

S v S (Conduct: Pensions)

IN THE FAMILY COURT AT MEDWAY

Case No BV17D05382

Neutral Citation Number: [2022] EWFC 176

Before HHJ Richard Robinson on the 11th March 2022

S Applicant

and

S Respondent (Petitioner in divorce proceedings)

JUDGMENT

1. This is my Judgment in the Financial Remedy dispute between S and S. I shall call the parties 'the Husband' and 'the Wife' respectively in the Judgment, without disrespect. I heard evidence in the case on the 21st and 22nd and submissions on the 25th February, and I am writing this Judgment prior to a final hearing on the 11th March.
2. The Wife has been represented by Ms Elizabeth Spence, and the Husband has appeared in person by video link from HMP Rye Hill. I express my thanks to Ms Spence for her assistance, particularly with figures and calculations and her opening Position Statement and Closing Submissions in writing. I am also grateful to the staff at the prison who have facilitated the hearing and provided facilities for the exchange of documents. The Husband has provided handwritten closing submissions, and I have seen a number of letters he has sent to the court.
3. The parties were married in 1986. The Husband is now 59 and the Wife 61. They have three adult children, girls aged 30 and 28 and a boy aged 23, who has been living in the family home with his mother. They separated in September 2016. As a result of an incident in the late 2016 the Husband, who was a sergeant in the local police force, was arrested, and subsequently prosecuted for serious offences.
4. Following a jury trial, the Husband was convicted in Spring 2018 of the rape of the Wife, stalking her, and perverting the course of justice. He was sentenced to 9 years imprisonment after a reduction on appeal and will be eligible for release on licence in May 2024.

5. The Wife petitioned for divorce in February 2017 and Decree nisi was pronounced in June 2018. Decree absolute has not been made; pension issues are very important in this case. The Husband served a Form A on the 22nd June 2018. Initially he was represented and there was a First Appointment before DDJ Rahman (as he was then) on the 28th September 2017. Questionnaires were exchanged and answered, and a pension report obtained from Matheson Consulting Limited. There have been various attempts to arrange a final hearing, on the 16/17th April 2019, the 21/22nd November 2019, the 22/23rd June 2020, the 25/26th February 2021 and the 16/17th September 2021. They have been ineffective for various reasons, most importantly the proceedings in respect of the Husband's pension brought by his Local Police and Crime Commissioner.
6. Ultimately, it was decided that while forfeiture would in normal circumstances have attracted 'the most significant levels of forfeiture' allowed, due to the Wife being the victim and any significant deduction to the pension would give rise to further detriment to her, a permanent deduction of 1 per cent was decided. I am told that the maximum deduction could have been 65 per cent, representing the proportion paid by the employers.
7. I heard the matter on the 16th August 2021 and directed this hearing, and gave directions for an updating pension report, narrative statements and updating disclosure. Since then, there has been an updating pension report, an exchange of open offers and the Wife has filed a narrative statement, which is in the Bundle. The Bundle contains the expected documentation and correspondence with the Pension Trustees, as well as medical reports on the Wife.

THE ISSUES

8. The issues are in fact relatively limited, and mostly concern the distribution of the Husband's pension, and the accrued arrears which have built up while the pension forfeiture was being considered. It is accepted that the former matrimonial home should be transferred into the sole name of the Wife and that the mortgage and sums charged against it should be paid. What is left is the accrued arrears on the Husband's pension, which are now substantial, and the pension itself together with other pensions on either side. It is also agreed that the Police pension should be taken after the maximum lump sum commutation, so I do not need to consider the alternative of taking the pension without deduction.
9. Ms Spence asks me to take account of the Husband's conduct as a particular factor. He accepts the convictions, but reserves the right to protest his innocence. He understands that I have to take the convictions as facts and treat them as such.
10. The wife sets out the consequences to her in her Statement. She had to give evidence at the criminal trial, and has sat through this hearing. She talks of worry and stress, not being able to move forward with her life, nightmares of the offences and the effect on the family, with widespread publicity and the fact that this has now been going on for 4 years. She says:

"he has affected my confidence and self-esteem, which I continue to struggle with. This will be with me for the rest of my life, and I cannot imagine that things will ever return to normal."

