

# Pensions for Family Lawyers: General Guidance

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## 1 Introduction

1.1 Pensions benefits are often the most significant financial element in divorce proceedings. This note explains:

- **briefly how pensions work in England and Wales.**
- **why family lawyers may need a separate valuation of the value of pension rights in order to advise clients properly, and**
- **how they commonly negotiate in relation to those values.**

1.2 Since 1996 the law has been clear that pension rights should be taken into account by advisers and the court when reviewing the division of matrimonial property on divorce. In practice there are two main problems:

- **first, whether the statutory valuation is appropriate in the circumstances, and**
- **second, once the valuation is agreed, which method of settlement is appropriate.**

1.3 The question of settlement method is a relatively new one; for cases in which petitions were issued before 1 July 1996 there was essentially only one method. Now there are three. They are as follows:

- **set-off (or offsetting), that is readjusting the division of other matrimonial assets to take account of pension rights;**
- **attachment, (previously called earmarking) i.e. an order of the court**

directing that part or all of any lump sum or pension arising at retirement or paid as a death-in-service benefit be paid to the other spouse; and

- **sharing, (previously called *splitting*)** i.e. an order of the court directing the pension scheme to allocate part or all of the pension rights to be awarded to the other spouse at divorce. This is provided by the Welfare Reform and Pensions Act 1999, and a host of supporting regulations; it operates in relation to divorce or nullity proceedings issued on or after 1 December 2000.

1.4 This note looks at whether and how these choices are exercised in practice, and the practical options available to the parties. Before looking at the choices, and how to exercise them in practice, it may be useful first to examine the pension system in England and Wales.

## 2 Simple guide to pensions

### 2.1 *State benefits*

2.1.1 There are two state pension arrangements:

- **The basic state pension, which provides a maximum of around £77.50 pw for a single person, provided s/he has a full employment record. Since this is payable as a social security benefit, and as the courts have no jurisdiction over social security benefits, it cannot be made the subject of a court order. In any event, a divorced former wife (although not a divorced former husband) can use a former husband's earnings record to enjoy a pension in her own right under what are called the substitution rules. Clients who may benefit from this should obtain advice from the Department of Work and Pensions (DWP) and complete form BR 19 to obtain a retirement benefits forecast.**
- **The state second pension (S2P) (replacing 'SERPS'– the State Earnings Related Pension Scheme which provided around 20% of earnings up to around £30,000 pa). Collectively, SERPS and S2P are known as the 'additional state pension' ('ASP'). On divorce however, the spouse cannot use the earner's track record to enjoy a parallel state benefit; it is therefore lost to the spouse. However it can be made the subject of a pension sharing order.**

2.1.2 ASP benefits can either be provided:

- **by the state (in which case the scheme is 'contracted-in') or,**
- **privately by an employer's pension scheme (in which case the scheme is 'contracted-out') or through an individual's personal pension (in which case it is an 'appropriate personal pension').**

2.1.3 In this guide the ASP benefits are not dealt with separately. The level of benefits can be ascertained by asking the DWP (see form BR20, available from the DWP). It is most important to make this enquiry as the maximum amount involved can exceed £100,000. If the benefits are provided through a company or personal pension scheme, they are conventionally included in the ordinary valuation and not separately identified.

## 2.2 *Occupational and personal pensions*

### 2.2.1 Pensions can either be provided:

- **individually, either**
- **by the individual contributing (perhaps with additional contributions by his employer, if any) to a personal pension scheme (perhaps with an insurance company or bank or building society) or**
- **by an employer making contributions to a company scheme, (perhaps with contributions by the employee) or**
- **collectively, by the employer providing benefits as set out in a 'defined-benefits' scheme, with contributions made preponderantly or solely by the employer, sometimes with contributions, or added contributions, by the employee.**
- **Since October 2001 all employers with five or more employees if they do not provide a suitable pension arrangement must have provided access to a 'stakeholder' pension for their employees. They do not have to contribute to a stakeholder pension. So far stakeholder pensions have had only a modest impact on pension provision.**

### 2.2.2 *Money purchase and final salary*

When dividing pension rights, it is essential to determine just what those rights are.

- ***Defined contribution schemes.*** In some schemes ('defined-contribution' or 'money-purchase' schemes) the benefits are merely what can be provided by a sum of money accumulated over time. The accumulated sum is used at retirement to buy a pension. The value depends on what annuity rates are at that time, and whether the value of the accumulated sum is affected by for example a fall or rise in the stock market at the time it is cashed in to buy an annuity.
- ***Defined benefit schemes.*** In other schemes 'defined-benefit' or final salary schemes (which must be employer-related), the amount of money in the scheme is not relevant; the promise is of a benefit, perhaps related to salary. For example the promise by the employer may be to provide half-salary or two-thirds salary. The promise is built up over years, perhaps at 1/60th of salary for each year of employment, so that after 40 years employment the employee will be entitled to 40/60ths of his salary at retirement (i.e. 2/3rds). Such benefits may be index-linked, and with additional benefits sometimes at the discretion of the schemes' trustees. Until recently there was no need to have the employer's promises supported by financial guarantees. From April 1997 the law required such promises to be supported by funds in a pension scheme.

