

PENSION SHARING: Where are we now?

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1 CASE LAW UPDATE

1.1 *Field v Field* [2003] 1 FLR 376, Wilson J

The court has no power to make a charging order on H's entitlement under a pension scheme because H had no beneficial interest under the trusts of the pension scheme and the scheme contained an express provision that no annuity or lump sum benefit payable was capable of being charged.

1.2 *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:

"[14] 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.

[15] 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 para [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."

1.3 *Pearce v Pearce* [2003] 3 FCR 178; [2003] 2 FLR 1144, CA

Where on a variation application an entitlement to future periodical payments was dismissed, the court's function was not to open capital claims but to substitute for the periodical payments order such other order or orders as would fairly compensate the payee and at the same time complete the clean break. Thorpe LJ held that, in surveying what substitute order or orders should be made, first consideration should be given to the option of carving out of the payer's pension fund a pension for the payee equivalent to the discharged periodical payments order. The rationale for this approach is, as Thorpe LJ put it at para [15] c/d:

"Often the application for the exercise of the jurisdiction under s31(7B) will not be opposed. The only issue is the nature and extent of the financial benefit to be substituted for the periodical payments order. The substitution of an alternative income stream in the shape of a pension involves a much simpler and less speculative exercise. Substituting like for like offers much less scope for debate, disagreement and ingenuity of argument".

This route will only apply where the periodical payments order to be discharged was made in divorce proceedings commence on or after 1 December 2000 (WRPA 1999, s85(3)(b)). However, as Thorpe LJ observed, despite this restriction on the wider availability of MCA 1974, s31(7B)(ba) (pension sharing orders on variation applications), the court may substitute a pension for a discharged periodical payments order by a variation of settlement order providing the pension plan can be construed as a post-nuptial settlement (*Brooks v Brooks* [1995] 3 All ER 257, HL) (at para [15]h).

The course advocated by Thorpe LJ cannot be taken against a pension that is already the subject of a pension sharing order in relation to that marriage or a pension attachment order (MCA 1973, s24B(3)-(5)). Does this herald the era of the nominal pension sharing order... or protection by way of pension attachment, eg a death benefits order under MCA 1973, s25C?

1.4 Discounted valuation

- (a) *Norris v Norris* [2003] 1FLR 1142, Bennett J

Bennett J distinguished *Cowan v Cowan* [2001] 2 FLR 192, CA, where the pension fund had vested, from *Maskell v Maskell* [2001] 3 FCR 296, CA, 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 £833,989, the court should adopt a lower figure of £500,971 representing the 25% lump sum together with a *Duxbury* calculation of the annuity stream purchased now by the remaining 75%. Bennett J held (at para [72]) that it would not be unfair to the husband to include the full value of the pension fund in his assets.

- (b) *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*, where Bennett J declined to discount the value of a pension to reflect its illiquid nature.

1.5 *D v D (Financial Provision: Periodical Payments)* [2004] EWHC 445 (Fam), Coleridge J

This is not so much a decision about pensions (although two pension sharing orders were made), but rather about retirement. It is also a middle money case. H was aged 51 and a partner in a two-partner firm of solicitors earning £61,000 per annum. W was aged 55 and a legal secretary. At first instance, capital orders were made to achieve equality, but with periodical payments of £10,000 per annum to W for joint lives or until remarriage. On appeal, H argued that the periodical payments should be limited to a non-extendable term of 10 years.

Coleridge J held that attempting to achieve equality had been the right objective. However, he then held at para [23]:

"The difficulty is that, if an order for periodical payments is left rampant, if I can use that word – without any restriction on it – then equality can later be destroyed because of intervening events and it potentially flies in the face of the attainment of the district judge's perfectly proper objective".

and at para [25]:

"It is not, in my judgment, fair to the parties or the courts to carry out careful, equal division of the assets in the way that this district judge did and then leave open, in an unrestricted way, the possibility for 'the basis of' that fairness to be revisited in years to come".

Coleridge J therefore imposed an extendable 10 year term on W's periodical payments so that they would not extend beyond H's retirement, even if he in relative terms prospered relative to her.