The court does not need to go into more detail to see just how traumatic this has been, and that it has been life changing for her.

THE ASSETS

11. More particularly the assets are as follows:

Former Matrimonial Home	Valuation	£363,333
	Mortgage	£48,000
	Second charge	£38,000
	Net equity	£288,747

There are also Charging Orders against the Husband's interest in favour of the Legal Aid Board (£3,602,61) and Mercedes Benz finance (£5,840,35). It is accepted that provision must also be made for the payment of these debts. Ms Spence asks me to make the conventional deduction for costs of sale, (£9,08333 at 2.5%); the Husband says it will not be sold so this is not necessary.

12. Police pension arrears are calculated by Ms Spence as £75,262.40, on the basis that the Pension Sharing Order is not taken until the financial year 2022/3, as the pension is back dated to May 2018 and the husband can be given credit for his tax free personal allowances before tax and tax rates for each year since. The total owed after tax would be in the region of £75,262.40. Ms Spence contends, and I accept, that this sum is available for distribution by Lump Sum, rather than by way of pension sharing.
13. The Pension itself will also be divided as to the maximum commutable capital sum and the balance which will fund continuing pension payments. The CEV of this pension as at 31 August 2021 was £608,942. Mathieson Consulting explain that the pension must be put into payment before the pension is shared, and the maximum capital sum at £137,611, which will be tax free. This would leave a fund for division of £212,873.40, though the two parts have to be the subject of separate orders.
14. The remaining pension would have a CEV of £466,529 providing an income of £21,140 a year before sharing. This is subject to CPI uprating.
15. The Husband also has a defined contribution personal pension with Phoenix Life (formerly Abbey Life) with a CEV of £43,326 which he could take now. He could either take a pension of £1,128 a year or a capital sum of approximately £10,000 and a pension of £868.
16. The Wife has two pensions in payment with the Local Government Pension Scheme. She receives £3,141 from one, with a CTV of £61,412, and £2,270 from the other, with a CEV of £61,412, making a total of £5,411 a year.
17. There are no significant other assets. The Wife received a compensation award of £11,000 from the Criminal Injuries Compensation Board on the 21st December 2018. She also

received an inheritance of £99,658.51. Both these sums have been spent, as explained in her Statement, including arrears of repayments of mortgage, loan and council tax, costs and the purchase of a car coming to £67,861, and most of the rest has gone on repaying loans from her parents and living costs. I accept what she says.

18. The Husband had a number of assets, including a Daimler Ferret Armoured Car, a vehicle and trailer and proceeds of a police mutual savings scheme and insurance proceeds. Ms Spence has included these in the Schedule of Assets at £26,232.20. The Husband says that these have all gone, and have been subsumed in any event by his debts, incurred principally in legal costs in seeking to appeal his conviction.

19. The Husband's debts have been a matter of contention. He lists the following:

Outstanding fees to Slater Gordon	£1,200
Promissory Note to Mr L	£25,000
Money from Mr L for criminal advice	£15,988
Goodall Bennet James re pension forfeiture	£1,800
Hatton Solicitor Limited disbursements lent by	
Mr J	£6,230
Total	£50,218

Ms Spence does not accept most of these, with the exception of the Slater Gordon fees. She says that the evidence supporting them was provided late, or not at all, and not in accordance with the court's directions. She points out that the military vehicles are stored by Mr L. She queries whether if they do exist, whether they should be regarded as "hard" debts and cites the reasoning of HHJ Hess in an unreported case, (since reported as **P v Q [2022 EWFC B9]**). This is related to the preparation of this case by the Husband.

THE PARTIES' POSITIONS

20. The Wife's open offer proposes that the former matrimonial home shall be transferred to her, and the mortgage and charge paid off. The Husband should pay 72.4% of the arrears and pension commutation to her and retain £27,655. On the figures I have this would be £154,122.5 to her and £58,753 to him. He would have to pay Mercedes Benz and the Legal Aid Board from his share, reducing it to £49,310.54. He would have to pay his debts. He should also pay £2,820 for the Mathieson Consulting Report. On income there should be a similar split of the CTV, 72.4% to her and 27.6% to him.

