

Financial planning for pensions and divorce

 | **SIFA** *Professional*

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Co-authored by

Paul Gorman

Chartered and Resolution Accredited Financial Adviser
Co-founder of Beaufort Financial Planning (West Midlands) Ltd

and

Philip Barnsley

Partner, Head of Family Law and Collaborative Lawyer
Higgs LLP, Brierley Hill, West Midlands

The case study was contributed by

Les Cameron

M & G Wealth

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Contributors

Paul Gorman

Chartered and Resolution Accredited Financial Adviser

Beaufort Financial Planning (West Midlands) Ltd

Paul is co-founder of Beaufort Financial Planning (West Midlands) Ltd, a Corporate Chartered Financial Planning firm, which he has led since 1999. Paul is a Chartered Financial Planner.

Paul is a Resolution Accredited financial adviser, specialising in all aspects of financial planning on divorce, with a particular focus on pensions and has been a member of Resolution since 2007. His experience includes supporting family lawyers across different types of dispute resolution work including collaborative law and mediations and attending and being involved in client meetings.

More recently, Paul jointly established Southdown Consultants Ltd, a niche practice providing expert witness pension reports for divorce purposes.

Paul has worked within the profession of financial services for 30 years with the vast majority of the time as a Financial Planner and Independent Financial Adviser.

In addition to being a member of Resolution, he is also a member of the Chartered Insurance Institute & Personal Finance Society

Philip Barnsley

Partner, Head of Family Law and Collaborative Lawyer

Higgs LLP, Brierley Hill

Philip is an experienced family lawyer at Higgs LLP. He is also a partner and is Head of the Family Law team. Philip specialises in cases dealing principally with divorce and significant financial elements. He is also trained as a collaborative lawyer.

Philip's cases usually involve high value and complex assets, ranging from inherited assets, to trusts, overseas assets and pre-nuptial agreements.

Philip is a member of Resolution, and has previously acted as a regional Chair, as well as being appointed to both the National and Executive Committees previously. Resolution are the leading membership organisation for family law professionals in the UK and have lead the campaign for the introduction of no fault divorce for over 30 years.

Disclaimer:

Nothing within this handbook constitutes legal advice or gives rise to a solicitor/client relationship. Specialist legal advice should be taken in relation to specific circumstances. The contents of this handbook are for general information purposes only. No liability will accrue for any error or omission. No representation, warranty or promise (whether express or implied) is given to the effect that any information is or remains accurate, complete or up to date, or fit or suitable for any purpose. Any reliance you place on the information within the publication is at your own risk.

Les Cameron

Head of Technical

M & G Wealth

Les covers most areas of financial planning, specialising in the pensions technical arena. Les joined Prudential in 1997 (now part of M & G plc) and has held various pensions technical and management roles throughout his career. Les holds the Advanced Diploma of the Personal Finance Society and has a BA in Financial Studies.

About SIFA Professional

SIFA was originally founded in 1992 as Solicitors for Independent Financial Advice with the objective of bringing together financial planning professionals and solicitors and assisting them to provide a joined-up service to their mutual benefit and that of their clients.

In 2022, SIFA still offers compliance services via SIFA Support Services but since 2009, via SIFA Professional it has offered support and consultancy to quality financial advisory businesses looking to build professional compliant relationships with solicitors. The SIFA Professional Directory of Financial Advisers can be found at www.sifa-directory.info.



SIFA Professional is an Affiliate Partner of the Law Society

The Legal Services Act of 2007 and subsequent developments in the legal market have dramatically changed the landscape. Solicitors are being encouraged by their regulator to respond to increasing competition, both regulated and unregulated, by taking an holistic view of their clients' needs and associating with other professionals whose business offerings are complementary to their own.

Financial services has been singled out both by the SRA and the Legal Ombudsman as being a potentially suitable area of diversification by solicitors. Crispin Passmore, the then Executive Director for Policy at the Solicitors Regulation Authority, speaking at a press reception to mark SIFA's 25th anniversary in February 2017, commented:

"One thing we are learning about the modern market is that people find it difficult to characterise whether their problem is legal, financial, business or whether it is even solvable. Problems do not fit into neat compartments. Therefore, we are seeing firms taking an increasingly holistic approach to problem solving. And many firms benefit from the expertise and specialism of financial advisers, solicitors, accountants and others."

Mr Passmore concluded by saying: *"The future of regulation will make it easier for financial advisers and others to work with solicitors. And it will be a two way street."*

In November 2019, the SRA introduced new Standards and Regulations. Being true to their word, they are simplifying the regulation of solicitors, raising professionalism with more concise principle governed rules and adding for the first time a 'Code of Conduct' for the firm management as well as for the individual solicitor. This should ensure a more structured approach to the provision of legal services and in turn lead to a more considered process in the selection, by solicitors, of the correct financial advisory partners. A referral has to be in the 'clients' best interests' and this is, of course important when solicitors and financial planners are working collaboratively



“ Solicitors are being encouraged by their regulator to respond to increasing competition... by taking an holistic view of their clients' needs and associating with other professionals whose business offerings are complementary to their own. ”

About M&G Wealth

M&G Wealth, as part of M&G plc, is using all our established business knowledge, experience and expertise to broaden our offerings for you and your clients.

By investing in technology and digitising processes we're creating efficiencies...

... with Pru products, M&G Investments and our platform combined, we have a full range of core tax wrappers and product ranges available on and off platform.

... giving you more choice of how you want to work with us...

... we promote sustainability, including our planet centric investment solutions PruFund Planet, and the Model Portfolio Services that could help your clients achieve their goals - while aiming to have a positive impact on our planet and society.

We're working hard with you to offer benefits of scale and added value through our specialist support, technical team expertise and thought leadership insight...

So, no matter what your needs, we can help.

We're re-imagining wealth – for you and your clients.



Foreword

Working with like minded professionals and in particular Family Lawyers has been an integral part of my business for many, many years now.

I made a conscious decision back in 2007 to specialise in Financial Planning on Divorce and gained Resolution's Accredited Specialist status, something which I still maintain today and am very proud of.

In those early days of building relationships and gaining credibility, having a good understanding of the divorce process and being able to converse about different dispute resolution methods was all important. It was guides like this that I was grateful for and would turn to, to support me and my development.

A guide like this, can truly help financial advisers attain some of those vital ingredients – knowledge and the confidence to communicate – needed to develop and have successful relationships with Family Lawyers.

This guide covers all of the key aspects for anyone wanting to get involved in financial planning on divorce and is a great aide memoire for those with experience.

This particular version of the guide has been updated to reflect the recent changes in divorce law, and as such, should be a guide that all working in this area can benefit in reading and keeping close by.

Paul Gorman

Chartered Financial Planner and Resolution Accredited

Co-Founder Beaufort (West Midlands) Ltd

“ It was guides like this that I was grateful for and would turn to, to support me and my development. ”

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1 The financial implications of divorce

1.1 Divorce and Financial Remedies

Divorce law in England and Wales is primarily governed by statute which sets out a checklist of factors that the Court must have regard to when deciding how to resolve the parties' finances. These factors include the welfare of any child of the family, the financial resources (and needs) of the parties, the parties' particular situations in terms of age, mental and physical health, the standard of living during the marriage and the contributions made by both parties during the subsistence of the marriage. The result is that the Court has a very wide discretion when reaching its final decision.

As the law is couched in such general terms, case law directs the evolution of principle from which practitioners can gain insight into the treatment by the Court of particular circumstances or events. Case law arises in an ad hoc way depending on circumstances from case to case so is not structured or planned. One consequence of this that pervades the law is that negotiations and arguments can become very complicated and protracted, inevitably increasing costs.

The overarching aim of the Court when resolving matrimonial finances is 'fairness' and this has been achieved by the Court by considering the result of applying the statutory criteria set out above against the three distributive principles of needs, compensation and sharing.