### 2.2.3 *Fully funded and under-funded schemes*

While money-purchase schemes are by definition funded, defined

benefit schemes often do not have enough funds to pay all benefits if the schemes were closed tomorrow. There are many good reasons for this for example:

- **the assets may have fallen in value at the time the scheme was closed, although in normal circumstances they would have been enough;**
- **interest rates had fallen at the time although that was not reasonably expected, or promises had been made that would have been paid for over the years, but not enough time has passed.**

#### 2.2.4 *Un-funded Schemes*

- **It is not normally tax effective to provide assets to support promises for pensions in respect of income over the 'cap', currently £99,000 pa. Such schemes are called UURBS (Un-funded Unapproved Retirement Benefit Schemes).**
- **Many perfectly proper pension schemes are not funded; these include many schemes in the public sector (among them, the Civil Service, police and firemen).**

#### 2.3 *Discretionary and indexed benefits*

In final-salary or salary-related schemes, some benefits are available as of right (subject to sufficient assets being available), and others may or may not be available, depending again on resources and the views of the trustees or managers. When valuing benefits, it is not always clear whether these discretionary benefits (which may include for example benefits on ill-health, or early-retirement benefits or inflation-protection) are to be included or not. There are also dependent's and survivor's pensions and ill-health and early retirement pensions. These are often discretionary, i.e. unenforceable. (Many pension schemes provide for payment of a lump sum if the member dies whilst still in employment – death in service benefits.)

#### 2.4 *Lump sums and commutation*

The core benefit provided by pension schemes is not surprisingly the pension. In most schemes some of the pension can (and in the Civil Service scheme for example must) be taken at retirement in 'commuted' form, i.e. the pension is reduced in exchange for tax-free cash.

### 3 **Pension Valuations & Outcomes**

- ***The Cash Equivalent Transfer Value (CETV)***

This is the method of valuation which must now be provided to the Court. (See the Pension Sharing (Valuation) Regulations 2000 and the Provision of Information Regulations 2000.)

The CETV has a history. The Social Security Act 1986 required pension scheme members who wished to leave schemes to permit them to do so and to offer a transfer value which would be paid over to the scheme into which they were transferring their pension.

Similar provisions exist for personal pensions.

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The transfer value is commonly called the Cash Equivalent Transfer Value and is the cash value of a member's accrued pension benefits.

The method for calculating the CETV is laid down in practice notes and over the years these have given a greater degree of uniformity to the calculation. The calculation methods are not entirely uniform however, which is one of the reasons pension schemes are required to tell people the method used when providing a calculation for use within divorce proceedings.

Pension scheme members are entitled to a free CETV calculation each year.

- ***The CETV and Divorce***

Prior to 1996 family lawyers were left to their own devices when it came to valuing pension rights.

However, in the case of [H v. H \[1993\] 2FLR 335](#), Thorpe J. as he then was, said "in deciding what weight to give to pension rights it is more important ... to look at the value of what has been earned during co-habitation rather than look at the prospective value of what may be earned over the course of 25 or 30 years after separation ...".

What the Judge was effectively saying was that he wanted to put a value on pension rights, and that value should be the value of the rights which had accrued by the end of the marriage.

In 1994 The Law Society produced a note saying the decision in H v. H was really saying we should value pensions using the CETV, since that system valued accrued benefits.

It also had, and has, the virtue of being readily available and cheap to produce and free to members at least once a year.

When attachment was introduced in 1996, regulations provided for the first time that the Cash Equivalent Transfer Value was the value to be used in initial financial disclosure. That remains the case (see the Regulations produced in 2000).

In the context of initial disclosure, as provided by Form E, the CETV gives an easy first snap shot of the position of the pension in the overall scheme of things. In some cases it may mean that the pension can be eliminated from further consideration.

For example: A couple aged 37 (H) and 38 (W) have assets excluding pensions of £375,000. The CETV of their pensions are £20,000 (H) and £32,000 (W). Is any further enquiry needed?

- ***The CETV – For and Against***

The advantages of the CETV are that it is cheap, often free, and readily available and provides a good first step.

However, the CETV has draw backs in relation to pensions and divorce.

In the first place different actuarial assumptions may give different results.

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Also it may not give an accurate assessment of value because the scheme may be under-funded, there may be penalties attached to transfers, because the nature of the scheme or the application of market value adjustor.

### 3.1 ***Under-funding***

Many schemes may not have enough funds to meet the pension promises they have made. Recently falls in the stock market have meant that many schemes are in that position. This may mean that the "full" CETV quoted by the scheme, that is the value of the accrued rights, is less than the value available on a transfer out of the scheme. If that is the case, the parties to a divorce are entitled to know and should ask for this information. (See the Divorce (Provision of Information) Regulations 2000 regulations 4.)

### 3.2 ***Penalties***

Personal pensions are contracts between the plan holder and the insurers offering the pension contract. Such contracts often contain penalties for those who exercise their statutory right to leave the plan before the end of the contract – a bit like the surrender value of an endowment policy. The CETV is therefore often less than the value of the fund.

### 3.3 ***The Nature of the Scheme***

Final salary or defined benefit schemes have real values which are usually higher than the CETV figure because they build in reserves to allow for the scheme member to stay in the scheme until retirement and allow for salary increases. The method for valuing the accrued benefit and reserves is called Past Service Reserve. It is much higher usually than the CETV, particularly for younger scheme members.

In Small Self Administered Schemes (SSAS) there may be a fund of say £3 million and five members, all with differing entitlements. A CETV may give a different valuation from a valuation based on each member's share of the fund if the scheme was broken up. A share of fund valuation may very well be higher.

In some public sector schemes the CETV does not allow for early retirement lump sums and benefits.

### 3.4 ***Market Value Adjusters***

These are effectively penalties over and above contractual obligations established for example by Equitable Life. It is a reduction to the CETV applied if an external transfer is taken whether on divorce or otherwise, or if the member retires.

### 3.5 ***Other Valuations, Projections and Analysis***

Although the Family Proceedings Rules and Regulations say that the CETV must be used as the basis of valuation, they do not say that this is to be the last word. In *T v T* [1998] 1FLR 1072, Singer J allowed a projection of future benefits.