21. The Husband's open offer was for a 50/50 split of the assets. If the Wife keeps the matrimonial home there should be a compensating transfer. He did not maintain this position at the hearing. He accepted that the home should go to her, and simply asked for as large a sum from the pensions as the court thought possible and proper, accepting that her needs had to be met.

THE HEARING

22. The Husband appeared from prison. The technology worked well, but until the hearing itself it had been difficult to exchange documents. In the Directions hearing in August, I had hoped that it would be possible for each party to draw down £20,000 for costs so that the Husband could be represented. It appears that because the pension had to be in payment before any sums could be released this was not possible. I can see that this was difficult and frustrating for the Husband who thought that the wife's solicitors were being difficult. He wrote a number of letters to the court complaining about the inequality of arms and seeking an adjournment. Not all of these were seen by me before the hearing. I ruled that the hearing should go ahead. While I understood why the Husband wished for representation, this was not possible, and I was not prepared to adjourn the hearing yet again. I explained the role of the judge to ensure that a litigant in person had a fair hearing, and I have endeavoured to do so. Amongst other things, I put a series of questions to the Wife at his request, as I did not consider that he should be allowed to cross examine her himself. She sat in court throughout, out of screen from the Husband. He is an intelligent man, with experience in the police, but that is not the same as running a matrimonial case. In fairness, he was keen to co-operate and polite, though Ms Spence suggested that this was a cover for his continuing behaviour. He accepted when I suggested that some of his points were not relevant to the issues before me.
23. For the most part, I did consider that the Husband was trying to assist the court, and he conducted himself as I would expect a former police officer to do. Apart from the convictions, however, there were points in his evidence where I thought his behaviour was questionable. He reported the Wife to the police in respect of a legacy to the animal welfare charity she worked with. It was investigated and no action was taken. He asked her about this, and she said that the legacy was dealt with by her mother. His conduct seemed to be an attempt to obtain revenge. He also had to accept that he was spending money on legal advice and appeals while the Wife was unable to pay the mortgage on the matrimonial home; it struck me as difficult to then seek a share of her inheritance, which was in any event received after separation and clearly not a matrimonial asset. At other times he expressed his continuing love and affection and did concede the argument about the home.
24. The Wife was stoic, as Ms Spence put it, patently not seeking to exaggerate her case, open about her financial situation. She suffers from MS and is not able to work. She explained that it varies from day to day, and I entirely accept her evidence. I found the Husband's attitude to her disability inconsistent, sometimes expressing sympathy, sometimes blaming it for problems in the marriage. I made it clear that I was not seeking to investigate the history of the marriage in detail, and I recognise that he was acting in person in difficult circumstances, but I record these points as to my impressions of the parties.

THE LAW

25. I have to consider each of the factors under section 25 of the Matrimonial Causes Act 1973. The children are all adult, though the youngest boy is still living with his mother. The Wife's income is limited to her pensions and is not likely to increase save when she reaches pension age. Her only assets are her home and a car. She needs a secure home and an income. The Husband has accepted that the present house is suitable for her needs; in another case I

might have considered whether she could trade down, but I do not do so in this case. The parties had a comfortable standard of living before the breakdown of the marriage. She is 61, he is 59. It is a long marriage of over 35 years. Her MS, will be a continuing issue for her. She mentions lack of feeling in her hands and feet, vision impairment, lack of sleep and pain in her limbs. The Husband accepts that she has the condition, but says there is no evidence that his offences made it worse, and says she has not produced all the medical evidence. There are a number of medical reports in the Bundle. This is a progressive disease, and I did not think she was trying to exaggerate the effects. The Husband does not seek to rely on any suggestion of PTSD from his career. Both parties contributed in a conventional way, the Husband by his work, the Wife by running the home and working when she was able. In addition, the Wife received an inheritance of nearly £100,000 and compensation of £11,000, which cannot be considered to be matrimonial property. The conduct of the Husband, shown by his convictions, is clearly such that it would be inequitable to disregard it. The distribution of the pensions is clearly of great importance, and the Wife will lose her prospective benefits.

