are reviewed annually on the 1<sup>st</sup> April each year. These are the fees which came into effect on 1<sup>st</sup> April 2024.

## **Calculations Included**

That fixed fee of £2,280 (£1,900 + VAT) includes the any or all of the following calculations:

- Pension Sharing Order to achieve Parity of Income
- Pension Sharing Order to achieve Equality of Capital
- Supplemented by figures based on benefits accrued at a previous date
- Augmented by assessments apportioned for Period of Marriage or Cohabitation
- Alternative Offsetting figures for each of the above scenarios

## ***Optional Ages***

Each of the above computations can be determined based on the benefits available at:

- Normal Retirement Age of each of the relevant benefits
- Normal Minimum Pension Age (currently 55, but 57 from 6<sup>th</sup> April 2028)
- Up to three further alternative Equivalence Ages

## ***Factors Considered***

All the calculations allow for

- State Pension accrued at the date of calculation
- Reflect the differential in valuation basis, determined by the type of plan and any associated guarantees
- Take account of any additional lump sum provision
- Consider the relevance and impact of the McCloud Remedy if relevant
- Allow for the lingering impact of Lifetime Allowance and any associated protections where relevant

## ***Format of Reports***

Reports also include:

- Summary Results tables
  - Estimated income after the application of any Pension Sharing Order
  - Details of fees imposed for Implementation of the Pension Sharing Order
  - Recommendation (with explanation) of most suitable option in my professional opinion
  - Offsetting Values if required
- Main Body of report
  - Confirmation of instructions and data ascertained
  - Summary of existing benefits
  - Evaluation of Cash Equivalent Values

- Estimates of Income available to both parties
- Explanation of income adjustments required
- Comparison of alternative options if more than one pension available
- Detailed analysis of impact of Pension Debit and Pension Credit on income
- Resultant income available to each party
- If Offsetting required:
  - Offsetting figures for each plan based on benefits available
  - Sliding Scale for Offsetting
- If Equality of Capital Value is also required
  - Estimates of Capital Value available to both parties
  - Explanation of Capital value redistribution requirements
  - Comparison of alternative options if more than one pension available
  - Detailed analysis of impact of Pension Debit and Pension Credit on income
  - Resultant income available to each party
  - If Offsetting required:
    - Offsetting figures for each plan based on Capital Value
    - Sliding Scale for Offsetting

Each is repeated for the various options i.e. different date, period of marriage or cohabitation and various equalisation ages required.

Reports are prepared in accord with Pension Advisory Group (PAG) Guidance.

Reports are compliant with FPR Part 25, including the appropriate qualification information, CV, declaration, and statement of truth.

## Letter of Instruction

Though my fees are fixed and inclusive, I would still suggest that any Letter of Instruction is restricted to the scenarios pertinent to the case.

If each and every one of the potential scenarios is included the results will be an alarming array of alternative figures. That will create confusion and additional work for the parties and their legal representatives incurring extra legal costs.

I have therefore set out notes about my views of the relevance of each, which is based on my experience and informed by the Pension Advisory Group (PAG) Guidance. I hope this will assist in the drafting of the Letter of Instruction and avoid unnecessary work on all our parts.

### **SP v AL [2024] EWFC 72 (B)**

HHJ Hess cited PAG as his “guide” as to the correct approach for dealing with pensions.

He added that the support PAG had from the Family Justice Council (FJC) and the President of the Family Division meant the report was “prima facie persuasive in the areas it has analysed, although of course susceptible to judicial oversight and criticism”

HHJ Hess suggests “it stands as the proper approach”

### ***Parity of Income v Equality of Capital Value***

The first step is to decide whether the apportionment should be based on the Income available or the Capital Value of the pensions. The PAG Guidance is clearly supported by the Judge in the following case, who was the Co-Chair of PAG.

### **W v H (divorce financial remedies) [2020] EWFC B10**

In this case, HHJ Hess concluded that:

- In a needs case, where the parties are ‘nearing retirement’ and defined benefit schemes are involved, equal sharing of pension income is more likely to be appropriate than sharing of capital.
- You should include all pensions accrued prior to the marriage. *‘It is difficult to see that excluding any portion of the pension has justification’.*
- Offsetting should be avoided where possible.

## **SP v AL [2024] EWFC 72 (B)**

HHJ Hess drew on three sources for guidance:

- W v H (cited above)
- PAG
- Family Justice Council's report "Guidance on Financial Needs on Divorce" (2018 Edition)

Having considered these and the seven year age gap in this case HHJ Hess determined Parity of Income was preferable to Equality of Capital Value.