2 PENSION CREDIT (STATE PENSION CREDIT ACT 2002)

The Act received the Royal Assent on 25 June 2002 and came into force on 6 October 2003. As of March 2004, 2.7 million pensioners received pension credit. The Act introduces a new state pension credit for persons aged 60 and over.

Pension credit is made up of two separate components:

- (a) a *guarantee credit* to ensure a minimum level of income to those aged 60 and over; and
- (b) a *savings credit* which, from age 65, provides an additional income for pensioners who have low or modest incomes in addition to the basic state pension.

The guarantee credit replaces the minimum income guarantee (MIG) introduced in April 1999 (the minimum level of income support payable to persons aged 60 and over under Part 7 of the Social Security Contributions and Benefits Act 1992).

It ensures a minimum guaranteed income for pensioners so they need not live on less than £105.45 per week (£160.95 per week for pensioner couples). It is paid to claimants (men and women) from age 60, but between 2010 and 2020 the age will rise by stages under the Pensions Act 1995 to 65 based on the date of birth of the claimant in the same way as the state pension age for women will rise over the same period.

The savings credit is designed to reward claimants, from age 65, who have modest levels of 'qualifying income' which takes their income over the 'savings credit threshold' (i.e. the basic state pension). 'Qualifying income' means income from either the state retirement pension or from occupational or personal pension schemes. In other words, pensioners with modest savings will no longer lose a pound in their benefit for every pound of pensions or other savings they have built up. It is intended that claimants will receive a cash addition of 60p per week for every £1 of qualifying income they have over the savings credit threshold (£79.60 per week in 2004). Single pensioners will receive a maximum savings credit of £15.51 per week. The savings credit threshold for couples in 2004 is £127.25 per week and the maximum savings credit for couples is £20.22 per week. For every £1 of income a pensioner has above the level of the guarantee credit (£105.45 per week in 2004) the pensioner's savings credit will be reduced by 40p per week.

All eligible applications received before October 2004 will be backdated to the commencement of pension credit in October 2003 or to the date of entitlement (if later). For applications received after 2004, the maximum period of backdating allowed will be extended from 3 months to 12 months.

Intrusive weekly means tests have been abolished. From age 65, most awards will instead be set for five years with pensioners only having to report significant changes in their circumstances. In general, increases in income during this fixed period (known as the 'assessed income period') will be ignored. For all purposes, the pension credit calculation ignores the amount of any capital held by the claimant which is less than £6,000. If capital of more than £6,000 is held, the excess over £6,000 (or £10,000 in the case of individuals in residential care and nursing homes) is deemed to provide qualifying income to the pensioner at the rate of return of £1 per week for every £500. The rule excluding pensioners with £12,000 or more of capital has been abolished.

Pensioners will not lose their entitlement to pension credit because of the number of hours they, or their partners, work; MIG was subject to a limit of 16 hours' remunerative work per week.

3 NEW FORMS

3.1 Introduction

Some dissatisfaction has been expressed over the existing pension sharing forms. For example, section 2.16 of Form E predates the introduction of pension sharing; Form P1 (pension sharing annex) confusingly required until very recently at paragraph 5 the specified date at which the benefits were to be valued under the Divorce etc (Pensions) Regulations 2000 to be stated, even though this was meaningless; Form M1 has not been updated to reflect the introduction of pension sharing.

In view of these concerns, the President's Ancillary Relief Advisory Group (PARAG) (chaired by Lord Justice Thorpe) set up a Pensions Sub-Group chaired by District Judge Roger Bird (Bristol County Court). The Sub-Group has now recommended the introduction of five new forms, of which four are discussed below. The fifth is a new pension attachment annex (form P2).

3.2 New Form E, section 2.16

It is proposed that section 2.16 be greatly simplified to reflect the fact that many cases (even though pensions are a disclosable resource) do not require any pensions remedy, be it pension sharing, pension attachment or offsetting. The new section 2.16 will essentially only require information to be given as to the type and identify of pension involved, the CETV, the date of calculation of the CETV and a statement as to whether the pension is in payment or drawdown. Further information about pensions can then, where appropriate, be dealt with by means of Form P3 (see paragraph 3.3 below).