The Court must start with the financial needs of the parties and any children. In most cases the search for fairness largely begins and ends

at this stage because there is nothing left once the needs of the parties are met, if indeed both parties' needs can be met. Meeting the 'needs' of the parties entails providing appropriate accommodation, the right level of pension fund (if relevant) and ensuring that each party is provided with enough to live on to an appropriate standard in the context of the marriage.

In certain cases, fairness also requires the Court to take account of 'compensation'. A spouse who suffers a loss in their earning capacity because a promising career has been given up in order to be the homemaker and child-carer can be entitled to compensation in the form of additional capital sums or maintenance. However, compensation cases are rare and, since the inception of the compensation principle in 2006, compensation-based cases have failed in a number of reported decisions. In most cases, any compensation element will be subsumed within 'needs'.

A third strand to fairness, of considerable importance in 'big money' cases, is 'sharing'. Married couples commit themselves to sharing their lives and when their partnership ends in circumstances where there are more assets than are 'needed', each is entitled to an equal share of the assets of the partnership – unless there is a good reason to the contrary.

The question then becomes how one divides this 'surplus wealth'. The presumption, in line with the 'sharing principle', is a 50/50 capital division upon divorce. The key question therefore becomes "why should the Court depart from it?"

The law says that where there are surplus assets there is a 'yardstick of equality' that should be applied. The Court should therefore consider what assets there are, what needs there are, what the parties' various arguments are and, based upon this, they should determine a result, always having in mind the basic principle that fairness will often mean that the assets should be divided equally.

Can the 50/50 presumption be avoided? Yes, in certain cases. What might those cases be? One is where the marriage is short: where there is a marriage of perhaps only two to four years with much of the wealth built up by one of the parties prior to the marriage then the likelihood is that everything is not going to be divided equally. What is much more likely is that the Court would look at what has been built up during the marriage itself and subject, to needs, divide that equally. In a 'long marriage' (perhaps over ten years although there is no strict rule) that is unlikely to apply and, in a medium length marriage of perhaps six to ten years it is very much a grey area.

Another way in which some, but only a very few, paying parties have successfully argued against an equal division of the wealth is when they are deemed to be a 'special contributor'. This is taken to mean that they have brought to the table something that is so 'touched by genius' and have displayed such an extreme and unusual talent for generating wealth that it would not be fair for the results of that brilliance to be divided equally. Whilst many people have tried to argue that they fall within this category, only a small proportion have succeeded. It seems likely that to be considered a 'special contributor' a person will not only have to have amassed a very significant amount of wealth. It may also have to be an extremely unusual level of wealth for the industry in which the individual operates (e.g. accumulating several million pounds as an investment banker or hedge fund executive may not be considered particularly unique).

Where the great majority of the assets in a case are in fact not the 'fruit of the matrimonial partnership' but inherited of other family wealth, there is a growing line of authority that this may be a reason to move away from equal sharing and towards a more restricted, needs-based approach. There can be argument that certain assets are not marital assets particularly where these assets have not been merged into the joint assets of the marriage and whilst this can cause a departure from equality, it can be overridden by the reasonable need of the other party.

Apart from situations such as those described above, under English law as it currently stands, and despite the uncertainty that can arise from ad hoc evolution through case law there is in effect a '50% tax' on people with significant assets who are unfortunate enough to find themselves caught up in a divorce.

It should not be forgotten that once the capital assets have been divided there are very often significant pensions and similar principles apply to their division, although the mechanics can be more complex and the outcome more nuanced. There is also the question of ongoing financial support i.e. maintenance. It may be that, in addition to parting with a substantial proportion of their wealth in terms of capital, the paying party may also have ongoing financial support to pay whether in the form of a regular monthly amount or by way of a capitalised lump sum. This is because the claims between spouses' range across the financial needs arising from capital, property, pension and income both during life and against the estate of the other, in death.

In April 2016 the Family Justice Council issued a publication 'Sorting out Finances on Divorce', which is designed to assist individuals, but particularly Litigants in Person, with understanding the financial issues on divorce.

<https://www.judiciary.uk/publications/sorting-out-finances-on-divorce/>

1.2 Assets available for division on divorce

As mentioned above, the Court has very wide powers when it comes to resolving the parties' finances and no asset is automatically exempt. As well as the more commonplace ability to make an order for the sale (or transfer) of the matrimonial home or another UK property, the Court may also make an order in respect of the following:

1.2.1 Inheritances and lifetime gifts

These can be involved particularly where they have been received during the course of the marriage, and sometimes where they were received before or even after separation.

1.2.2 Business assets

The Family Division has on occasion pierced the corporate veil and made orders for the distribution of business assets from a company of which one of the parties is a shareholder. This will depend on whether the Court is able to determine that the company 'is a mere façade concealing the true facts'. However, ownership and control of a company are not of themselves sufficient to justify piercing the veil. Nor is the Court able to do so merely because it is thought to be necessary in the interests of justice. The Court needs to find control on the part of the wrongdoer and impropriety linked to the use of the company structure to avoid or conceal liability (i.e. misuse of the company as a device or façade to conceal wrongdoing). The above is additional to the simpler concept that the value of a business in which one party has a share can be taken into account even if only by attributing the value of that interest as an asset to be retained by that party, needing financial balance elsewhere in the marital asset base for the other party.

1.2.3 Foreign assets

The Family Division has no qualms in making an order for the sale of a foreign property or company shares. The divorce jurisdiction encompasses worldwide assets. Enforcement against foreign assets may be another matter.

1.2.4 Trusts

Courts have very wide discretion in respect of trusts and are generally not afraid to use them. If, in reality, some or all of the trust assets are a 'resource' of that party then most probably they will comprise part of the resource available to that party in considering both needs and how the asset base should be divided, whether the trust is based onshore or offshore. The question that will be asked is whether, in a 'rainy day' scenario, trust assets would be made available to the party upon the making of a genuine request. Relevant factors will include whether the party is the settlor of the trust, what the letter of wishes says, how the trust has operated historically (e.g. has it been treated as a piggy bank or have trustees actively exercised discretion?) and the composition of the class of beneficiaries and their expectations of benefit.

The Family Court have the power to vary the terms of 'Nuptial settlements'. This term has never been precisely defined, but is widely construed, and it is safest to assume that the Court will consider themselves able to vary any trust conferring a benefit on one of the parties which was settled during the marriage or in contemplation of it. In varying the terms of a nuptial settlement, the Court may order, by way of examples, that a new beneficiary be added, that funds be segregated or that distributions be made.

Generally, the Court will try and avoid varying trusts, particularly where there are other assets that can be called upon. The preference is generally to use ‘judicious encouragement’ – i.e. an order against the party premised on the basis that the trustees will assist.

It should be noted that the Court has the power to make an order requiring distribution of funds from overseas/offshore trusts with foreign trustees and even where the trust itself is not governed by English law. Where there is an offshore trust holding offshore assets, the really tough questions will often relate to enforcement of the English order in overseas jurisdictions. This is an area of considerable complexity, and one that is increasingly given detailed consideration by wealthy families seeking to create robust inter-generational structures.

1.2.5 Pensions

It has now been 21 years since the introduction of pension sharing and the treatment of pensions on the breakdown of a relationship has come a long way in the interim. Earmarking orders continued to be available after the 1999 Act but were renamed pension attachment orders; and this is the term used in this handbook.

The Matrimonial Causes Act 1973 already placed the Court under a duty to have regard to the value to each of the spouses of any benefit (including pensions) which they might lose the chance of acquiring as a result of divorce. However, the 1973 Act did not give the Court the power to make orders directly affecting pension schemes. Consequently, the Court took account of the existence of pension funds, and the value to either spouse of the loss of pension benefits, when deciding how to exercise the powers which were available to them to make ‘offsetting’ orders for ‘lump sum’ capital payments, property adjustment or maintenance payments (‘periodical payments’).