### **PAG**

The PAG Guidance does consider Equality of Capital Value may be more appropriate for younger divorcees and in other very specific circumstances.

### ***Pension Sharing Order to achieve Parity of Income***

It is generally accepted that the purpose of a pension is to provide income in retirement. To my mind Parity of Income is therefore the most appropriate way to assess and divide the benefits fairly and equitably. I expect this requirement to be included in all Letters of Instruction, but it is also necessary to consider the associated age to be used (see Equivalence Ages).

### ***Pension Sharing Order to achieve Equality of Capital***

Providing the same Capital Value to both parties, mirrors the starting point in relation to the other finances, but is not directly relevant for the pension as it will not give them an equal benefit.

The actual benefit each derives from the capital value varies. It can be impacted by their age, gender occupation and health. This will also be affected by which type of scheme provides the benefits. Additionally, it will depend on how the pension is eventually drawn and when.

### ***My View***

I would therefore recommend that Parity of Income is used as the basis for the Pension Sharing Order as against Equality of Capital Value in the majority of cases.

I concur with PAG, that Equality of Capital Value is more appropriate for younger (under 40) divorcees. This is based on the premise that the income figures are all estimates based on assumptions and as such less reliable over a longer term.



Equality of Capital Value will also be relevant in a case where all of the pensions are Defined Contribution and include no guarantees i.e. Guaranteed Annuity Rates (of any form) or With Profits (or other similar investments, with a fixed return). However, in those cases it is also unlikely a PODE Report will be required.

### ***Full Benefits v Apportioned Benefits***

The Pension Advisory Group Guidance is clear that the Period of Marriage or Cohabitation should only be considered where the parties have more than sufficient to meet their retirement needs. This reflects the fact that the court can take into consideration the entirety of the couple's assets irrespective of when they were acquired and so the same treatment should apply to their pension benefits.

This is in line with the legislation in England and Wales. The situation does differ in Scotland, (and indeed many other countries), where the legal requirement is only to consider benefits accrued during marriage.

As noted in the case of *W v H*, quoted earlier, HHJ Hess stated:

*'It is difficult to see that excluding any portion of the pension has justification'.*

He was of course referring to a **needs case** as against a **sharing case**. This is again an aspect covered in depth by PAG. PAG is clear that apportionment based on Proportion of Marriage or Cohabitation should only be requested if the parties have large pension benefits, which will provide more income than they need. This is rarely the situation in the cases I see.

### ***Needs Cases***

The majority of cases I see are "needs cases".

A "needs case" is one where the parties have insufficient pensions and other assets to meet their reasonable retirement needs. This is not directly related to the size of those pensions.

Some individuals will have benefits with a Cash Equivalent Value in excess of £1M, which would have exceeded the old Lifetime Allowance. One might think they could not be described as "needs cases", but in practice, in pension terms that is not actually a great deal of money. It costs a significant amount to provide an income for life. Furthermore, once the benefits are shared, they will each have significantly less.

Most individuals will have Cash Equivalent Values which even combined are well under that £1M barrier. Those are almost certainly “needs cases”.

If neither party has sufficient to meet their retirement needs, it seems unreasonable to exclude pension benefits they had at the point of marriage. This is consistent with all other assets which are considered marital unless specifically excluded.

### ***Sharing Cases***

A “sharing case” is one where the parties have more than sufficient pensions and other assets to meet their reasonable retirement needs.

This is again not directly related to the size of those pensions.

- They could have “small” pensions (the £100K quoted in PAG, is purely a guide) and significant other assets which means the pensions are largely irrelevant in the overall sharing proposition.
- They could have reasonably large pensions which are still dwarfed by their other assets and so similarly of less significance in the overall apportionment.

### **SP v AL [2024] EWFC 72 (B)**

HHJ Hess considered whether all the benefits or only those accrued during the marriage should be available for sharing. He determined there were two points to consider:

- Is it a “needs case” or a “sharing case”  
If needs all pensions in the mix, if sharing apportionment may be appropriate
- Section 25 factor to take into account “the duration of the marriage”

HHJ Hess decided this was a sharing case with a marriage of medium length:

- Pensions totalled £1.89m with all but c.£21K being in the NHS Scheme
- Marriage was nine years long

### ***Short Marriage***

The other aspect relevant here is that in a “short marriage” it is possible to request exclusion of assets and pensions are subject to the same judicial discretion. The big question then is what a “short marriage” and the associated impact on the “sharing principle”; the principle that the matrimonial assets will be shared equally between the parties unless there is a good reason they should not be. That is clearly a legal rather than pensions based question and so outside my area of expertise.

