

Series on Financial Matters in Family Proceedings – Pension sharing in divorce – How much of my pension will my spouse be entitled to?

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Very often in divorce proceedings, the carving up of family assets into two separate households is the most stressful and contentious aspect. Pension or retirement benefits may also be one of the more substantial assets in the family pot, especially in grey divorces, where one party gave up their career to look after the children. If an agreement on financial relief cannot be reached, the Court's assistance would be required.

As mentioned in previous articles, there is a duty for parties in divorce proceedings to fully disclose all their assets in a Financial Statement known as "Form E", to allow the Court to properly assess the size of the family pot. Pensions and Mandatory Provident Funds (MPFs) are no exception and must be disclosed in the Form E, in addition to landed properties, bank savings and stock investments, shareholdings in private companies, insurance policies, motor vehicles and other luxury goods, such as yachts, cars, jewellery and watches.

Thus, in the event of pre-retirement divorce, should the pension/MPF be considered as a matrimonial asset at all and if so, how much of it should be attributed to the family pot?

In the recent decision of *陳對鍾 CACV 461/2022, [2023] HKCA 560*, the Court of Appeal overturned a Family Court decision which attributed only one-third of the husband's pension to the matrimonial pot.

In this case, the husband had served in the Hong Kong Police Force for 17 years before marrying the wife. After 10 years of marriage, the parties separated and the husband was expected to receive a pension of approximately HK\$6.17 million when he retired, which was around 5.5 years after the Decree Nisi (i.e. provisional divorce decree) had been granted. Taking into consideration other matters, the Family Court was of the view that only one-third of the pension should be included in the matrimonial pot because the parties were only married for 10 years during the husband's 36 year career as a policeman. Based on this finding, the judge held that the wife was entitled to one-sixth (16.67%) of the husband's pension.

The wife was dissatisfied with the judge's finding and appealed to the Court of Appeal. Whilst the appellate court reaffirmed the equal sharing principle (i.e. all matrimonial assets should be divided equally, unless there are good reasons not to do so) as laid down in *LKW v DD (2010) 13 HKCFAR 582*, it recognized that the same may not apply to non-matrimonial assets.

At the end of the day, whether such assets should be excluded from equal sharing is entirely a matter for the court's discretion, with fairness as the overriding principle guiding the exercise of such discretion. Examples of non-matrimonial assets may include:

- Gifts acquired during marriage;
- Inheritance;
- Trust money and assets; and
- Pre-marital assets.

In this case, even though the husband's pension entitlement was not a matrimonial asset at the time of marriage, it had gradually evolved into one as time passed during the long marriage. This was because the longer the marriage lasted,

the more interdependent the parties had become and the more difficult it was to distinguish the source of the property (*Z v X (C Intervener) [2015] HKLRD 791*).

In view of the long duration of the marriage and the fact that the husband could only realize the pension 5.5 years after the divorce, the Court of Appeal held that the Judge had the discretion not to treat the entire pension as a matrimonial asset. However, because 10 years is considered to be a long marriage, 80% of the pension should be treated as a matrimonial asset and the Court of Appeal ultimately awarded the wife 40% of the same.

Stay tuned for more updates on family law developments.

Our Family Law team at Deacons is experienced in handling matrimonial and family matters including asset division and maintenance claims. Please reach out to us if you would like to know more.

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