S166 of the Pensions Act 1995 modified the provisions of the Matrimonial Causes Act 1973 by giving Court new powers to take account of the loss of pension rights and to make attachment orders for the benefit of an ex-spouse. Scheme Trustees or Managers could be directed by the Court to divert payments from a member to the member’s ex-spouse.

Attachment, however, has its shortcomings and has not proved popular either with Solicitors or with the Court. Though there are some circumstances when from a financial planning perspective an attachment order may be the best solution to the problem, such as when the member is entitled to protected tax-free cash on benefits which had accrued before 6 April 2006 (‘A Day’) when the tax treatment of pensions was standardised, or where one party has retired and taken benefits from the Police Pension Scheme or Armed Forces Pension Scheme and the spouse is not yet old enough to receive payment of the pension credit, where the member’s benefits will have been reduced immediately.

The perceived difficulty with attachment orders is that the member can delay the commencement of the pension benefits to the detriment of the ex-spouse. Furthermore, if the ex-spouse benefiting from the order remarries, the order (as a form of maintenance order) will lapse insofar as it relates to income and may be subject to variation insofar as it relates to a lump sum. Also, benefits might be lost in the event of the member’s death before retirement.

It was these difficulties which increased the pressure on Government for a ‘clean break’ solution, which would give the ex-spouse quantifiable and enforceable rights.

The pension sharing solution became available for divorces where the petition was issued on or after 1 December 2000, when the Welfare Reform and Pensions Act 1999 came into force. This introduced into pensions law the entirely

new principle that benefits could be taken away from a pension scheme member. When a sharing order is made, pension benefits are divided between the couple at the time of divorce and a legal transfer of ownership of benefits is made from member to ex-spouse. The ex-spouse’s benefits are thus separated completely from those of the member.

There are therefore three alternative ways in which the Court can now treat pension rights:

- offsetting against other matrimonial assets
- pension attachment orders (previously referred to as ‘earmarking’)
- pension sharing orders.

Whatever options are contemplated with pensions it is important that the family lawyer and the financial adviser work together to identify the net effect of taxation in any pension solutions contemplated before solutions are finalised.

The Court does not have to make either a pension attachment order or a pension sharing order in every case and in many cases such an order may not be appropriate.

It is not possible to obtain a pension sharing order against the same set of benefits as those which are subject to an attachment order. Accordingly, in cases where an attachment order has already been made, a sharing order is not an option, even where the attachment order is in respect of a different marriage. An attachment order can, however, be made after a pension sharing order has been made, against the shared benefits, provided that it relates to a different marriage.

If a spouse has more than one pension arrangement, each can be treated differently – i.e. if appropriate an attachment order could be made against one pension arrangement and a sharing order against another.

There can be complicating factors in deciding what is an appropriate pension outcome such as: significant age differential between the parties; the need to maximise State pension entitlement; seeking to ring fence from division pension accruing outside of the years of the marriage; considering releasing capital through drawdown to an older spouse by pension sharing a younger spouse’s greater pension provision. These concepts are largely outside the remit of this brochure other than to say the family lawyer and the financial adviser need to work together to creatively consider all possibilities using the expert knowledge of each for the holistic benefit to the clients.

Among the changes in the world of pensions which have taken place since the last edition of this handbook and which impact divorce settlements, the following are notable:

- The McCloud remedy removing the age discrimination that was judged to have arisen in public service pension schemes. Further detail is still awaited on this matter.
- Case law and an increasing number of Pension Ombudsman determinations

2 The divorce process in England and Wales

2.1 The law

On 6 April 2022 the Divorce Dissolution and Separation Act 2020 (DDSA 2020) was enacted and swept away almost 50 years of legal procedure on divorce. This heralded a new era of “no-fault divorce” for couples in the UK.

2.2 The language

There is a significant change in the language that is now used to describe the divorce process. Some of the key changes are:

Old language	New language
Petition	Application
Petitioner	Applicant
Decree Nisi	Conditional Order
Decree Absolute	Final Order

2.3 The divorce application

After the first year of marriage, either spouse may (subject to meeting the requirements as to domicile or habitual residence) issue a divorce application asking for the marriage to be dissolved. In England and Wales, the only ground for divorce is the irretrievable breakdown of the marriage, which will be satisfied by a simple statement which will stand as the only evidence. The DDSA 2020 removes the need to plead the previous facts of adultery, behaviour, desertion, two or five years’ separation.

A civil partnership can be dissolved on the same grounds as a marriage. Unless indicated

otherwise, the term ‘divorce’ will be used in this handbook to include the dissolution of a civil partnership.

A key change under the DDSA 2020 is the removal of the ability to defend a divorce application. An application can be disputed on various procedural grounds, but not defended on the facts.

The DDSA 2020 also introduced for the first time the ability for divorce applications to be sole or joint applications.

Once a divorce application is made, the applicant has 28 days to effect service of this upon the respondent.

However, there are concerns in the family law community regarding the rules around service of a divorce application and the lack of penalties of extended time limits in the event that service is not effected after 28 days.

The concern is based upon a respondent not being served notice of an application until very close to the date that a Conditional Order of divorce is made, placing that respondent at a huge disadvantage in the process. It is hoped that this will be remedied following implementation of the DDSA 2020.

The DDSA 2020 has also implemented a new 26 week timeframe for divorce proceedings.

There is an initial 20 week period from issue of the divorce application until an application can be made for a Conditional Order. This application must be made by the original applicant(s) to confirm their intention still remains to divorce.

6 weeks after the Conditional Order is made an application for a Final Order can be made.

The 26 week timeframe is designed to allow time for greater reflection and to allow couples and families time to agree future practical, financial and child arrangements.

The DDSA 2020 still does not cover arrangements for cohabiting couples who still have limited financial claims upon separation and no rights to share pension benefits.

In some circumstances it might be held that a divorce would have too great an effect on either or both parties, and that in these circumstances judicial separation may be more appropriate. Judicial separation leaves the parties married but takes away the obligation to cohabit. Judicial separation may also be used when divorce is not acceptable, for example on religious grounds.

There are several methods of dealing with the divorce and agreeing the terms of the financial settlement:

- self-representation
- mediation
- collaborative divorce
- arbitration <http://ifla.org.uk/>
- litigation
- the other alternative dispute resolution (ADR) methods which are being developed.

These are considered in a later section of this handbook.

Following the introduction of the Family Proceeding Rules 2010, as from April 2011 all applications for financial relief have to be at least assessed for the suitability of achieving a settlement by mediation.

The divorce procedure is as shown in the flow chart at the end of this section.

Any financial order agreed between the parties cannot be approved by the Court until the Final Order has been pronounced.

It is not necessary however for a financial settlement to have been agreed or for the Court to have determined the financial issues before the Final Order on divorce is made.

In practice the applicant will often be advised to defer making the application for the Final Order until the financial issues have been resolved either by agreement or by the Court, following a hearing.

There is provision in the law to apply to delay the Final Order in circumstances where a financial settlement has not been agreed. There may be more applications under this law if the problem with service become a common occurrence.

It is important to bear this in mind in cases where there are pension benefits within a final salary scheme, as any spouse’s benefits may fall away on the issue of the Final Order.

Although there is no requirement to instruct solicitors in divorce proceedings it is usually considered prudent to take legal advice before finalising any financial arrangements. Some couples negotiate their own agreements and only need advice on how to make these binding; and because of the current economic climate there is an increasing number of parties who are acting in person. For others, mediation can be a useful process to facilitate agreement.

Mediation is the process whereby a neutral third party (not necessarily legally qualified) helps a divorcing couple to resolve the issues between them, whether these relate to finances or children or other matters. Mediators are trained to narrow differences and facilitate accord.