3.3 New Form P3 (Pension Inquiry Form)

This is a completely new form. It is envisaged that, where either party seeks any form of pension remedy, the court will be asked at the First Appointment to direct the completion by the relevant pension arrangement of Form P3. This seeks in one comprehensive document the information required by the Pensions on Divorce etc (Provision of Information) Regulations 2000 regs 2, 3, and 4 as well as the information required by the FPR 1991, r 2.70(2).

Form P3 can be used to provide voluntary disclosure in accordance with the Law Society's Protocol in which event Form P3 will need to be signed by the pension scheme member/policy holder to provide authorisation for the release of information. Alternatively, Form P3 can be used prior to the first appointment on a voluntary basis so that the timetable of the ancillary relief application is not unnecessarily extended eg where it might otherwise be possible to combine the FDR with the first appointment. In this alternative situation, Form P3 will again need to be signed by the pension scheme member/policy holder.

3.4 New Form P1 (Pension Sharing Annex)

Amendments to the pension sharing annex include tackling the problem that the implementation period cannot begin until the information required by the Pensions on Divorce etc (Provision of Information) Regulations 2000, reg 5 (information required by the pension arrangement before the implementation period may begin eg personal details of transferor and transferee and details of destination arrangement (where applicable)) has been supplied.

The opportunity has been taken to simplify the text concerning the date on which the pension sharing order takes effect and the date from which the implementation period runs.

3.5 New Form M1 (Statement of Financial Information Supporting a Consent Order)

Form P1 in its existing format requires the court to be satisfied that the pension arrangement has furnished the information required by the Pensions on Divorce etc (Provision of Information) Regulations 2000, reg 4 and that it appears from the information

that there is power to make a pension sharing order. However, no provision had been made procedurally to ensure information required by reg 4 had been received by the court. Accordingly, Form M1 is to be amended so that, when the court is asked to make a pension sharing order by consent, confirmation must be given in the new Form M1 that the pension arrangement has furnished the information required by reg 4 and that from that information it appears that there is power to make a pension sharing order.

4 SIMPLIFICATION OF PENSIONS LAW

4.1 The story so far

(a) The *Pickering* report

The *Pickering* Report commissioned by the Government on the simplification of pensions law was published on 11 July 2002. Amongst its recommendations were some dealing specifically with pensions and divorce:

- (i) abolition of pension attachment because of the uncertainties involved, whilst recognising that the court may regard attachment as the most appropriate option in certain circumstances;
- (ii) simplification of pension sharing rules;
- (iii) bringing into line the conditions for receipt of benefits under pension sharing arrangements with those for other types of scheme member;
- (iv) the removal of restrictions on the share derived from contracted out rights.

(b) *White Paper: Simplicity, Security and Choice: Working and Saving for Retirement*

The Government published a White Paper "*Simplicity, Security and Choice: Working and Saving for Retirement*" on 13 June 2003. This followed the Green Paper on the same subject issued on 17 December 2002, consideration having been given to the *Pickering* Report (as well as the *Sandler* Review of medium and long-term retail investment set up by the Chancellor of the Exchequer and the Inland Revenue's review of the simplification of the tax rules relating to pensions).

The intention is to address the pensions crisis involving a £27 multi-billion gap between savers' expectations of retirement income and the reality, when many final salary schemes are closing to new members, and in specific terms a number of issues:

- a population that is living longer than ever before;
- improving the protection of benefits for members of occupational schemes;
- simplifying pensions legislation in order to make pension provision easier for employers;
- a more flexible approach as to when an individual may retire; and
- incentives to plan better for retirement.

4.2 2004 Budget: 17 March 2004 – the Finance Bill

(a) *Introduction*

The Government's proposals represent a clean break with the past, although a measure of protection will be provided for pension rights built up under the old regime. The essence of the new regime is one of simplification condensing the present 8 set of rules into one

simplified regime. The new legislation will now come into force on 6 April 2006 (A Day) (instead of 6 April 2005 as originally stated).