Additionally, there has been debate as to whether or not the value of a pension provided by the CETV should be treated as if it were cash and

simply added in to the rest of the assets. This has been the subject of recent judicial interpretation. In Maskell v Maskell [2003] 1FLR 1138, the Court said that the value given to a pension should not be confused with present capital, especially when the pension would not vest for many years, (Mr Maskell was 41 years old).

However the position may well be different at or near retirement when the value of the pension, the CETV, is more likely to be ascribed its full value, as in the case of Norris v Norris [2003] 1FLR 1142.

### 3.6 What do Lawyers and their Clients Need?

In most cases:

- An idea of where the pension fits in to the overall asset structure. This will give an idea of whether or not the pension needs to be factored in, to any settlement.
- Is the CETV provided by the scheme accurate? Is it prepared using sensible assumptions?
- If the pension is a major part of the family's asset structure, then lawyers and their clients will need to consider whether an off-setting arrangement, a pension sharing or attachment order or other solution needs to be addressed.
- If pension sharing is being considered, then regard needs to be had to the cost of a pension share to the transferor and the benefit to the transferee.

This is not always straightforward. For example, if a pension is in payment and the husband is 75 and the wife 52, the cost of providing £1 of pension to the wife may be in the order of £14 to the husband.

Alternatively if the husband is a member of a final salary scheme, the cost of providing a pension share to the wife, who will have to take it as a personal pension, may be quite modest. He may therefore be able, or have to, offer a greater percentage as a pension share in order to provide the wife with a reasonable outcome.

- If pension sharing is being considered then the outcomes for the transferee need to be given consideration to. In particular where will the pension have to go? Can it stay within the scheme? Has the transferee a choice? If she has a choice should she exercise it?
  - What is the pension likely to produce for her?
  - If pension sharing is not a sensible option, then off-setting may need to be considered. In that regard lawyers and their clients need to look at the effect of taxation of the CETV, whether the CETV includes all benefits for example death-in-service benefits.
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- If attachment is being considered, the scheme member's pension benefits should be re-valued to retirement age to enable the parties to see roughly what an order might produce. For example:

	At valuation date	Projected rights for service up to member's age of 60
Tax free lump sum plus pension	£58,555 + £19,518 per year	£107,218 + £35,740 per year

The questions can be answered by actuaries and IFAs.

#### 4 Powers of the court

4.1 Until July 1996 the court in practice had no direct power to make orders in relation to pension rights. In relation to petitions issued before July 1996, although it was settled law that the court could take pensions into account when considering financial arrangements on divorce (and in Scotland had to consider pensions), in practice the law throughout the UK was constrained by the fact that the courts had no authority to direct pension scheme managers and trustees to allocate one spouse's interests or part of them to another. In practice, there were two main problems:

- that the court had no power to make an order in relation to a member's pension rights; and
- that it was difficult in some cases for a spouse's advisers to obtain the information.

#### 4.2 *Protective trusts*

There were three main reasons for the court's previous difficulties:

- First, the Inland Revenue require as a condition of approval of the scheme that it contains a clause against 'alienation', prohibiting a member charging or alienating his acquired pension interests to anyone else;
- Secondly, the Inland Revenue rules as set down in statute and in practice notes prohibit the allocation of a member's pension rights to a spouse;
- Thirdly, almost all occupational schemes and an increasing number of personal pensions contain 'protective trusts' or 'spendthrift trusts' which operate a form of 'Catch-22' system. It operates so that where a court makes an order against a member's rights in a scheme, they are forfeit, and the trustees then decide to whom to make payments – which can include the member himself. In practice, it makes it all but impossible to obtain garnishee orders against such payments, so that to all intents and purposes the protective trust mechanism is effective as protection. In 1996 (July 1) the court was given power to overcome these trusts in relation

**to divorce nullity and judicial separation proceedings when making pension sharing or pension attachment orders.**

4.3 ***Obtaining information***

It is now much easier than before to obtain information about pension arrangements. A member should normally disclose in his Form E (or, if not, should be asked about them) all pension arrangements.

Once that information is available, it is normally possible to obtain the necessary further information to value the member's interests either:

- **under the Pensions on Divorce etc (Provision of Information) Regulations 2000 which impose obligations on pension schemes to disclose information and give the court power to order them to do so where necessary.**
- **under the Occupational Pension Schemes (Disclosure of Information) Regulations 1996 and the Pension Schemes Act 1993 s133, under which some consider a spouse has rights to a member's pensions information; or**
- **under a court order.**

4.4 ***Making the spouse a scheme member (The Brooks case)***

There was at one time some confusion about the relevance of the decision in *Brooks v Brooks* [1996] AC 375, [1995] 3 All ER 257, [1995] 3 WLR 141, [1995] 3 FCR 214, [1995] 2 FLR 13, [1995] Fam Law 54. This suggested that the court may in some cases have had jurisdiction under the Matrimonial Causes Act 1973 to reallocate pension rights between husband and wife. The House of Lords decision seemed to apply only in relatively infrequent cases:

- **in the absence of protective trusts; and**
- **where an order would not affect third party rights; and**
- **where the scheme is in surplus; and**
- **where the spouse was employed by the same employer; and**
- **where the scheme was established under trust (not always the case in personal pension arrangements).**

In practice it seemed even then limited to certain rare small self-administered pension schemes, a special form of pension scheme appropriate to small family companies. The Welfare Reform and Pensions Act 1999 made it impossible to make Brooks-type orders (MCA s24(1)(c)), where a petition for divorce or nullity was issued after the 1.12.2000. However, it remains technically possible for such an order to be made after this date where the petition predates 1.12.2000.