Collaborative divorce requires the parties to work cooperatively towards reaching agreement and the professional advisers to undertake not to go to Court. Collaborative divorce requires the parties to work cooperatively towards reaching agreement and the professional advisers to undertake not to go to Court. All parties then complete a participation agreement to bind them to this arrangement. If either party decides to quit the collaborative basis and revert to

Court proceedings, at this point both their own and the other party's legal representatives must resign and will be prohibited from representing the same client again in relation to the divorce (a prohibition which extends to other members of the same firm). Similar conditions apply for any financial planners involved in the collaborative process.

2.4 Financial settlements

Most divorcing couples agree a financial settlement with the help of legal advisers or mediators. The financial settlement will however have to be ratified by the Court and become an order of the Court to make it binding. If the parties reach an agreement, a draft Consent Order can be filed with the Court, without the parties having to appear in Court.

A financial settlement can be agreed at any time after the parties separate – i.e. before or after a divorce application has been issued, including after the date of the Final Order. If the parties reach agreement between themselves, the Court's only involvement in the financial issues will be when the draft financial Consent Order is filed with the Court and the District Judge is asked to approve the order.

It is important to remember that the law allows for a settlement to be varied or discharged, and case law provides examples of how this may affect parties.

A settlement cannot be incorporated into a Court order until a Conditional Order has been pronounced in divorce proceedings.

If the parties are unable to reach a financial agreement, then a divorce application will have to be issued before either spouse can make an application to the Court for determination of their financial claims.

The Family Proceedings Rules 2010 came into effect on 6 April 2011, and these set out the procedures for dealing with a financial claim.

The Family Proceedings Rules are written in plain English and therefore phrases such as a 'prayer for relief' have been removed.

A financial application, referred to as an application for financial remedies or a 'Form A' can be issued by either spouse at any time after the divorce application has been made including after the Final Order. The Form A should refer in broad terms to any pension sharing order or attachment order sought by the applying spouse.

It is advisable for a spouse to have any financial claims dealt with, either by consent or by determination by the Court, before re-marrying; otherwise they may be barred from making a financial application.

The Court can order regular maintenance payments (normally monthly) to a husband or wife while the marriage still exists, as well as after its dissolution. Maintenance orders are made with a list of trigger events which enable the obligation to cease – some of these may relate to a fixed event such as a number of years or the age of a child. Whereas others may relate to an event where the timing of occurrence is not known at the time the order is made, but the nature of the event is understood, such as the cohabitation by the recipient or death of either. Maintenance orders will cease automatically on the re-marriage of the recipient.

Settlements which do not provide for any on-going maintenance payments and in which neither spouse will have any further claim against the income, capital, property or pension of the other during life or on death are known as 'clean break' settlements. A clean break settlement does not however terminate the financial responsibility of a parent towards their child.

The first step towards reaching a settlement is for the parties' solicitors to undertake an investigation into their clients' financial arrangements. All assets (including pension provision), liabilities, income and likely changes in circumstances must be disclosed. The disclosure will form the basis of negotiation.

Information is often exchanged on a voluntary basis to facilitate negotiation.

If either party issues a financial application, the Court will automatically direct the parties to provide disclosure within a specified time period by filing a statement of means to which a statement of truth attaches via Form E. [Form E Financial statement \(publishing.service.gov.uk\)](https://www.publishing.service.gov.uk)

Spouses making voluntary financial disclosure often do so by way of a voluntary (as in not ordered by the court) Form E. The statement of truth should still be completed.

The Family Proceedings Rules 2010 have now introduced three versions of the Form E applicable to the differing circumstances of the application for financial relief.

There are no set rules as to how assets should be divided or what payments should be made by one spouse to the other. Husbands and wives are treated the same and there is no presumption that a settlement should confer equal benefits on both parties. There is however a principle that the outcome be fair.

Many cases are settled on a 'needs' basis, with the party who has the main care of the children perhaps receiving a larger share of the matrimonial assets or income, if necessary. Bad behaviour or conduct by one of the spouses during the marriage will only be taken into account in very exceptional circumstances. The aim is to find a solution which is equitable in the particular circumstances, and each solution is likely to be as simple or complex as the situation of the couple involved. If there are any children, primary consideration will be given to their welfare.

The Court is under a duty to take account of certain factors specified in section 25 of the Matrimonial Causes Act 1973, including:

- the financial resources, needs (including the children), obligations and responsibilities of both husband and wife
- their respective earning capacities both currently and in the foreseeable future

- their ages
- any physical or mental disability from which they may suffer
- the length of the marriage
- their standard of living during the marriage and
- the contributions of each to the welfare of the family whether financial or otherwise.

The Court also has to consider the value of any benefit, such as a pension, which may be lost to the husband or wife on divorce. However, the fact that the Court has to consider these specified factors does not mean that other factors are excluded. The Court must have regard to all the circumstances of each individual case.

Financial planning professionals will need to remember that on the granting of a Final Order, a dependent spouse will often lose his or her entitlement to a widow's or widower's pension or death in service benefits under the other spouse's occupational pension scheme. Hence the fact that the parties may be advised to defer making the application for a Final Order until the financial issues have been resolved.

If a pension share is contemplated as part of the terms of financial settlement, the pension trustees need to be provided with draft pension annex for the possibility of input, before the agreement is put before the Court to be approved.

It is sometimes necessary to consider pension entitlements where the parties are dealing with an application to vary the original financial order. This can be a complex area and is outside the remit of this brochure.

2.5 Pension assets

Immediately upon a Form A financial application being issued by either spouse, the Court will lay down a timetable for making financial disclosure and for advancing the application. The date of the first hearing (called the 'First Appointment') is automatically included as part of the timetable.

When either of the parties to a divorce “has or is likely to have any benefits under a pension arrangement”, he or she must within seven days of receiving Notice of First Appointment (Form C) apply to the ‘person responsible’ (i.e. the scheme trustees or provider of the pension arrangement) for the information prescribed in clause 2 of the Pensions on Divorce (Provision of Information) Regulations 2000, Statutory Instrument 2000 No. 1048: [The Pensions on Divorce etc. \(Provision of Information\) Regulations 2000 \(legislation.gov.uk\)](#)

The information, when provided, must be served on the other spouse within seven days of receipt. It will comprise:

- a valuation of benefits under the pension arrangement
- the method of valuation and details of the nature of the benefits and
- details of how the pension provider would deal with a pension sharing order, including the charges which would be made and whether an internal transfer would be available.

This information must be provided by the scheme trustees or providers within six weeks after receiving the request and the member should provide the information to the other spouse within seven days of receiving it.

2.5.1 State Pension

The Pension Service will provide a forecast of the pension accrued and a valuation of any rights accrued under the State Pension Scheme. The value of state pension should never be overlooked and full disclosure should be considered between the family lawyer and the financial adviser.

The State Pension changed in April 2016 for all individuals reaching State Pension age on or after 6 April 2016.

It is not within the scope of this handbook to explain in detail the actual changes.

For the family lawyer there are three regimes to be considered:

1. Parties who reach State Pension age before 6 April 2016

The previous rules still apply, and the parties will continue to receive a basic State Pension and possibly an additional State Pension and graduated pension.

The basic State Pension can still be subject to substitution of National Insurance records so that the basic State Pension is provided to both parties based upon the National

Insurance record of the party with the highest record.

The additional State Pension can still be subject to a pension sharing order.

Therefore, both of BR19 and BR20 are required to be completed by both parties and will show the full value of benefits.

2. Parties reach State Pension age after 6 April 2016, but proceedings commenced before 6 April 2016

The parties are subject to the new State Pension and no substitution of National Insurance records is possible, but the additional State Pension is still fully shareable.

When sending the BR19 and BR20 to The Pension Service it must state the proceedings commenced before 6 April 2016 otherwise The Pension Service default position is option 3 below.