Pension schemes will be able to invest in all types of investments (including residential property, subject to a pension benefit in kind charge), except loans to members. Borrowings and loans to a connected company (which must be secured) will be limited to 50% of the fund and holding shares in the company will be limited to 5% of funds.

(b) *Limits on contributions*

(i) Lifetime allowance

In 1989, an earnings cap was introduced. Its purpose was to limit the level of earnings which could be used to support tax effective pension contributions. The limit is set at £102,000 for 2004/05 (£99,000 for 2003/04). Individuals who joined an employer's pension scheme before June 1989 and who have not changed employment since, as well as those who hold pre-1988 retirement annuity contracts, are not subject to the earnings cap. This means that contributions may be based on their total earnings with no upper limit.

The Government's intention is to introduce a lifetime allowance, which effectively places a cap on everyone's pension fund. The old earnings cap is abolished. The initial lifetime allowance will be set at £1.5m rising incrementally as follows:

6 April 2007 - £1.6m

6 April 2008 - £1.65m

6 April 2009 - £1.75m

6 April 2010 - £1.8m

After 2010, the limit will be reviewed every five years taking into account *inter alia* the increase in the RPI.

The fixing of £1.5m as the initial lifetime limit follows investigations by the National Audit Office as to the number of individuals likely to be affected by the lifetime allowance. The lifetime allowance has originally been mooted at £1.4m against the Government's estimate that approximately 5,000 individuals who joined their schemes before 1989 will have funds in excess of £1.4m.

Personal pensions and money purchase occupational pension schemes will be straightforward to value. However, valuing final salary occupational schemes is more complex; (final salary occupational schemes provide a pension fund based upon the number of years' service and final (average) earnings at retirement). The proposal is that a factor of 20:1 will be used. This means that for every £1 of a proposed pension there must be a pension fund of £20. This effectively limits a final salary pension to £75,000 (£1.5m/20 per annum).

Above the lifetime allowance, a tax charge will be made at the time benefits are taken. Funds in excess of the lifetime allowance will be subject to a lifetime allowance charge of 25%. The remaining excess can be withdrawn as a lump sum taxed at the member's marginal income tax rate, which would result in an effective tax rate of 55% on the excess.

(ii) Annual allowance

One of the most radical changes is to the level of annual contributions which may be made into a pension scheme. Currently, the occupational pension regime offers no real limit to employer's contributions, but rather measures the benefits which may be

taken out on retirement. Conversely, the retirement annuity contract/personal pension regimes allow contributions as a percentage of earnings, such percentage increasing with age. This takes no account of erratic earnings patterns and therefore the benefit of being able to make larger contributions in years when earnings are higher. For some people, these may be earlier rather than later in their career. The new rules break the link between contributions on the one hand and the combination of salary, service and age on the other.

Employers will be able to make unlimited contributions with corporation tax relief. Each member may make personal contributions with income tax relief of the greater of 100% of UK taxable earnings and £3,600. However, only annual contributions up to £215,000 in tax year 2006/2007 will attract tax relief. This allowance will increase annually so that by 2010 the annual allowance will be £255,000. The annual allowance will then be reviewed every five years. Contributions or accrued benefit increases which exceed the annual allowance will be subject to a 40% tax charge. This limit will not apply in the year of actual retirement.

(c) *Benefits*

(i) Income

Income may be Secured, Unsecured or Alternatively Secured:

- Secured Income:
 - Income:
 - Lifetime annuity paid by the provider
 - Death:
 - Predetermined dependants' income; or
 - Lump sum payable under a guarantee period; or
 - Lump sum payable under a value protected fund
 - Investment:
 - Unrestricted
- Unsecured Income (only available to aged 75):
 - Income:
 - Drawdown from pension fund
 - Minimum £1 per annum
 - Maximum 120% of income under a secured annuity
 - Death:
 - Dependants' income can continue up to age 75; or
 - Remaining value of fund available as a lump sum less 35% tax charge;
 - Investment:

Unrestricted

- Alternatively Secured Income
 - Income:
 - Lifetime drawdown
 - Minimum £1 per annum
 - Maximum 75% of income under a secured annuity but age 75 is the highest age which may be used
 - Death:
 - Income only available to dependants
 - If not dependants, lump sum payable to employer, provider or member designated charity
 - Investment:
 - Unrestricted

(ii) Tax-free lump sum

Instead of the varying formulae for calculating tax-free lump sums under the old regime, all schemes will be able to pay tax-free lump sums of up to 25% of the lifetime allowance, making the maximum tax-free lump sum £375,000 from 6 April 2006.