4.5 ***The changes***

The law was changed following substantial pressure for reform during the passage of the Pensions Act 1995, which introduced the concept of earmarking, now known as attachment orders, to the Matrimonial Causes Act 1973. In particular s25B - D of the MCA 1973 gave the court power in divorce, nullity or judicial separation proceedings:

- **to award a periodical payments order against the pension when it**

**is being paid; and/or**

- **to compel a member to take all or part of the amount he is allowed to take as a tax-free lump sum on retirement and to pay some or all of it to his spouse; and/or**
- **to require scheme trustees to pay part or all of any death-in-service lump sums to the former spouse, overriding any nomination the scheme member may have made.**

The periodical payments orders come to an end on the death of either of the parties or on the remarriage of the spouse.

Pension sharing was subsequently introduced by the Welfare Reform and Pensions Act 1999 and came into force in relation to divorce and nullity proceedings begun on or after the 1.12.2000. Attachment orders remain available.

## **5 Remedy 1: Offsetting**

Offsetting involves adjusting other assets, usually by means of lump sum or property adjustment orders to take account of pension assets without adjusting those.

When deciding whether or not to seek a set-off solution, the following factors will affect the negotiations:

- **Tax**

**Whatever is agreed as the value, the agreed figure should be adjusted to take account of the fact that it will be settled without any tax obligation; normally pensions bear tax of between 10% and 40% although sometimes some of it can be commuted tax-free.**

- **Discount for cash**

**A spouse may also wish to give a further allowance for the fact that a benefit is being acquired in cash, rather than later in the form of pension.**

- **Discount for early payment**

**A spouse may also wish to give a further allowance for the fact that a benefit is being acquired now rather than some years in the future.**

- **Discount for risk**

**A spouse may also wish to give a further allowance for the fact that a benefit is being acquired which is certain, rather than subject to the vagaries of risk in the investment of the funds, the risks of death of either the member or the spouse or both, the risks of tax changes, and other risks.**

- **Setting off of own pension arrangements**

**Where both spouses have pension interests both will have to be**

taken into account.

- **Ages of the parties**

There are no rules governing the discounts or adjustments to be made although a brave attempt has been made by David Burrows (see [1999] Fam Law 556). Normally a pension advisor will be able to help.

- **Pensions for house**

In the past the practice has often been to adjust a spouse's interest in the matrimonial home in lieu of being able to settle the pension rights. This practice continues (even after the introduction of attachment and pension sharing orders), but often there is insufficient equity in the house to do this.

## **6 Remedy 2: Pensions attachment (earmarking)**

### **6.1 Introduction**

The Court may order that:

- **The pension scheme trustees or managers pay all or part of the member's pension to his spouse as a periodical payments order. Such an order will come into effect only when a party with pension rights takes his pension. It comes to an end when the pension scheme member dies. The court cannot direct when the scheme member should retire; and/or**
- **the scheme member commutes his pension benefits up to the lump sum maximum allowed by the pension scheme on retirement and that the scheme pays all or part of that benefit to the former spouse; and/or**
- **(in respect of any death in service benefits) that the pension scheme pay all or part of the death benefits to the other party.**
- **These are varieties of periodical payments orders and lump sum orders and unless otherwise provided have the same characteristics. Attachment orders are only effective where there are benefits to meet them. They cannot be made so that the scheme has to pay more than is available for payment to an individual pension scheme member.**

The lump sum payments are treated as capital payments and thus survive the death or remarriage of the recipient, although they are variable even as to the amount payable. The pension payments do not survive the death of either party or remarriage of the spouse.

The order must be made in percentage terms. Those drafting orders need to bear in mind that the tax is paid by the member before payment, that tax rates may change, and that life expectancies or the desire to remarry will affect the decision.

In any event the spouse needs to consider insuring the member against death before the spouse, since the pension payments will cease on the member's death.

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## 6.2 ***Application for an attachment order***

The court cannot make an order of its own motion, and an application must be made (Family Proceedings Rules 1991 Rule 2.70(3)). The petition should include a claim for the usual forms of ancillary relief, and a specific claim for an attachment order should be made in the petition itself.

The application should be made on Form A or B as appropriate. The application must be served on the pension scheme trustees or managers. They must also be provided with the following information:

- **an address to which any notice which the trustees or managers are required to serve under the Divorce etc (Pensions) Regulations 2000 is to be sent;**
- **an address to which any payment which the managers or trustees are required to pay the party without pension rights is to be sent; and**
- **if that address is a bank or building society or the Department of National Savings and Investments, sufficient details to enable payment to be made into that account.**

## 6.3 ***After the order is made***

The person in whose favour the order is made must serve it on the trustees or managers of the pension scheme. This applies also to orders amending or revoking attachment orders. The spouse who is in receipt of an attachment order needs to keep the pension scheme managers and trustees informed of changes of addresses and bank details (Divorce etc (Pensions) Regulations 2000). Where the details supplied earlier have ceased to have effect because the spouse with the order has remarried or for other reasons, the recipient of the attachment order has to give notice to the trustees or managers of pension schemes within fourteen days of the event taking place.

Where it is not reasonably practicable for the pension scheme trustees to make the payment under the order because the details have not been given or kept up to date, the pension scheme must make the payment to the person with pension rights. The trustees are then discharged from their liability to make the payments under the order. The beneficiary is not able to recover payments from the scheme, but must attempt to claim them from the scheme member.

If the payments are made in error because the party without pension rights has failed to notify the pension scheme trustees or administrators of, for example, her remarriage, the pension scheme is absolved of liability if the payments were made in good faith and the pension scheme member will need to try to recover the payments made in error from the former spouse.

Pension schemes must notify beneficiaries of transfers of pension benefits by the scheme member to another scheme and must give a copy of the order and details about payments to the new scheme. Schemes must also inform the beneficiaries of the attachment order of any event likely to result in a significant reduction in the benefits payable under the scheme. These are not defined, but will include, for example,

early retirement.