### ***Period of Marriage / Cohabitation***

I also receive requests which ask for figures based on both Period of Marriage and separately the Period of Cohabitation.

The PAG View is that: Pre-marital cohabitation running seamlessly into marriage should be treated as part of the marriage. The case law on which that premise is based predates PAG by many years.

### **GW v RW (2003) EWHC 611 (Fam)**

Mostyn Q.C. (sitting as a deputy High Court judge) in this case stated:

“I cannot imagine anyone nowadays seriously stigmatising pre-marital cohabitation as “living in sin” or lacking the quality of emotional commitment assumed in marriage. Plus, in my judgment where a relationship moves seamlessly from cohabitation into marriage without any major alteration in the way the couple live, it is unreal and artificial to treat the periods differently. On the other hand, if it is found that the pre-marital cohabitation was on the basis of a trial period to see if there is any basis for later marriage then I would be of the view that it would not be right to be included as part of the “duration of marriage”.”

### ***Supplemented by figures based on benefits accrued at a” Second Date”***

I can provide additional figures based on those accrued at an earlier date. This is useful where a Pension Sharing Order is being assessed sometime after the parties separated. It may also be relevant if one party has had a notable change in employment circumstances after the separation.

### ***My View***

When I receive a Letter of Instruction which includes a request for some form of apportionment, I will question this. If it seems unlikely the judge will allow exclusion of part of the benefit, because it appears to be a “needs case” calculating figures on that basis seems a waste of time for me. Incorporating such figures suggests they are an option to be considered, which gives the divorcing parties and the court a certain amount of misdirection. My duty is to the court to provide clear guidance on the appropriate Pension Sharing Order. It seems to me that including figures I do not believe are relevant contravenes that duty.

If asked to consider both cohabitation and marriage, I ask whether that pre-marital cohabitation ran seamlessly into the marriage and therefore whether the longer period is actually the relevant one.

Again, I will need to take instruction from the instructing solicitors or the divorcing parties, but if the figures are not truly required, the same argument applies.

If the parties cannot agree and one insists, they are included I will of course do so. However, in most cases I find the requirement is dropped based on my logical explanation of the reasoning they are not relevant.

The requirement to consider the values on a specific "Second Date" is pertinent in specific cases, but not relevant for the majority. Again, if this appropriate, I would recommend that this is based on Parity of Income.

### ***Alternative Offsetting figures for each of the above scenarios***

This may be useful where it is likely that one party will accept an alternate asset in exchange for pension.

The Pension Advisory Group (PAG) Guidance devotes an entire section of its report to Offsetting, examining various options for evaluation. It also confirms that this is the area in which PODEs are in most disagreement about the methodology. It is exceptionally difficult to compare a pension which promises a whole of life income at some point in the future, with an asset like the Former Matrimonial Home, which is essential but not income producing.

Again, I shall refer to HHJ Hess's conclusions in **W v H (divorce financial remedies) [2020] EWFC B10**, where he said Offsetting should be avoided where possible.

HHJ Hess reiterates this in **SP v AL [2024] EWFC 72 (B)**

In this case, HHJ Hess considered offsetting or pensions sharing considering two things:

- Thorpe LJ's views in *Martin-Dye v Martin-Dye* [2006] 2 FLR 901  
HHJ Hess summarises that as "pensions should be dealt with separately and discretely from the other capital assets"
- PAG  
"Try, if possible, to deal with each asset class in isolation and avoid offsetting – a discrete solution which equalises pensions by pension sharing orders and which equalises non-pension assets by lump sum or property adjustment orders"

HHJ Hess then concludes that although the preference is for pension sharing, sometimes the facts of a case make offsetting unavoidable.

In my view, it is not beneficial to consider the Offsetting Value unless it is likely to be used. It is determined in an entirely different way. The unnecessary inclusion of Offsetting Calculations will only serve to cause confusion and raise additional questions.

### ***Options in relation to Ages***

I have said that each of the Pension Sharing Order computations can be determined based on the benefits available at:

- Normal Retirement Age of each of the relevant benefits,
- Up to three further alternative Equivalence Ages
- The Normal Minimum Pension Age

In my computations I estimate the benefits due at the relevant age and then discount them back to the report date, so that all the figures are into today's terms. It is highly unlikely that the differing sources of benefit will have the same Normal Retirement Age. Some schemes do now provide benefits in line with State Retirement Age. Parity of Income at Normal Retirement Age may mean they both have the same income in today's terms, but payable at different ages.