(iii) Death benefits

The current inheritance tax advantages of lump sum payments from pension schemes on the death of a member have been retained. On death before drawing benefits, a tax-free lump sum or a dependants' pension can be paid (subject to a tax charge if the lifetime allowances is exceeded). In summary, the position on death pre-retirement is:

- Lump sum:
 - up to lifetime allowance available IHT free;
 - excess funds subject to 55% tax charge before payment
- Income:
 - no limit on income payable to dependants;
 - income can be Secured, Unsecured or Alternatively Secured

4.3 Protecting pre-A Day pensions

Where the value of a member's pension fund is already over the lifetime allowance as at A Day, he/she will be able to substitute that higher value for the lifetime allowance. For individuals ceasing to have active membership of an approved pension scheme by 6 April 2006, and not resuming active membership, benefits coming into payment after 5 April 2006 will not be affected by the lifetime allowance restriction. The detailed transitional arrangements for those with existing pension benefits are complex. A degree of protection under the new regime offers two options:

(a) *Primary Protection*

This is only available to an individual whose existing pension funds as at A Day exceed the lifetime allowance of £1.5m. Such rights may be registered (within 3 years of A Day). Future pension contributions may be made. The total benefits from the pension fund can accrue in line with the increase in the lifetime allowance without any recovery charge being applied. However, there may be a recovery charge (25%) if the total value of the pension fund exceeds the lifetime allowance after deducting the value of the registered benefits.

(b) *Enhanced protection*

Under this option, an individual may register a pension fund of any size as at A Day. The value of the pension benefits arising from the fund will be allowed to accrue without the need to refer to the level of the lifetime allowance in the future and will not be subject to a recovery charge at any time. However, it will not be possible to accrue any further pension benefits nor to make any further contributions into the pension arrangement. If further contributions are made, the position will revert to primary protection as described above.

4.4 **Flexible retirement**

The concept of a normal retirement date will disappear after A Day. Everyone will be able to draw benefits from age 50 whether continuing to work or not. Those in employer's pension schemes will be able to draw their pension and continue to work making gradual retirement possible for many. The self-employed with personal pensions already have this option. Benefits must commence by age 75. By 2010 the minimum pension age will rise to 55 (except incapacity retirement or those with a contractual right to early retirement at age 50 at A Day provided that certain criteria are met). A lower normal retirement ages for those in specific professions (eg sportmen/women) will also rise.

4.5 **Other issues of importance to the family lawyer**

Some of the detailed reforms may prove to be of importance to family lawyers:

(a) *Abolition of safeguarded rights*

Safeguarded rights represent a pension share derived from *protected rights* (SERPs/S2P type benefits comprised within a contracted-out scheme) (Pension Sharing (Safeguarded Rights) Regulations 2000). The White Paper proposes that the concept of safeguarded rights be abolished in order to make it simpler to make a pension sharing order against a contracted-out scheme. This change will increase the number of schemes able to accept a pension credit given that most contracted-in pension schemes are unable to accept a pension credit containing safeguarded rights. The time required to implement a pension share should be shortened as the administrative requirements on pension schemes will be fewer.

It was intended that the abolition of safeguarded rights should be dealt with in the Pensions Bill. Space for this reform has not been found in the Bill. The Government had then mooted the idea of dealing with the reform by way of a Regulatory Reform Order (under the Regulatory Reform Act 2001). This now appears unlikely.