*Consent orders* An attachment order may be made by consent but an application must be made on Form A and a draft order must be lodged. The pension scheme must be served with the application and it is wise to send the scheme the draft order for approval.

*Variation and duration of order.* Orders can be varied, including orders for the payment of lump sums. An order for the payment of lump sum death-in-service benefits does not lapse on remarriage unless specifically provided for but cannot be varied after the death of either of the parties (MCA 1973 s31(2)(dd), 31(2)(2B)).

#### 6.4 **Drafting the order**

As already stated the order must be expressed as a percentage of the pension at retirement. It is in practice difficult to calculate for example the value of say 50% of the pension accrued to date based on the CETV at retirement whether in £s per annum or as a percentage of the eventual total. This may lead to orders being varied (MCA 1973 s31). A lump sum attachment order may also be varied.

##### *Percentage orders*

A percentage order can be advantageous since it includes a measure of inflation protection before and after the retirement of a member.

In final-salary-based occupational pension schemes, the order could be expressed as being a percentage of the member's accrued benefits with increases before and after retirement in accordance with the provisions of the scheme against which the attachment order is made. The increases before retirement would be consistent with those applying to deferred benefits under the scheme, generally in line with the increase in the RPI subject to a maximum of 5% pa. The increases after retirement are consistent with those provided to pensioners of the scheme.

##### EXAMPLE

*At the time of divorce H has accrued rights in his final salary occupational scheme of 8/60ths of his salary at the time of divorce. The CETV provided is £15,000 of which £2,000 is attributable to Ws pension. The scheme provides for increases in deferred pensions in line with the increase in the RPI subject to a maximum of 5% per annum. Pensions in payment increase at the same rate.*

*After taking into account all other matrimonial assets and all the circumstances of the application, the court decides to make an earmarking order in favour of W which has a current value of £6,500. The value of Hs benefits against which the court can make an order is £13,000 (£15,000 less £2,000). The value of the court's award is, therefore, 50% of the value of Hs benefits and so the order could be expressed as follows:*

*'50% of Hs accrued pension as at [date of order] with increases before and after Hs retirement in line with the increase in the RPI subject to a maximum of 5% pa.'*

*This approach prevents the spouse from receiving a windfall benefit if the member's salary rises faster than expected. It is unattractive because if poorly drafted it will include after acquired member's rights.*

### 6.5 ***Personal pensions and money - purchase occupational pension schemes***

A similar approach can be applied to money-purchase systems. An order must take the form of a percentage of the accumulated fund at the date of divorce:

### 6.6 ***Attachment and the Inland Revenue***

Periodical payments under an attachment order from a pension scheme are regarded for tax purposes as deferred maintenance. Such payments are regarded as the income of the scheme member and are not taxable in the hands of the payee (i.e. the former spouse).

Since the order must be expressed in percentage terms, problems may arise because the pension provider deducts tax at source. The party without pension rights can only reasonably expect to receive a percentage of the net amount received by the party with pension rights. The important factor is for it to be clear on the face of the order exactly what is intended.

### 6.7 ***Attachment and the clean break***

Attachment does not sit comfortably – or at all – with the principle of the clean break. The injunction in MCA 1973 s25A towards clean break solutions has not been amended by the Pensions Act 1995. If a clean break solution is agreed which contains an attachment order for periodical payments, the order in relation to the period between date of the order and the date of the husband's retirement could be expressed on one of three ways:

- **a nominal order for periodical payments for the spouse; or**
- **an order for periodical payments for the spouse; or**
- **a non-extendable (nominal) term order expressed to be subject only to the attached order for periodical payments.**

### 6.8 ***Attachment and offsetting***

A combination of earmarking and offsetting may be helpful where some assets are available immediately by way of an offset, but a clean break is not possible.

### 6.9 ***Frequency of attachment orders***

It seems that relatively few attachment orders have been made. It is possible that problems with valuation, the conflict with the clean break principle, the absence of any widow's provision on death of the member and the prospect of a spouse's remarriage affecting the order all have a bearing.

Orders for lump sums do survive a spouse's remarriage, unless the order contains a specific proviso for lapse on remarriage (as well as on the spouse's death prior to the member's retirement) (*Legrove v Legrove* [1994] 2 FLR 119 CA). Even without such a proviso, an application

could be made to vary the lump sum downwards (even to nil) on death or remarriage.

## 7 Remedy 3: Pension sharing

7.1 Pension sharing (formerly referred to as pension splitting) introduced by the Welfare Reform and Pensions Act 1999, enables the court to divide a pension at the time of divorce so that the spouse either becomes a member of the pension scheme in her/his own right ('internal transfer') or takes a transfer of a designated amount into her or his own pension scheme ('external transfer'). External transfers are not possible from unfunded public schemes, which are treated differently. In those cases the transferee must leave the pension share within the scheme although s/he will have her/his own pension.