3. Parties reach State Pension age after 6 April 2016 and proceedings have not commenced before that date

A pension sharing order can only be made on the ‘protected amount’ if the party is entitled to one. The protected amount is the amount of State Pension entitlement under the pre-April 2016 regime that exceeds the new State Pension at 6 April 2016 and it is unlikely that this will apply

in all cases. However until the necessary forms are submitted to The Pension Service this issue cannot be clarified.

The BR19 will show the forecasted benefits payable at State Pension age, but the BR20 will only show the value of the protected amount.

The Pension Service has published a revised BR19 and BR20 in June 2016, which includes additional questions about the date of the divorce petition, and whether the individual has paid National Insurance contributions in the Isle of Man.

Summary information in relation to the spouses’ pension arrangements must be detailed on page 12 of Form E, whether or not a pension attachment or pension sharing order is being sought (as to attachment and sharing, see section 4).

In the case of pension assets, a view will have to be taken as to whether the value quoted is acceptable and whether it suggests one form of settlement in preference to another.

If it is decided that a pension attachment or pension sharing order is appropriate then additional information may be required about the pension arrangements, in which case a Pension Enquiry Form may be provided at the request of the member or the order of the Court (Form P – [Form P: Pension Inquiry Form information needed when a Pension Sharing Order or Pension Attachment Order may be made - GOV.UK \(www.gov.uk\)](#))

If a pension sharing order is being applied for, or may be applied for, the ‘person responsible’, has 21 days from receipt of notice (or such time as may be specified by the Court) to provide certain information set out in clause 4 of the Pensions on Divorce (Provision of Information) Regulations 2000 and to confirm that implementation does not present any insuperable problems from the point of view of the scheme. This additional information can, however, be provided at the beginning of the process with the basic information/ valuation and some providers have therefore decided to send out both sets of information simultaneously, at the outset.

The Consent Order must refer to a pension sharing annex P1 [Form P1: Pension sharing annex under \[section 24B of the Matrimonial Causes Act 1973\] \[paragraph 15 of Schedule 5 to the Civil Partnership Act 2004\] - GOV.UK \(www.gov.uk\)](#) and there must be an annex in respect of each pension arrangement which is to be shared.

In April 2016 a revised pension sharing annex was published which requires that in circumstances where State Pension is to be shared, if the transferor reaches his/her State Pension age on or after 6 April 2016 and divorce or dissolution proceedings start on or after that date, then the shared weekly amount of State Pension which is payable is to be inserted. This can only relate to the ‘protected amount’.

Similar regulations apply if benefits are held within the Pension Protection Fund (PPF). However, three separate documents apply, namely the PPF pension compensation sharing annex [Form PPF1: Pension Protection Fund \(PPF\) - Sharing annex to a Pension Compensation Sharing Order \[section 24E of the Matrimonial Causes Act 1973\] \[paragraph 19A of Schedule 5 to the Civil Partnership Act 2004\] - GOV.UK \(www.gov.uk\)](#)

[Form PPF2: Pension Protection Fund \(PPF\) - Attachment Annex to a Pension Compensation Attachment Order \[section 25F of the Matrimonial Causes Act 1973\] \[paragraph 34A of Schedule 5 to the Civil Partnership Act 2004\] - GOV.UK \(www.gov.uk\)](#) the PPF pension compensation attachment annex; and PPF P1, the pension enquiry form for the PPF [Form PPF: Pension Protection Fund \(PPF\) - Inquiry form information needed when a Pension Compensation Sharing Order or Pension Compensation Attachment Order may be made - GOV.UK \(www.gov.uk\)](#)

Within seven days of the Final Order or the date of the order (whichever is later) the Court (or the person instructed within the Pension Sharing Annex as the recipient of the pension sharing order) should send to the pension provider a copy of the Final Order and other documentation, including the order.

It is, however, common to find that the transferring pension schemes have not been provided with confirmation that a pension sharing order or pension attachment order has been made, let alone the detailed requirements that they will probably require in order to comply with the order.

A pension sharing order cannot take effect until 28 days after its issue by the Court.

2.5.2 Defined Contribution schemes

Since April 2015, savers in Defined Contribution schemes have been able to draw their whole pension pot as cash as from age 55, with no need to purchase an annuity. 25% of each pension pot can generally be drawn tax-free as a lump sum and the remaining 75% of the fund can be drawn and will be subject to Income Tax at the investor's marginal rate. The undrawn element retains the tax-advantaged environment for pension fund investment returns.

If the tax-free cash ('TFC' or 'PCLS' – Pension Commencement Lump Sum) is not withdrawn as soon as a pension pot or a segregated part of a pension pot is 'crystallised' by the withdrawal of funds, the right to receive TFC tax-free will be lost.

Tax on death

Most pensions are written under a Discretionary Trust, so benefits will avoid the holder's estate and instead be paid directly to the beneficiaries. Nominated beneficiaries may, subject to scheme rules, be able to choose between receiving the benefits as a lump sum or as a drawdown or annuity. Pension holders are recommended to notify the scheme trustees of their non-binding expressions of wishes as to the identity of the nominated beneficiaries and future nominees.

For all distributions made on or after 6 April 2016 the tax position on death is: If the pension holder dies before age 75, then both crystallised and uncrystallised funds pass free of tax, regardless of whether taken as a lump sum, drawdown or annuity. This is the position providing, where relevant, funds are distributed within two years of the date the pension scheme administrator

first knew of the member's death, or the date the scheme administrator could reasonably have been expected to know of the member's death.

- If they transferred scheme provider(s) and die within two years of the transfer their executors would need to report this. HMRC will then investigate and if they consider that the individual knew they had a short life expectancy, they may decide that the amount transferred is assessable to Inheritance Tax.
- If the pension holder dies after age 75 or distribution does not occur within the permitted two-year window (see above) then the distribution of both crystallised and uncrystallised funds is taxable.
- Where the recipient is an individual the tax charge is an Income Tax charge through PAYE at their highest marginal rate.
- Where the recipient is not an individual (a trustee or personal representative for example) the tax charge is a Special Lump Sum death benefit charge of 45%.

NB: Any distribution made from uncrystallised funds (death before age 75 and settled within the two-year window as above) will also be subject to a Lifetime Allowance test that may give rise to a tax charge.

The beneficiaries are responsible for paying any Lifetime Allowance tax charges.

Minimum pension age

The minimum pension age is due to increase from 55 to 57 with effect from 2028 and it is perhaps worthwhile considering how maintenance orders are written if it is intended for maintenance to cease as from the date on which the pension income is expected to become payable.

Rather than maintenance agreements stating that the periodic payments will continue to age 55, a non-specific reference to the normal minimum pension age may be considered more appropriate, which would avoid costly action in the future to extend maintenance payments.

Bankruptcy

It is a requirement of financial disclosure to obtain confirmation as to whether any bankruptcy orders apply to an individual's pension arrangements.

In the case of *Raithatha v Williamson* an expectation was provided that the Trustee in Bankruptcy could put an individual's pension into payment if they had passed the normal minimum pension age and accessed the pension commencement lump sum, together with an income payments order for at least three years, to help benefit the creditors.

However, with the introduction of the new pension freedoms in 2015, this could result in the Trustee in Bankruptcy encashing the whole fund as whilst there would be a tax liability it would provide a greater payment to the creditors. The case of *Raithatha v Williamson* was expected to go to appeal, but as the parties settled before going to Court the precedent stands.

In the case of *Horton v Henry*, on 17 December 2014, a contradictory view was given to the effect that the Trustee in Bankruptcy does not have the authority to put pension benefits into payment.

This case went to the Court of Appeal in 2016 and was dismissed, so holding that the court does not have the power to put the pension into payment in any way.

Death Benefits

The introduction of the new death benefit rules, which for Defined Contribution schemes allow the benefits to 'cascade' down the generations, presents a new 'asset' that may be available on the divorce.