Some schemes (especially the older Public Sector ones) do not offer revaluation or increases if benefits are drawn after the Normal Retirement Age. This means the member will receive the same amount of income at State Retirement Age, as they would have done at the Normal Retirement Age. As that figure will then be discounted to today's date, it will be less valuable. In that scenario Equalisation at State Retirement Age will be vastly different to Parity of Income at Normal Retirement Age. This will skew the Pension Sharing Order in favour of the member of the scheme incorporating that restriction.

Some private sector schemes do not allow early or late retirement. That means in those cases, any projection at a different age, will only be theoretical. This will of necessity be based on a fictitious adjustment which will not be applied in practice. The true situation is the benefit will not be paid at the chosen age.

I am frequently instructed to use State Retirement Age, but it is quite usual for that to differ; for example, to be 66 for one party and 67 for the other. This will be due to the age differential between

them and will simply further exacerbate the impact of that. The State Pension does allow individuals to defer drawing benefits, but it is not possible to take them before State Retirement Age. This means that a comparison aiming at an earlier age is based on a hypothetical assessment for that benefit.

The same fund value now in a Defined Contributions Scheme will provide more pension at a later date due to the investment return achieved in the interim. Aiming for Parity of Income as against Equality of Capital Value will reduce the distortion this creates.

I am aware that some Letters of Instruction request figures at numerous ages, reflecting the parties intended or planned age to draw benefits. That is not the purpose of a Pension on Divorce Expert Report. The PODE Report does not reflect what income they may have at retirement; it applies a theoretical value to assess an equitable split. Those type of assessments are in the purview of the individual's Financial Adviser and should be considered entirely separately.

I will incorporate the figures at the relevant Normal Retirement Ages (including the appropriate State Retirement Age for the State Pension). To my mind that is when the benefits are due. This minimises the impact of restrictions imposed by the individual schemes on the drawing of benefits. As my computations are undertaken based on the figures in today's terms, the projections automatically reflect the differences in the dates they are due to be paid.

Adding another alternative Equivalence Age or two even three further ages, will simply result in additional figures. It is important to appreciate that all of these are estimates and any change in the assumptions will directly affect the results. The benefits they eventually draw will be entirely different as the assumptions used within the calculations will not be matched exactly in practice. Furthermore, they may accrue further benefits or changes in the scheme rules, provider charges, State Pensions, legislation, case law or indeed a myriad of other factors outside their control will impact on the value of the benefits.

Similarly, a further calculation based on Normal Minimum Pension Age can be included. That is currently 55 but increases to 57 from 5<sup>th</sup> April 2028. Adding this in will give yet another set of results. It is only really relevant if both parties do want to retire as soon as possible.

My fear is that incorporating numerous figures will only polarise the two divorcing parties. The one suffering the Pension Debit will choose the smallest number and the one due to benefit from the

Pension Credit will opt for the highest. They may wish to be equitable, but it is only natural to prefer their own position. I believe they should agree the basis before they see the numbers, that way the report helps rather than hinders the process.

In my view the most appropriate age to use is the Normal Retirement Age and aim for both parties to be in receipt of the same income in today's terms.

### ***State Pension***

The Pension Advisory Group Guidance requires State Pension Provision to be considered reflecting the differential in benefits individuals may hold. There is a theoretical facility to apply a Pension Sharing Order to the State Pension, but it is not workable in practice. The impact is therefore reflected in the Pension Sharing Order applied to other benefits.

The State Pension was changed significantly in April 2016. It remains a mainstay of many an individual's retirement income. Theoretically, all individuals are due the same flat rate amount. However, the transitional arrangements in place due to previous changes and the way in which the benefit is acquired mean it does vary. I consider the benefits already held at the time as against those potentially available, which is consistent with other schemes and plans. Again, these are assessed in today's terms.

In my view the State Pension should be evaluated as and when it is due. The aim should be for Parity of Income based on the benefits due at the relevant State Retirement Age, in today's terms.

### ***Summary***

I would suggest that normally the Letter of Instruction requires the Single Joint Expert to compute the figures for Parity of Income based on the relevant Normal Retirement Ages of the couple's benefits.

I think the following supplemental calculations will be relevant in specific circumstances:

- *Alternative Ages* – Only if the parties have previously planned to retire at a specific age
- *Benefits accrued at a previous date* – Only if the assessment is being undertaken long after separation or following significant changes in employment.
- *Apportioned for Period of Marriage or Cohabitation* – Only if the two individuals have more pension than required to meet their needs.
- *Offsetting figures* – Only if there is an intention to take an alternative asset in place of pension and it cannot be avoided.