(b) *Alignment of the pension credit benefit age for occupational pension schemes and personal pensions*

At present, pension credit benefit in an occupational pension scheme may only be accessed at age 60. However, if pension credit benefit is set up in a personal pension, it may be accessed from age 50. The Government in the White Paper proposes the removal of the anomaly by increasing the age at which pension credit benefit may be drawn from a personal pension to age 60. This proposal, which is

hailed as a simplification which is of particular benefit to women, does not address the issue of 'income gap syndrome' (see para 7.3 below).

The legislative position with regard to this reform is identical to the abolition of safeguarded rights.

(c) *Normal retirement age in public sector schemes to be increased from 60 to 65*

This may mean that members will not be able to retire at age 60 because of the lower pension payable. The White Paper indicates that pension rights accrued from past service will be protected and will be capable of being taken from aged 60 in an unreduced form. However, benefits accrued in future years will be subject to the new regime. New entrants to public sector pension schemes will be affected by the changes immediately they come into operation, which is expected to be by the end of 2006.

The vast majority of pension sharing orders made against public sector pension schemes are by way of internal transfer. The age for accessing pension credit benefits (other than in cases of ill-health) is currently age 60 in most public sector pension schemes, but will following the White Paper changes increase to age 65 possibly in 2006. Family lawyers need to be aware of the need for some form of additional income provision for the spouse as a result of this change.

(d) *The Lifetime Allowance and Pension Sharing*

- Pre A Day

The value of any pension credit/debit will be ignored for the purposes of both spouses' lifetime allowances.

- Post A Day

Pension credits will count towards the transferee's lifetime allowance, but pension debits will not be counted towards the transferor's lifetime allowance. Does this provision offer tax planning/rebuilding opportunities?

Bear in mind the following considerations:

- (i) A pension sharing order made pre or post A Day will not affect the position of the transferor providing the resultant fund is below the lifetime allowance.
- (ii) A pension sharing order made post A Day may adversely affect the transferee if the amount of the pension credit combined with any existing or new pensions will result in the total fund exceeding the lifetime allowance.
- (iii) Incorrect allowance for the protection basis secured post A Day by the transferor could make a significant difference to either the transferor or the transferee.
- (iv) A pension sharing order in relation to the wrong pension could make a significant difference to the benefits available to the transferor.
- (v) If a pension sharing order has been agreed on the basis of future benefit expectations, does the agreement need to be revisited in the light of the post A Day rules?
- (vi) Is there a need to ensure that the pension sharing order is made pre A Day?

5 PENSIONS BILL

The Pensions Bill was published on 12 February 2004. The two subjects covered by the Bill which have attracted most media coverage have been the new *Pension Protection Fund* and the *Pension Regulator*. These two subjects are not, however, by any means the only matters covered by the 248 clauses and 12 schedules.

The subject matter of the Bill may be briefly summarised as follows:

- The creation of a new *Pensions Regulator*
- A new *Pensions Regulator Tribunal*, to which any person affected by certain of the Regulator's powers can make representations
- A new *Register of Occupational Personal Pension Schemes* containing more information than the current register
- A duty on an expanded category of *statutory whistle-blowers* to inform the Register of Pensions Schemes of breaches of law
- The creation of the *Pension Protection Fund* (PPF). The PPF will act as a form of insurance to ensure the payment of defined occupational pension scheme benefits up to a certain level if the scheme is of insufficient funds to pay them and the employer is insolvent (where there is no prospect of corporate rescue, or business rescue with pension liabilities attached). The PPF is to be funded initially by a flat-rate levy dependant on the number of scheme members. Further funding will be decided by the Pensions Regulator. The PPF is only to apply to future insolvencies.

It is envisaged by the PPF will cover 100% of pension benefits in payment for those who have reached normal scheme retirement age and 90% of the accrued pensions for all others. However, the Bill contains a provision for a cap on both these amounts set at £25,000 per annum (such amount to be increased in line with average earnings). The PPF will deal with increases to pensions in payment in line with RPI or 2.5% per annum, if less. Pensions in deferment will be revalued in line with RPI or 5% per annum, if less.