7.2 The Welfare Reform and Pensions Act 1999 operates under the following principles:

- **Pension sharing is not compulsory: it is one of a range of options.**
- **Sharing does not mean half in England and Wales: it may be any % from 1% to 100%;**
- **Pension sharing does not apply to judicial separation;**
- **pension sharing applies only to those overseas pensions which are subject to United Kingdom jurisdiction and where a court order could be enforced ;**
- **Pension sharing applies to the additional state pension;**
- **Pension sharing applies only to the rights which have accrued to the date the pension sharing order takes effect, although the order may grant the spouse a higher percentage of the pension to deal with the loss of prospective benefits;**
- **The valuation used is that prescribed by Regulation, usually the CETV; in Scotland, the valuation applies only to the pension accumulated during the period of the marriage;**
- **Attachment continues as an option;**
- **The division must include all rights involved in the pension scheme, including for example AVCs. Different percentage splits may apply to different pension schemes of the member;**
- **A spouse who receives pension rights under a pension- share takes the pension at her/his own normal retirement age;**
- **Lower earners may have the right to 'rebuild' their pension rights;**
- **There is no retrospective implementation.**

## 8 Pension Sharing: Post Application Procedure

	Action required	Source
1	<b>Petition</b> Include prayer for a pension sharing or attachment order in petition for divorce or nullity (even if only for dismissal purposes). It should be included even if there are no shareable rights, to avoid the prospect of any application for a pensions sharing order at a later stage. This prayer is the application referred to in FPR r2.70(1).	FPR 1991 r2.53(1)
2	<b>Form A</b> Apply for pension sharing or attachment order by notice in Form A, specifying the terms of the order requested. The terms will only be known where there has been full disclosure in accordance with the protocol, where it could be along the lines of 'an order under the Matrimonial Causes Act 1973 s24B [pensions sharing] [pensions attachment] in relation to the	FPR 1991, r2.61A(3)

	Action required	Source
	respondent's pensions with X insurer under policy no Y.	
3	<b>Service on pension fund</b> Serve copy of Form A on person responsible for the pension arrangement upon making an application for a pension sharing order or adding a request for a pension sharing order or attachment to an existing application. If the information available is not sufficient to be able do so, the other side should be put on notice as to costs if the First Appointment cannot deal with the pensions issue as an FDR where appropriate. Every pension scheme should be served, including DWP in the case of SERPS.	FPR 1991 r2.70(6)
4	<b>Information from pension fund</b> Within <b>7 days</b> of receiving notification of the date of the first appointment, the party with pension rights must request from each pension arrangement the information referred to in the Pensions on Divorce etc (Provision of Information) Regulations 2000 (SI 2000/1084) (PDPIR 2000) reg 2(2) and (3)(b)-(f) unless that party already has a valuation dated not earlier than <b>12 months</b> prior to the date of the first appointment. Where a request for information has to be made, it does not relate solely to valuation but covers, for example, the availability of an internal transfer and charges. The pension fund must provide the information regardless of whether the Form A seeks a sharing or attachment order. If there is already a 'relevant valuation' (ie less than 12 months old) which does not contain the extra information, there is no obligation to provide the extra information.	FPR 1991 r2.70(2),(4) and (5)
5	<b>Service of information</b> Party with pension rights sends information received to other party, together with the name and address of each pension arrangement, within <b>7 days</b> of receipt. The duty to inform the other side only applies once the information has been received from the pension fund.	FPR 1991 r2.70(3)
6	<b>Pension fund extra information pre-order</b> Pre-order information within <b>21 days</b> of notification that a pension sharing order may be made, the pension arrangement must furnish certain information to the member, for example a prior attachment order, details of charges if not already supplied and whether scheme is winding-up. It is not certain whether the pension fund can regard 'notification' as being the service of Form A or prior notification by letter.	PDPIR 2000 reg 2(7) and 4
7	<b>Pension fund valuation</b> Pension arrangement must supply valuation within <b>3 months</b> of the request or (if needed in connection with proceedings) within <b>6 weeks</b> (or such shorter period specified by the court). Where the request relates to information other than a valuation, the pension arrangement must supply that information within one month. The court also has a general power to order the supply of any other information it thinks fit (PDPIR 2000 reg 2(1)© and (4)).	PDPIR 2000 reg 2(5), (6)
8	<b>Form E</b> Form E should have attached to it any documents produced by the pension arrangement under FPR 1991 r2.70(2) or (4). In practice even if information is requested in good time from the pension fund, it may not be available, and Form E should indicate when it is likely to be available, and attach a copy of the request to the pension fund. The information detailed differs in FPR r2.70(2) and Form E para 2.16.	FPR 1991 r2.61B(3)(c)
9	<b>Pension sharing order</b> The pension sharing order must state that there is to be pension sharing in accordance with the annex or annexes to the order (there is a prescribed form of annex setting out information required by FPR 1991 r2.70(14), Practice Form P1). There must be a separate annex for each pension arrangement.	FPR 1991 r2.70(13),(14)
10	<b>Court action</b> Court sends, within <b>7 days</b> of the making of the pension sharing order or of decree absolute (whichever is the later), to pension arrangement: a copy of the decree nisi of divorce or nullity; a copy of the decree absolute of divorce or nullity; a copy of the pension sharing order and annex relating	FPR 1991 r2.70(16)-(17)

	Action required	Source
	only to that pension arrangement. Lawyers may (and maybe should) also send the documents to the pension arrangement; and must ensure the pension arrangement has sufficient information to enable implementation (PDPIR 2000 reg 5)	
11	<b>Implementation period</b> Pension arrangement has <b>4 months</b> in which to implement the pension sharing order, beginning with the later of: (i) the date on which the order takes effect; and (ii) the date on which the pension arrangement receives the relevant matrimonial documents (step10) and the information required by the PDPIR 2000 reg 5 (regarding the transferor and transferee). OPRA (on request) may extend period (WRAPA 33(4); PS (I&DL)R 2000 reg 3). This may operate where the scheme is winding up or there is insufficient information. Failure to implement exposes scheme to OPRA penalty of £1,000 for a trustee and £10,000 for a company	WRAPA 1999 s34(1)
12	<b>Notice of information by pension scheme</b> Within <b>21 days</b> of receipt of the pension sharing order, the pension arrangement must provide the parties with a notice of charges and a list of personal information held. If the pension sharing order cannot be implemented, a statement to that effect must be supplied to the parties within <b>21 days</b> of receipt of the pension sharing order. Alternatively, a notice of implementation must be given within <b>21 days</b> of the commencement of the implementation period.	PDPIR 2000 reg 7
13	<b>Notice of discharge by pension scheme</b> The pension arrangement must issue a notice of discharge of liability within <b>21 days</b> of completing discharge of the liability in respect of the pension credit.	PDPIR 2000 reg 8

## 9 Variations, Consent Orders etc

- 9.1 Where there is a *consent application* for a pensions sharing order, the pension arrangement must be served with the proposed order (FPR r2.61(1)(dd)).