26. Ms Spence refers me to two cases which she considers comparable, **H v H (Financial Provision: Conduct) [1994] 1 FLR 1186**, (Thorpe J), and **H v H (Financial Relief: attempted murder as conduct) [2005] EWHC 2911 (Fam)** a decision of Coleridge J. Both deal with the situation where husband had committed serious assaults against their wives. I make it clear that there is no way that I consider that the facts of this case are less serious, because the charge was not attempted murder. The Husband was sentenced to 9 years in prison, which speaks for itself. The effect on the Wife's life has been dramatic and comprehensive, and her stoicism does not reduce this. For example, her counselling has been suspended for financial reasons; I would wish her to be able to access such counselling as she may wish. I must look at the effect on the Wife and also her needs as a result of her age, medical condition and finances.

27. Coleridge J said:

"The court should not be punitive or confiscatory for its own sake; the proper way to have regard to such conduct was as a potentially magnifying factor when considering the Wife's position under the other subsections and criteria, placing the wife's needs as a much higher priority to those of the husband, because the situation in which she found herself was, in a very real way, his fault".

I entirely accept and apply this observation. My first priority is to consider the Wife's needs, and only consider those of the Husband when I am satisfied that hers have been met.

28. Ms Spence also argues that in addition, because the Husband's pension has been preserved at its present value, it would be contrary to public policy for him to benefit from this. She says that the deduction would have been 65%, and that part of the pension should not enter into the calculation, as he should not profit from his own wrong-doing. I can understand the logic of this, but I question whether the principle should be applied specifically to the pension share, as opposed to the total package, as the Wife will be receiving the whole house free of mortgage or charge. In practice, I consider that this point resolves itself when considering the figures.

29. The first stage is to deal with the home. It will be transferred to the Wife. In addition, she will need £65,502.47 to pay off the mortgage and charge; this will certainly increase before this can happen, and I will round this up to £67,000. This reduces the capital for distribution from £212,873 to £145,873. I note that the Wife has spent a large part of her inheritance and compensation on meeting these costs. She has paid off £20,047.03 of capital, not including interest payments, and £20,725.17 paying arrears and council tax arrears and this has come from the non-matrimonial contribution of the inheritance received after the separation. This is at least £40,772.20 that she should have reimbursed, and she has had to pay for the Mathieson Consulting Report in full (£2,820, which should be a joint expense so £1,410). I shall round this up to £42,000, which should also be returned to her before I divide the balance, leaving £103,873. I note that CICB compensation effectively paid for her car and she has costs of £47,447.60, which I have not included.
30. Turning to the income position, the Wife will qualify for her state pension at 66 years and 9 months in September 2027, and her income from this will be £9,371. The Husband will qualify on his 67th birthday in March 2029, when he should receive £9,627.80. His Form E, settled by his lawyers mentions an additional state pension, but with no value. I shall disregard this.
31. The wife's budget in her Form E is put at £24,448 a year. This is not excessive, but she will not need £7,800 for a mortgage, leaving £16,688. There have been some increases, including Council Tax, gym membership which will help with her condition, holiday costs, and provision for counselling. She will need some provision for household maintenance and repairs. I do not accept Ms Spence's submission that this cancels out the mortgage provision, but I will accept an increase to approximately £20,000 a year (£1,666 a month). This reflects the approach I have indicated placing her needs as a priority. It is not a case where any examination of whether she could manage with less is appropriate.
32. Her income at present is £8,531.68. It includes Personal Independence Payment of £3,120, which is not guaranteed to continue. Ms Spence seeks a pension share of 72.4 per cent of the remaining CTV after the lump sums, which would give her £17,187 a year, based on the information from Mathieson Consulting, which would give her a net income of £23,124 a year. As I have indicated, I am not prepared to go as high as this.
33. I note Ms Spence's submission that the Husband would be benefitting from his own conduct if he were to receive any of the pension that would otherwise have been deducted. The logic is that he should only receive a maximum of half of the balance of 35 per cent. I recognise the public policy argument, but I do not consider that I am bound to apply it rigidly, particularly given my decisions as to the capital. I also accept the Husband's submission that 'the most significant level of forfeiture' does not automatically mean 65%; it would certainly have been substantial but may not have been the absolute maximum.
34. However, I do think that a pension share of 65 per cent would provide the Wife with sufficient income to meet her needs. The calculation is that for every 10% of pension share of CTV the Wife receives £2,367 and the Husband loses £2,114. The residual CTV after lump sums is £466,529, which would produce an income of £21,140. If the wife receives 65% she will receive £15,385 before tax. The Husband will receive £7,399. With her existing income

the Wife will have £20,796 before tax in addition to PIP which is not taxable, which at 20% tax would leave her with £17,486 in addition to her PIP of £3,310. While not guaranteed, I consider that this is likely to continue, and she has a capital cushion if it does not. When she reaches retirement age she will in addition have her state pension.