Scheme trustees will face the potentially onerous obligation under the Bill of being obliged to notify the Board of the PPF if it appears to them that their scheme's employer could become insolvent. Once the PPF steps into take control of the scheme, all of the scheme's assets transferred to the PPF along with all of the scheme's pension obligations.

The Government is concerned about the effect of the new provisions relating to the PPF on both pension attachment and pension sharing orders. The Government's thinking on these issues is still to be refined. However, the issues to be considered are:

- Will an existing pension attachment order continue against the Pension Protection Fund?
- Will a variation to an existing pension attachment order bind the Pension Protection Fund?
- When the Pension Protection Fund has been set up, will it be possible to make new pension attachment orders against the Pension Protection Fund?

- When the Pension Protection Fund has been set up, will it be possible to make a new pension sharing order against the Pension Protection Fund?
 - What will be the position with a pension sharing order which has been made but not implemented when the PPF takes control of a scheme
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- There is created a *PPF Ombudsman*, who can investigate complaints of maladministration
 - A *Fraud Compensation Fund* (FCF) is created, which should not be confused with the PPF. The FCF takes over from the Pensions Compensation Board
 - The minimum funding requirement is replaced with the scheme-specific strategy (known as the *Statutory Funding Objective*) to fund pension commitments and correct any deficits
 - The Bill contains a power to require trustees and managers to provide *combined* (state, occupational and personal) *pension forecasts*
 - As from 6 April 2005, the Government will increase the rate at which *state pensions* are increased when a person defers receipt of payment after state pension age. The rate will increase from about 7% from each year deferred to 10% for each year and allows a choice of an increased pension or a lump sum payment.

6 CIVIL PARTNERSHIP BILL

Clause 2 of the Bill provides for the formation of a civil partnership (as defined by clause 1 as between a same sex couple) by registration.

Chapter 2 of Part 2 of the Bill deals with the dissolution, nullity and other proceedings, (eg presumption of death orders and separation orders) relating to a civil partnership. Irretrievable breakdown is the sole ground for the court to grant a dissolution order (clause 36). The facts to be proved to establish irretrievable breakdown are the same as in the MCA 1973 for divorce with the exception of adultery. Dissolution, nullity and presumption of death orders are initially conditional for a period of six weeks. There is a time bar on applications for dissolution of one year.

Chapter 3 of Part 2 of the Bill (clauses 63-69) deals with property and financial arrangements. In particular, clause 69(1) and Sched 5 make provision for financial relief for civil partners and children of the family corresponding to provision made for financial relief in relation in connection with marriages by Part 2 of the MCA 1973.

Part 4 of Sched 5 provides for pension sharing orders on or after a dissolution or nullity order in relation to a civil partnership. Part 6 of Sched 5 makes provision for pension attachment orders to be made on the making of a dissolution, nullity or separation order

7 PROBLEMS FOR THE PRACTITIONER

7.1 Pensions in payment and s 37 orders

It is possible for an avoidance of disposition order to be made under MCA 1973, s37 in support of an application for a pension sharing order (MCA 1973, s37 as amended by WRPA 1999, Sched 3, para 9).

An avoidance of disposition order may be used to prevent the pension going into payment until implementation of a pension sharing order.

Consider the position which arises where a pension sharing order is to be made against a pension which is about to go into payment:

- As long as the member/policy holder has taken his tax-free lump sum prior to implementation, the pension sharing order will only operate under moving target syndrome against the reduced value of the fund; and
- The person with the benefit of the pension credit will not then be able to commute any part of her pension credit in the form of the tax-free lump sum (see para 7.4 below).

7.2 Pension sharing and death

What is the position where one of the parties dies after a pension sharing order has been made but before implementation?

If the transferor dies after the date on which the pension sharing order has taken effect but before implementation, the transferee has nonetheless an enforceable pension credit under WRPA 1999, s29. If the transferor dies before the pension sharing order has taken effect it is unenforceable. Consequently claims should be stated to be active until the pension sharing order takes effect so that the intended transferee (presumably) retains claims under I(PFD)A 1975.