This would probably be considered on similar lines to trust funds, so that if evidence shows that distributions have been made previously, the Court can decide to take the pension funds into account within any overall settlement even if a payment cannot be made directly from the pension fund in question via a pension sharing order.

Lifetime Allowance

Since its introduction we have been presented with a number of reductions in the Lifetime Allowance and the introduction of various protections including Primary Protection, Enhanced Protection, Fixed Protection 2012, Fixed Protection 2014 and Fixed Protection 2016, together with Individual Protection 2014 and Individual Protection 2016.

When considering the division of pension assets regard should be had to the effects of possible future changes to the Lifetime Allowances. The importance is often overlooked of considering not what the pension share is now but what it will be worth by the time retirement is reached.

If the pension scheme member retains significant benefits within a Defined Benefit scheme, this may not be subject to a Lifetime Allowance charge, due to the 20:1 rule applying (HMRC are using a valuation factor of 20:1 for converting a Defined Benefit pension to a cash equivalent for Lifetime Allowance calculations.)

However, the likelihood is that, for Private Sector schemes in this situation, there would be an external transfer, probably to a Defined Contribution arrangement, and so the ex-spouse may be subject to a Lifetime Allowance charge if the pension credit is sufficiently large.

A creative financial planning professional can help to structure a settlement whereby benefits are crystallised by the member before being subject to a pension sharing order if:

- the member is over 55
- there is a mixture of Defined Benefit and Defined Contribution arrangements
- there is some form of transitional protection from the Lifetime Allowance
- there is a joint willingness between the parties to avoid an unnecessary Lifetime Allowance charge.

On receiving the pension credit from crystallised funds, on funds put in to payment on or after 6 April 2006, a pension credit factor that increases

his or her own Lifetime Allowance limit before any tax charge applies. To claim this, increase application must be sent to HMRC no later than five years after 31 January following the tax year the pension sharing order took effect.

In other cases, it may be appropriate to consider a division of the pension assets to avoid a Lifetime Allowance charge being payable, with an adjustment to other assets such as equity in the matrimonial home.

Annual Allowance

The changes in the annual allowance, especially for high earners and those who trigger the money purchase annual allowance, can have an impact on divorce settlements and may require assistance from a financial planning professional.

This is due to some settlements being based on the intention of the member, who has higher earning capacity, to rebuild lost pension rights and obtain the relevant tax relief post-divorce, and therefore a willingness to provide higher pension sharing orders to the other party.

Also, the encashments of smaller pension pots to help raise funds for a settlement, (or pay legal costs!), could have a devastating effect on anticipated future pension provision.

Taxation of benefits on retirement

Much has been written about where pension assets will now sit on the 'balance sheet' following a divorce, but it is important to remember that any pension fund taken in excess of the tax-free amount will be taxed at the individual's marginal rate of Income Tax.

It is also important to consider that initial payments will be taxed under PAYE on a month one (emergency) tax basis and that any overpayment has to be reclaimed either within the tax year, using the appropriate HMRC form, or is dealt with directly by HMRC after the end of the tax year.

Many clients, and some family lawyers, overlook this important issue particularly when a specific net payment is required, for example to help repay an outstanding mortgage.

2.6 Flowchart: the divorce process

The Applicant (or Applicants) file with the Court the divorce application (which should include as a matter of course an application for financial orders including a pension sharing order if appropriate). The HMCTS digital service is mandatory for solicitors.

For sole applications, the Court can serve the application or the Applicant can elect to do so. Email service will be the normal expectation under the DDSA 2020.

The Respondent completes an acknowledgment of service form online.

After a 20 week period from the date of the divorce application, the Applicant (or both parties in the case of a joint application, but note that a Conditional Order can be made if only one of the Applicants applies to the court for this) can apply to the Court for a Conditional Order by re-affirming their intention to divorce.

The Applicant (or both parties in the case of a joint application but note that a Conditional Order can be made if only one of the Applicants applies to the court for this) can apply for a Final Order six weeks after the Conditional Order. If the Applicant fails to apply, the Respondent can apply for a Final Order three months after the date on which the Applicant could first have applied for a Final Order.

The Final Order will be pronounced shortly thereafter. This brings the marriage to an end and brings into force any financial order which has been approved.

Details of the process are set out in the financial remedy rules which are shown in the 'At a Glance' publication from the Family Law Bar Association: <http://flba.co.uk/at-a-glance/>

3 Valuing pension rights

3.1 How is a pension asset valued?

The prescribed method of valuing a pension for divorce purposes, whether the pension rights are to be subject to off-set, attachment or sharing, is the Cash Equivalent Value (CEV). The CEV is the capital value of the pension rights as calculated by the scheme Actuary or pension provider.

The Pension Sharing (Valuation) Regulations 2000 sets out the considerations involved in valuing pension assets – see: [The Pension Sharing \(Valuation\) Regulations 2000 \(legislation.gov.uk\)](#)

In recent times the CEV from Defined Benefit schemes have been subject to fluctuation and this is evidenced by the Xafinity Transfer Value Index shown below.

The 'Xafinity Transfer Value Index' tracks the transfer value that would be provided by an example DB scheme to a member aged 64 who is currently entitled to a pension of £10,000 each year starting at age 65 (and which increases each year in line with inflation). Different schemes calculate transfer values in different ways. A given individual may therefore receive a transfer value from their scheme that is significantly different from that quoted by the Xafinity Transfer Value Index.

A particular valuation issue arises in relation to pensions in payment, and whilst there is no standard actuarial method of calculating CEV for a pension in payment, the regulations require that the calculation must be verified by the scheme Actuary. There has been a widely held misconception that once a pension is in payment it cannot be shared because there is no longer a capital value. However, this is not the case and thankfully examples of this are now being seen.



In England, Wales and Northern Ireland, the date of valuation will be the date on which the request is received by the provider or scheme trustees. This is known as the 'Valuation Date' but it should be noted that the benefits that will actually be implemented will not be based on the figure calculated at this date but on the revised figure recalculated within the four month implementation period – the 'Valuation Day'.

In certain circumstances one of the parties may argue that another figure would be a fairer representation of the value of the benefits. Even in cases where such an argument might be accepted, the alternative arrangement would be reflected either in the proportions in which the pension rights might be shared between the member and the ex-spouse or in a different distribution of other assets. It would not have any effect on the CEV figure being provided by the scheme.

Any challenge to the fairness of the CEV would normally need to be supported by expert opinion, probably from an Actuary, and the likelihood of success is low.

Such a challenge should not be confused with the commissioning of an 'expert's report' on how the pension funds should be split in order to provide equality so that, for example, both

parties have the same income at an agreed retirement age. This could result in the wife receiving a pension sharing order for as specific an amount as 76.3% of the CEV quoted.

Clearly the cost of obtaining expert opinion will be a factor in determining whether a pension report is required to consider the most suitable approach of equalising capital or income, particularly if the CEV is small. In such circumstances, the Court may consider the cost to be disproportionate to the benefit.

3.2 Points to note regarding CEV

- For some types of arrangement (e.g. a Personal Pension) the CEV may be the total value of the individual's fund whereas for other types of arrangement (e.g. a Defined Benefit scheme) the value might need to be calculated by the scheme Actuary.
- In England and Wales, the total CEV will initially need to be considered, regardless of the duration of the marriage. This means that benefits built up under a scheme which the member left prior to getting married, or which accrued in part prior to the date of the marriage, will have to be included as part of the matrimonial assets. However, cases such as *Miller v Miller*, *McFarlane v McFarlane*, *H v H*, *Harris v Harris* and *Rossi v Rossi* have demonstrated that in the apportionment of benefits account may be taken of the short duration of a marriage or of the fact that benefits have accrued post-separation.
- In Scotland (see section 8), it is only the value of the pension which has accrued during the period of the marriage and up to the date of separation which is counted.
- The basis of calculation of the CEV means that it relates only to pensionable service up to the date of the calculation and therefore does not take account of any future expectations arising, for example, from future salary increases or the anticipated promotion of the scheme member to a more senior job.