35. The husband's needs are more difficult to calculate. He has produced some evidence of his debts, but I am by no means clear that he will have to pay all of them back. He is particularly concerned about the Promissory Note to Mr L, but there is no statement from this gentleman. The other debts he lists do not appear to be the result of any contractual obligation. In any event they were accrued for his criminal appeal costs and do not represent matrimonial debts. He has spent or disposed of significant assets which were matrimonial. He will have to pay the sums charged on the house, Mercedes Benz of £5,840.35 and the Legal Aid Board of £3602.61, £9,442.96 in total. I accept that these debts should be paid before division as they are genuine hard debts, and I will order that they should be paid out of the pension lump sums. Otherwise, he will be able to do his best with the share he will have, which will be just under £50,000.
36. He has and will keep his second pension, with a CEV of £43,326, and can either take a lump sum or not as he chooses, the income is £1,228 a year. Ms Spence points out that while he is in prison, he does not need to draw his pensions and can accrue these for when he is released. He will reach state pension age in 5 years' time. While I accept that many jobs will not be open to him, I have little doubt that he will be able to find some employment. He talked of restoring military vehicles as a possible business. I do not know if this is realistic, but my impression is that he is capable and will do his best.
37. In summary, the figures to the nearest pound are these:

CAPITAL:	
Former Matrimonial Home	£288,747
Arrears	£75,262
Pension Lump Sums	£137,611
Total to distribute	£212,873
Less sums to Wife	
Cost of charges	£67,000
Reimbursement	£42,000
Balance	£109,000
Husbands debts charged on House	£9,443
Balance	£99,557
Equal shares	£49,778.5

INCOME:

Pension Share of balance after Lump sum taken:

65 per cent to Wife.

Estimate annual income: £15,385

35% to Husband

Estimate annual income £7,339

Wife's existing Pensions £103,376

In payment £5,412 pa

Husband's existing Pension £43,326

Potential £1,228 pa

38. For purposes of comparison, I calculate that the Wife will retain about 85% of the capital, which includes the inheritance which was non matrimonial. The pensions divide about 66% to the Wife and 34% to the Husband (£406,620 to £206,611). This is a significant disparity, which is well justified by the Wife's needs and the impact of the Husband's conduct.

COSTS

39. The issue of costs has to be determined after my findings, but has been the subject of preliminary submission by Ms Spence. I do not think that I should treat the delays as a result of the pension forfeiture as litigation conduct by the Husband. Indeed, he complains about the delays himself. I do not think that he has really been trying to delay the hearing. It was reasonable for him to want to be represented, and I can understand his frustration with the fact that this was not possible. Insofar as he has delayed or not provided information about his debts, I have taken this into account in my Judgment, and the fact that he was not represented has in fact reduced the total costs. I did not feel that his conduct in the hearing was reprehensible, and while he did not comply with the court direction to file a Statement this has not increased the costs.
40. As a matter of practicality, I will ask for assistance on the drawing of the order. There will need to be separate orders for the arrears, the pension lump sums and the pension sharing order and annex. This Judgment remains in draft until it has been shown to the Pension Trustees, to check that it is capable of being implemented and my intentions can be put into effect. I do not believe that it is necessary for the division of the capital sums to be expressed as a percentage.

41. I agree that the appropriate course is for the sums to be divided to be paid in the first instance to the Wife's solicitors, who can make the payments which I have indicated and then pay the balance to the parties.
42. There are number of practicalities suggested by Ms Spence, which will need to be contained in the final Order. These will include a direction for the husband to commute the maximum sum on his pension, the signing of necessary paperwork give the difficulty of the Husband being in prison, permission to apply for Decree absolute out of time and a clean break on capital and income.

Richard Robinson

11th March 2022