Where the transferee dies before implementation, the position is more complex. The Pensions on Divorce (Implementation and Discharge) Regulations 2000, reg 6 applies and prescribes how liability should be discharged. Reg 6 enables the pension arrangement (if it provides for discharge in accordance with Reg 6) to discharge the pension credit in this situation by making a lump sum payment or pension payments to one or more persons (including the transferor and any dependants) or by entering into an annuity contract or insurance contract. However, if the scheme does not provide for Reg 6, the pension credit reverts to the "pension arrangement". In the case of an occupational pension scheme, the credit would normally revert under the augmentation rule to the individual fund of the transferor. If the trustees attempt to retain the pension credit for the benefit of the scheme as a whole, the transferor must make a complaint to the Pensions Ombudsman. In the case of a personal pension, where reg 6 does not apply, the issue becomes one of whether the "pension arrangement" means the global funds of the institution or the specific personal pension contract.

In summary, the following considerations apply:

- Does reg 6 apply? If so, this may provide a solution
- If not, should a *Barder* application be made?
- Can the position be resolved by correspondence with the pension arrangement over the meaning of "pension arrangement"?
- If not, is a complaint to the Pensions Ombudsman appropriate?

7.3 Deferred pension sharing orders: income gap syndrome

If a pension is in payment and a pension sharing order is made against that pension, the effect of the pension debit will be to reduce the amount of the pension payable with immediate effect. However, there may not be an immediate corresponding benefit to the person with the benefit of the pension credit. For example, she may be somewhat younger than her [former] husband and may not be able to access pension credit benefit taken by way of an internal transfer in an occupational scheme until age 60 or, alternatively, may not be able to access pension credit benefit transferred externally into a personal pension until age 50. In either situation, an *income gap* arises.

Some practitioners have ingeniously tried to circumvent income gap syndrome by making a deferred pension sharing order, ie one which takes effect only at the date when the person with the benefit of the pension credit can access that credit so that the effect of the pension debit and the pension credit occurs simultaneously. A number of such orders have been made. The Department of Work and Pensions and the Department of Constitutional Affairs have both indicated that the current framework of the legislation does not permit such orders to be made and that no changes are contemplated.

7.4 Two tax-free lump sums?

If a pension is in payment, it is more likely than not (and in the case of certain pensions eg the Civil Service, certain) that a tax-free lump sum has been taken by the member/policy holder. If a pension sharing order is then made against the pension in payment, can the person with the benefit of the pension credit herself take a tax-free lump sum when she elects to draw benefit?

And the answer is: NO!

The source material is:

- occupational pension schemes

Inland Revenue's Guidance Notes for Occupational Schemes IR12 para 6.5:

"..... where the ex-spouse's pension credit rights arise..... as a result of a pension sharing order which took place after the scheme member had already taken tax-free lump sum retirement benefit under the scheme the ex-spouse may receive pension credit rights in pension form only"

- Personal pensions

Inland Revenue's Guidance Notes for Personal Pensions IR76:

Paras 12.16 and 12.18

7.5 Pension sharing and remarriage

It is not possible to apply for a property adjustment order or a lump sum order following remarriage, unless the requisite application has been made before remarriage. An application for this purpose includes a prayer in a petition. Problems of this type are therefore normally encountered by Respondents to a petition who remarry without having filed Form A. MCA 1973, s28(3) was not, however, amended to include a pension sharing order. It is therefore possible for a Respondent caught by the remarriage trap (or indeed a Petitioner who has not incorporated a prayer for a pension sharing order in his/her petition) to apply for a pension sharing order notwithstanding remarriage providing the petition was issued on or after 1 December 2000.

8 RETIREMENT INCOME REFORM BILL

The Bill inserts a new section 637B into ICTA 1988, which introduces a *Retirement Income Fund*, which is a vehicle for the reinvestment of savings in retirement designed to replace the current income drawdown provisions (both during life and after death).

Investment in a Retirement Income Fund is subject to the requirements in relation to *Minimum Retirement Income* contained in clause 2 of the Bill. The amount of the Minimum Retirement Income is to be set for each financial year by statutory instrument made on or before the preceding 31 January.