- If a pension arrangement is invested in a With Profits fund, account may need to be taken of the possibility that at times of stock market uncertainty the product provider may impose a Market Value Adjustment penalty to discourage premature withdrawals from the fund, and there may also be doubts as to the value of any prospective terminal bonus. Old-style With Profits policies may have guaranteed values at a particular date, e.g. on the investor's 65th birthday.
- Contracts such as S32 transfer policies with GMP liabilities may not reflect the value of the benefits.
- Many of the public sector schemes such as for the Armed Forces, Police and Teachers may include benefits such as preferential early retirement that are not reflected within the cash equivalent.

3.3 Questions a financial planning professional might ask about CEV figures

- Q In a Defined Benefit scheme, is the scheme fully funded or over-funded, and has the scheme Actuary taken into account the value of discretionary increases to pensions in payment, when calculating the CEV?
- Q Does the scheme offer generous early retirement terms, especially in relation to ill-health early retirement or redundancy? Public sector schemes often offer such benefits.
- Q Are the benefits at retirement based on an accelerated rate of accrual after a number of years' service (as in the case of the Armed Forces, Police and some other public sector schemes)? Here, the CEV will be based on standard accrual, which means that the CEV may not proportionately reflect the benefits the member would receive at retirement.
- Q Are there guaranteed benefits such as guaranteed annuity rates or minimum fund values at retirement included within personal pension arrangements?

4 The options for pensions

This section of the handbook expands on the three options referred to in section 1.

4.1 Offsetting

Offsetting involves taking a global view of a spouse's assets, including the pension rights, and compensating for the loss of pension rights by redistributing other assets, such as investments or property. This avoids the complications of attachment and sharing. However, there may be cases where the value of the pension rights represents such a high proportion of the matrimonial assets that offsetting becomes impractical.

If other assets of the marriage are to be offset against pension rights, it should be borne in mind that there is no single correct method of comparing the respective values.

At younger ages a non-pension asset with an intrinsic value of £1 would arguably be worth more than £1 invested in a pension fund because if £1 of new money were to be invested in a pension fund it would attract Income Tax Relief at the individual's marginal rate of tax, for non-tax payers, the basic rate of (currently) 20%. However, the maximum permitted contribution per tax year on which tax relief is available is 100% of earnings, subject to the Annual Allowance, or £3,600 gross if greater.

It is sometimes suggested that cash in hand is preferable to a future income payable from a pension over the longer term. This is referred to as the 'utility argument'. However, it is not based on any actuarial assessment and there is no formula or rule requiring that the argument should be adopted. The principles of financial planning suggest that a diversified portfolio of

investments, using different tax wrappers, is usually more appropriate than cash.

Many family lawyers apply the 'rule of thumb' of reducing the value of the pension rights by up to two-thirds. However, in 'Fam Law 1999' David Burrows provided a more formulaic method depending on the number of years from divorce to retirement. From a family lawyer perspective the safest approach is to seek the financial advisers advice on the approach towards offsetting and the degree of financial adviser input necessary in so considering what will produce a reasonable outcome.

Offsetting may be favoured where:

- the CEV is so small that it is not worth considering attachment or sharing
- each partner has sufficient pension rights of their own and it is unnecessary (and would be costly) to opt for attachment or sharing
- the priority for primary carer with young children is to secure the matrimonial home
- the parties are young and have good prospects of building up pension benefits in their own right after the divorce.

4.2 Attachment orders

Attachment orders are a direction by the Court to the pension trustees to pay part or all of the member's benefit to the ex-spouse on retirement or death. It is crucial to remember that an attachment order does not in itself operate to transfer legal ownership of the benefits from the member to the ex-spouse.

Attachment orders must be worded precisely, so as to make clear whether it is the benefit of

pension income, retirement tax-free cash or lump sum payment on death (or any combination of these) which is to be attached. It is important to note that an order made against pension income benefits (but not lump sum benefits) would cease on the re-marriage of the recipient ex-spouse (but not on the re-marriage of the member), as attachment orders are a form of deferred spousal maintenance.

Attachment may be favoured in the following circumstances:

- Where the need is to continue to provide lump sum life cover, perhaps for an ex-wife with young children or in the case of an older couple, close to retirement.
- Where the need is for a tax-free lump sum to be paid to the ex-spouse on the member's retirement. The maximum tax-free cash which can be transferred to a spouse under a pension sharing order is 25% of the value of the fund. However, before the 'simplified' taxation regime for pensions was introduced on 6 April 2006, some pension schemes permitted the payment of tax-free cash in excess of 25%, and the simplification rules permitted such higher levels of tax-free cash to be protected. An attachment order could give the spouse access to this benefit.
- Where the attachment order is to be used as a way of providing maintenance in retirement, without ownership being transferred (though payments under the attachment order would cease on the death of the member).

Where the pension provider recognises the spouse as a financial dependent for the payment of spouse's pension, which many do where an annuity has been purchased in a 'named spouse' basis. It is possible under S31 of the Matrimonial Causes Act 1973 for an attachment order to be varied, or indeed discharged, which would then permit a pension sharing order to be applied against the arrangement.

It is not possible to obtain an attachment order against the State Pension either in its pre or post 6 April 2016 form.

There is general agreement that the problem with attachment, and the reason it has proved unpopular, is that it does not transfer ownership or control of benefits to the ex-spouse. However, it should not be dismissed without careful consideration of the facts of each case.

Following the introduction of the pension freedoms in April 2015 (see section 2.3.2) there were some unintended consequences for existing pension attachment orders.

An attachment order that required 100% of the lump sum payable may originally have been intended to apply to only the pension commencement lump sum, but it could now be interpreted that the whole fund should be paid to the former spouse.

Equally an attachment order may have required an income to be paid to the former spouse, but the member could now commute the whole benefit for a lump sum, thus thwarting the intent of the Court to provide the former spouse with an income during retirement. Since the introduction of the changes some scheme administrators have refused to put benefits into payment until clarification of the intent is obtained.

It is recommended that any existing pension attachment orders are revisited to ensure that they will be implemented in accordance with the original expectations. Section 31 of the Matrimonial Causes Act 1973 allows for an attachment order to be varied if necessary.

In October 2015 the FCA published a consultation paper – 'Pension Reforms – Proposed Changes to Our Rules and Guidance', which states that the DWP may consider changes to the pensions legislation that would require trustees and providers to notify the other party on receipt of an application to access pension benefits that are subject to an attachment order.

The FCA propose guidance for financial planning professionals that they should also enquire as to the existence of any pension attachment orders and take these into account when providing advice to clients on retirement as they consider it is not in the client's best interest to ignore or to seek to circumvent an attachment order.

4.3 Sharing

When a pension sharing order is granted, benefits are divided between the couple at the time of divorce and a legal transfer of ownership of benefits is made from member to ex-spouse.

For **private sector schemes**, there are essentially two ways in which such a transfer can be arranged:

- such schemes **must** offer the ex-spouse an external transfer value which they may place in a pension arrangement of their choice
- schemes **may**, in their discretion, offer the option of an internal transfer value, whereby the ex-spouse becomes a 'shadow' member in their own right.

If the private sector scheme is under-funded, then shadow membership must be offered unless the former spouse has rejected the offer, or the scheme trustees are prepared to pay the initial CEV.

Public sector schemes are not obliged to offer external transfers and are therefore expected only to offer internal transfers.

