"Window Dressing"

When the earmarking provisions were first introduced[1], the press along with many lay people saw it as the potential wronged spouse's comeback to relieve asperity against the well-off husband's lucrative future retirement. Although from the beginning, it was always seen as a stopgap before the real equaliser: pension-splitting, which incidentally has been put back to April 2001. The reality however has been a disappointment.

Under the provisions the court is obliged to consider making a deferred periodical payments order or a deferred lump sum order in any case where the husband is likely to have a benefit under a pension scheme.[2]
Practically this would mean, in respect of the annuity fund, an instruction to the trustees of the pension fund to either take part of the sums payable to the husband and direct them to the wife in a similar manner to an attachment of earnings order or in respect of the capital fund, to take a slice of the capital fund at the outset.

From the outset the legislation suffered from poor drafting. There was no provision as to when the husband should take his pension. This left the possibility of the husband refusing to take the benefit of the pension to avoid his former wife benefiting, and then using the fund as collateral in raising sums to his benefit.

In a lecture given by Mr Justice Wilson on the 8th March 1996, His Lordship described the new legislation as an important jurisprudential development. In anticipating how a Judge would deal with an earmarking application, His Lordship described how a court would calculate how much a wife had earned of her ex-husband's pension e.g. a wife would earn one-half of the amount accumulated by the husband in his pension fund during the subsistence of the marriage, and earmark that earned amount for the wife.

It was two years before the illusion of fair and just provision for wives were shattered by the High Court.

In T -v- T [3]H was 47 and W was 46. There were no children. The parties separated after 14 years of marriage. The former matrimonial home had a equity of £ 160,000. There were savings of £ 36,000. H was living in rented accommodation and was earning £ 109,000 per annum. W lived in the former matrimonial home and was unemployed. It was accepted that W had an earning capacity of £ 3,000.
W applied for an earmarking order claiming that the new legislation should compensate her for her loss of pension. Mr Justice Singer held that the new legislation had if fact not altered the court's approach to assessing ancillary relief claims. The section 25 criteria should be used in the usual way. There was no new compensatory approach. His Lordship considered the new legislation as permissive in nature rather than mandatory as to the exercise of the court's powers. On the facts of this particular case W's needs could be met from the assets already available. An

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[1] s.166 Pensions Act 1995 amending the Matrimonial Causes Act 1973; becoming applicable on all petitions issued on or after 1 July 1996.

[2] s. 25B(2) Matrimonial Causes Act 1973.

[3] T -v- T(Financial Relief: Pensions)[1998] 1 FLR 1072.

earmarked maintenance order to take effect in 13 years time would give rise to pitfalls, disadvantages, complications and distractions: W having no real security, by the making of the orders, as the orders in any event were subject to variation. A decision on the appropriateness of a deferred periodical payments should be made at the time or near retirement. Save, for the limited earmarking order for a lump sum as the pension trustees were not obliged to make any distribution of any death in service benefits to W, no earmarking orders were made.
It was later reported that His Lordship considered the provisions as pure political window dressing.

T -v-T has now been followed in the case of Burrow[4]. Here, H was 48 and W was 50. There were two children of the family. The parties separated after 16-year marriage. The former matrimonial home had a net equity of £ 425,000. H was a managing director of the family building business earning above £ 3,000 per month. W earned a relatively minor sum working part-time intermittently. H owned 98.6% of shares in the business and had a pension fund totalling £ 267,712. The pension provided that on reaching the age of 50 H would be entitled to commute one-quarter of the fund as a lump sum, the remainder providing an annuity. Mr Justice Cazalet decided that an earmarking order was appropriate in this case. His Lordship held however that the annuity fund was to be treated differently to the capital fund. The annuity fund should not be earmarked, following T -v- T reasoning, as the order could be made up to 12 years or more before the sums become payable, and so one would not be able to say whether the level of periodical payments would be appropriate at that time. His Lordship indicated that the correct approach would be to apply to vary the current periodical payments at that stage. Contradictively, the capital fund should be earmarked in the sum of 50% as it reflected the wife contribution to the family and business a la Conran[5].

While this case confirms the reluctance of the court not to earmark funds while the future remains unpredictable, what is not clear is why the capital fund should be treated any differently? If one is taking a snapshot of the family assets at the time of making the order, then if the W is entitled to a share of the pension annuity then an order at an appropriate level should be made, similarly with the capital fund. Things may happen in the future which may make a periodical payments inappropriate but surely that applies to the capital fund as well. Would not a capitalisation of the periodical payments by taking out a larger lump sum in the capital fund be a more appropriate order?
In any event it seems that the court will now not make a deferred periodical payments order out of a pension annuity unless the husband is on the brink of retirement. Justice for the wronged spouse must wait a little longer.

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[4]Burrow -v- Burrow (1999) 1 FamLaw 83.

[5]Conran -v- Conran [1997] 2 FLR 615.