There is a minor cross-referencing error since r2.61 cross refers to r2.70(11) which itself refers only to attachment. If no objection is received from the pension fund within 14 days, the consent application is lodged together with the proposed order and relevant annex and form M1. There are conflicting time periods in FPR2.61(1)(dd) (14 days) and FPR 2.70(12) (21 days) and PD(PI)R 2000 reg 4 (21 days).

- 9.2 *Variation of pension sharing order*

A pension sharing order can be used to capitalise periodical payments orders (MCA 1973 s31(7B)(ba)) made in relation to proceedings started after 1 December 2000. This might be used where pension rights accrue significantly after divorce rather than before. However, a death-benefits attachment order will prevent a pension sharing order being made in an application for variation in relation to the same pension arrangement.

Once a pension sharing order has been made, it cannot be varied after the decree absolute is made, but can be if not made absolute. There are provisions enabling appeals to be made against such orders.

## 10 What do the cases say?

### 10.1 Introduction

There is still a dearth of case law relating to the valuation of pension rights within ancillary relief applications. There is no decision of the High Court or above giving *direct* guidance on how the CETV should be applied by the court.

### 10.2 *H v H [1993] 2 FLR 335, Thorpe J (as he then was)*

H and W were 39 and 42 respectively. He was a doctor and had 13 years' membership of the NHS pension scheme. W's solicitors obtained an accountant's report giving projected future pension benefits prepared on the basis that H remained in employment, became a consultant in 4 years' time and continued to work until he was 60 or 65.

*Decision (at 344):*

“...in deciding what weight to give to pension rights it is more important in this case to look at the value of what has been earned during cohabitation than to look at the prospective value of what may be earned over the course of the 25 or 30 years between separation and retirement age.”

This decision was, of course, made before the Divorce etc (Pensions) Regulations 1996 came into force on 1 August 1996 introducing a prescribed valuation methodology for the first time. It may still be thought to offer some useful *indirect* guidance in determining how the court should approach the use of CETV.

### 10.3 *T v T [1998] 1 FLR 1072, Singer J*

This decision (along with *Burrow v Burrow (1999) 1 FLR 508, Cazalet J*) offers general guidance on the operation of earmarking/attachment. In the course of his judgement, Singer J offered the following guidance on valuation (in circumstances where no CETVs were available):

(at 1077):

“I am satisfied (and fortified by the evidence of the actuaries) that the CETV would have been of no assistance in this case.

(at 1079):

....I should perhaps emphasise that these values are at best a guide, and their apparent precision (down to the nearest pound) is illusory, and the product of mathematical rather than predictive accuracy. For they necessarily incorporate various assumptions (as to the rate of future inflation before and after the pension commences in payment; an appropriate discount rate reflecting the tax-exempt environment (currently) enjoyed by the pension fund; and of course that ultimately unpredictable factor, mortality)... Thus (as has been

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said of a *Duxbury* fund) the only fact which can be predicted with absolute accuracy is that the prediction will turn out to be inaccurate. These figures are, therefore, at best and when it is appropriate to have regard to them at all, a guide rather than a rule.”

#### 10.4 *Cowan v Cowan* [2001] 2 FLR 192, CA

Note the *dicta* of Thorpe LJ (at para 69)

.....the special characteristics of the pension funds held by the husband and wife respectively require recognition. The husband’s fund is all vested and is no more and no less than a whole life fixed rate income stream. The fact that it would cost £1.19m to purchase an identical income stream allows a capitalisation for comparative purposes. But it is not truly comparable with a cash fund of 1.19m for the obvious reason that the latter is replete with options as to deployment, investment, and spending, as well as having the capacity to survive intact the owner’s demise.

#### 10.5 *Maskell v Maskell* [2001] 3 FCR 296, CA

Thorpe LJ developed his theme on valuation in *Cowan* in circumstances where the asset base was much smaller, the main asset being a pension with a CETV of £40,000. He held (at paragraph 6):

.....the judge (in the court below) is making the seemingly somewhat elementary mistake of confusing present capital with the right to financial benefits on retirement, only 25% of which maximum could be taken in capital terms, the other 75% being taken as an annuity stream. He simply failed to compare like with like.

See also, *Pensions - the Maskell Approach* [2002] Fam Law 848, Elissa da Costa *cf Maskell Unmasked* [2003] Fam Law 345, David Salter. It is, however, submitted that the approach of only having regard to the capital element of the CETV should be approached with caution.

#### 10.6 *S v S (Financial Provision: Departing from Equality)* [2001] 2 FLR 246, Mr Peter Collier QC sitting as a Deputy Judge of the High Court

The court was invited to find that H’s pension fund, being the largest single part of the assets, took the case outside *White*. However, it was held that the court could not differentiate between assets in relation to their value: “assets are assets”.

#### 10.7 *Norris v Norris* [2003] 1 FLR 1142, Bennett J

Bennett J distinguished *Cowan*, where the pension had vested, from *Maskell*, where it had not. It was argued unsuccessfully on behalf of H that, instead of taking the conventional value (presumed to be the CETV) of the pension fund, not yet vested, of £733,989, the court should adopt a lower figure of £500,971 representing the 25% lump sum together with a *Duxbury* capitalisation of the annuity stream purchased now by the remaining 75%. Bennett held (at paragraph [72]) that it would not

be unfair to the husband to include the full value of the pension fund in his assets.

**10.8 *F v F (Clean Break: Balance of Fairness) [2003] 1 FLR 847, Singer J***

A 50% pension sharing order was made in relation to a self-administered scheme of which H was a beneficiary, the assets of which were held entirely in cash and stood at £468,000, where illiquidity meant that a clean break was unachievable. Singer J commented:

“I very much bear in mind that these pension valuations, whether expressed as CETVs or as the value of a fund held in cash, are for practically all purposes a quite distinct form of currency compared with assets which can be realised for cash which is then freely available. As and when these pensions are drawn, there will clearly be the potential to withdraw up to the maximum permissible commuted lump sum. But the balance must be used to provide an income stream. Happily the power to make pension sharing orders under section 21A of the 1973 Act is available in this case, and each party proposes that an order should be made in W’s favour. It is possible then to arrive at an approximation for the gross income which such a pension annuity could in current circumstances provide, if W chose (as I assume she could) to draw her pension immediately.

In this manner, the section 25 discretion as to the pension assets can be looked at in isolation, as it were, although always taking into account their nature, value and proposed distribution when standing back to consider how fair and appropriate any proposed order is overall. What is then highlighted in the case of this family is the serious lack of practical liquidity imposed by the distribution and nature of the other main elements in their economic equation...”

Singer J indicated further (at paragraph [78] that he had “left the pension funds in their own compartment”. He chose not to make pension sharing orders in relation to four smaller pension policies with commercial providers (H: £80,000; W: £18,229) “because it does not seem to me to be cost-efficient to make pension sharing orders in relation ... to three out of these four relatively modest policies.”.

**10.9 *GW v RW (Financial Provision: Departure from Equality) [2003] 2 FLR 108, Mr Nicholas Mostyn QC sitting as a deputy judge of the High Court***

The court declined to reduce the value of H’s US pensions of £130,000 by £50,000 being the tax payable if H were to withdraw the money. The deputy learned judge held that the court would not discount the CETV of a UK pension to reflect tax that would be payable once the pension comes into payment applying *Norris v Norris* (see 10.7 above) where Bennett J declined to discount the value of a pension to reflect its illiquid nature

**10.10 *T v T [1998] 1 FLR 1072, Singer J***

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In *T v T* [1998]; a husband (46) and wife (47) divorced after 14 years of childless marriage. He had significant earning power, her earning power was modest. She sought, amongst other things, an earmarking order (as it was then) directing the trustees of his pension scheme to pay some, or all, of his pension when it fell due. It was held:

- **Compensation for loss of pension rights on divorce is discretionary rather than mandatory**
- **Attachment orders for periodical payments terminate on remarriage (para 86).**
- **An attachment order continues subject to variation during the payer's lifetime until death or remarriage of the recipient.**
- **Extreme accuracy in the calculation of the value of pension benefits is not required (para 90)**
- **Attachment orders for periodical payments should only be made at or near retirement.**

No attachment order was made except for death-in-service benefits where it was ordered that the trustees of the pension scheme pay the wife on the husband's death 10 times any subsisting annual maintenance payment.

A maintenance order of £22,000 pa reducing to £17,000 was made. The reduction reflected the court's view that the wife had an earning capacity and should in the future be able to work.

- 10.11 In *Burrow v Burrow* (8 April 1999, [1999] 1 FLR 508 Cazalet J) the district judge had earmarked 50% of the commuted pension rights at retirement to be paid to the wife, and then 50% of the post-tax pension. He was 48, she 50. They separated in 1994. On appeal, the High Court overturned the earmarking of the pension, since it regarded the payments as periodical rather than capital. It may well have been that there was a drafting flaw in the District Judge's order, since it was not proportional to the years of marriage or to the pension rights acquired to date. It also affected the accrual of future pension rights.
- 10.12 **Transitional** In *W v W (Divorce Proceedings: Withdrawal of Consent after perfection of Order)* [2002] EWHC 1826 (Fam) the husband's petition was presented before December 2000, the wife's after December 2000. Both had agreed that a pensions sharing order should be made but the court considered it did not have jurisdiction. The Family Division held that since the first petition had been filed before December 2000 it had indeed no jurisdiction.

## 11. Pension Sharing, Attachment and the Statutory Charge

### (a) *The Statutory Charge*

The Legal Services' Commission's charge arises under the Access to Justice Act 1999, s 10(7) on money or property recovered or preserved in family proceedings. Whether or not the charge applies depends on whether or not property was in issue in the proceedings; that will be

determined as a matter of fact from the court order, evidence, pleadings and correspondence in the case (*Hanlon v Law Society* [1981] AC 124; [1980] 2 All ER 199). It is subject to the exemption of the first £3,000 recovered or preserved (CLS (Financial) Regulations 2000, reg 44(1)(d) as amended by the CLS (Financial) (Amendment No 3) Regulations 2001, reg 22).

(b) ***Legal Services Commission Guidance***

The Legal Services Commission originally published guidance on the operation of the statutory charge on pension sharing and pension attachment orders in July 2001. The Commission then took the view that, whilst all periodical payments by way of pension attachment would be exempt from the statutory charge, it might be possible for the charge to operate on a preserved pension following an application for pension attachment/sharing, any position would depend, in each case, on whether the original pension was affected by a statutory prohibition on assignment or charging and whether the provision had been disappplied.

Having taken the advice of leading Counsel (Mr John Wardell QC), the Legal Services Commission announced in May 2002 that its revised view is that, when a court determines an application for a pension sharing or attachment order, any property recovered or preserved as a result of its determination is exempt from the statutory charge apart from any lump sum order (subject to the exemptions referred to above) payable under a pension sharing order.