Sharing may be favoured where:

- it is preferred to the division of other assets
- the ex-spouse has no pension rights of his or her own and is unlikely to be able to build up pension rights after the divorce
- the CEV is relatively significant (as the costs incurred need to be proportionate to the benefit the ex-spouse will receive)
- the ex-spouse has more need of retirement income than of property rights
- pension rights form a substantial element of the family wealth (pension sharing is likely to be attractive to 'middle England' couples aged mid-40s upwards, the wives in this situation being typically more dependent, having spent years looking after the family)

- the husband is a higher earner and the marriage has been a long one (correspondingly, pension sharing is unlikely to be appropriate for younger couples with short marriages and small funds; and younger women may in any event have their own pension provision)
- the pension fund is larger and can justify the cost of the sharing arrangements
- tax savings can be achieved (sharing is more tax-efficient in that the scheme member and the ex-spouse are individually liable for the Income Tax due on their respective shares of the pension benefits, whereas with attachment, the scheme member remains liable for Income Tax on the total pension benefits including those attached for the ex-spouse)
- if the benefits are in payment then following the Martin-Dye judgment the 'yardstick' is that the pensions are considered as a separate asset class and should be divided by way of equalising income via a pension sharing order
- there are no assets against which pension rights can be offset (sharing is likely to be the only option in this situation).

It is worth remembering that many people have more than one source of pension benefits, and not all pension arrangements need be treated in the same way. For example, it would be permissible, where one party had three pension contracts, to offset the first; to attach the second; and to share the third. Equally, where there are several sources of private pension it may make sense to transfer all of one contract to the ex-spouse rather than arranging for a partial share in more than one contract.

In order to minimise implementation costs, it is often advantageous for the member to consolidate his or her various pension 'pots' before a pension sharing order is applied. Consideration should also be given to whether guaranteed annuity rates, safeguarded rights or benefits in payment are available, before any final decision is made.

4.4 Summary of the options

4.4.1 Offsetting

- In some circumstances it can be straightforward, but by no means simple and should always involve an appropriately qualified financial planning professional to ensure this is suitable
- Pension benefits are offset against other matrimonial assets
- Offers a clean break
- Useful where:
 - the CEV is small
 - the parties have sufficient pension of their own
 - the priority is for one spouse to keep the matrimonial home.

4.4.2 Attachment

- A Court direction to pay at a later date
- No legal transfer of ownership involved
- No clean break achieved
- Has not proved popular in practice
- The scheme member remains liable for Income Tax on all the pension benefits
- The possible pitfall is that control remains with the member and that income stops when the member dies
- Useful where:
 - there is a need for continuing lump sum life cover
 - tax-free cash at retirement is needed by the recipient ex-spouse.

4.4.3 Sharing

- Involves a legal transfer of ownership
- Benefits are divided at the time of the divorce (although an application for a pension sharing order can be made years later in certain circumstances)
- Clean break achieved
- The possible pitfall is the impact of sharing on members' existing benefits
- The cost is likely to be higher than earmarking or offsetting
- Useful where:
 - the preference is to divide the pension rather than other assets
 - the ex-spouse has no pension of his/her own.

5 Pension sharing: the principles

5.1 The principles

A pension sharing order, which must be made by Court order, must specify what proportion of the benefits is to be transferred. This will be expressed as a percentage of the Cash Equivalent ('CEV' – see 3.1). The transferor's rights then become subject to a debit of the appropriate amount, and the transferee becomes entitled to a corresponding credit.

The amount of the debit will be expressed as a percentage of the cash equivalent of the member's pension rights on the 'Valuation Day' (see 3.1 above), which will be decided by the transferring scheme during the four-month implementation period.

It is important to note that a 50:50 division of the CEV is unlikely to provide equality of income at retirement. A split of 60:40 might be appropriate, so that if a husband's rights in a scheme were valued at £100,000 and the pension-sharing order required that 40% of the CEV should be transferred to his wife, then his fund would be debited £40,000 and hers credited with the same amount, so that she would gain a pension fund of £40,000 in her own name. However, a split of 75:25 in favour of the receiving spouse would not be unprecedented.

The following types of schemes can be shared:

- Personal Pension Plans ('PPPs') including stakeholder and SIPP arrangements
- Retirement annuity contracts ('s226 schemes')
- Final salary and money purchase occupational pension schemes

- Self-administered schemes ('SSAS')
- SERPS and Second State Pension if the petition was issued before 6 April 2016, or if the parties were of State Pension age at 6 April 2016
- Pensions and annuities in payment
- Drawdown pensions
- Additional Voluntary Contribution schemes and Free Standing AVCs.

The following types of scheme cannot be made subject to a sharing order:

- Basic State Pension
- State Graduated Pension Scheme benefits and Equivalent Pension Benefit accrued between 1966 and 1975
- Any widows', widowers' and dependants' pensions in payment
- Any lump sum payable on death in service
- Benefits transferred to an overseas scheme such as a QROPS
- The schemes enjoyed by the officers of High State – the Speaker of the House of Commons, the Lord Chancellor and the Prime Minister.

In addition, some benefits which are considered as compensation are deemed to be non-shareable rights and will not therefore be included within the CEV. A common example of this is within the Teachers Pension Scheme or the Local Government Pension Scheme where an individual has taken early retirement, for example on the basis of efficiency.

Under these circumstances an additional period of service will be credited to the individual. However, this enhancement is deemed to be compensation and is financed directly by the Local Authority and not through the respective pension arrangement even though it is the pension scheme which makes the monthly payments to the individual.

Although inherited pension death benefits e.g. dependant's drawdown cannot be shared under a Pension Sharing Order, their value may be taken in to account when reaching a financial settlement. This may mean other assets must be offset instead of splitting the pension fund.

5.2 Pension debits

The pension debit is taken from the member, reducing his or her rights under the scheme or arrangement by the percentage shown in the pension sharing order. The benefits will be those accumulated up to the transfer day, which is the effective date of the order. This is the later of 28 days after the issue of the pension sharing order and the date of the Final Order, but the valuation is at the declared Valuation Day within the four-month implementation period.

Where a member has different tranches of benefit (e.g. GMP rights, non-GMP rights or Reference Scheme Test ('RST') benefits), the debit will be applied pro-rata across all tranches. So, if the pension share is to be, say, 50%, then that percentage will be debited to each set of rights or benefits. The effect of the deduction depends on the type of scheme:

- **Money purchase arrangements (including PPP, s226 and stakeholder)**
There will be a reduction in the member's entitlement equal to the percentage specified in the sharing order.
- **Final salary schemes**
The debit will take the form of a 'negative deferred pension', i.e. the amount by which the member's formula benefits will be reduced to reflect the payment to the

ex-spouse. The pension will be calculated on retirement in the usual way and then reduced by the amount of the pension given up at the time of the pension sharing, with the reduction increased to compensate for the effect of inflation between the time of the sharing and retirement.

The member will be free to rebuild the value debited, subject to the normal limits on contributions, subject to the normal limits on contributions and funding considerations e.g. the Lifetime Allowance. Although if they hold certain lifetime allowance protections (enhanced and any of the fixed protections 2012, 2014 or 2016) then these will be lost if there is further contributions or benefit accrual. However, it should be remembered that it is possible to apply in the future for a pension sharing order against a pension arrangement that has not previously been subject to a pension sharing order for the purpose of capitalising any outstanding maintenance.

5.3 Pension credits

The ex-spouse will be required to count any pension credit received against their Lifetime Allowance test for future Benefit Crystallisation Events, even where they have applied for an enhanced Lifetime Allowance factor.

5.4 Internal and external transfers

The spouse receiving the pension credit may either become a member of the relevant scheme (known as an internal transfer or 'shadow membership') or may transfer the credit to another scheme or policy (an 'external transfer').

If the scheme against which the order is made is a private sector occupational scheme or a Personal Pension, the transferee can demand an external transfer; but with unfunded public sector schemes, only internal transfers are permitted (unless the scheme is closed to new members).

Final salary schemes are required by law to offer ex-spouses internal scheme membership if the scheme is under-funded (as shown by the most recent 'insufficiency report') unless the ex-spouse has accepted a reduced transfer value to another pension arrangement.

External transfers of benefits from PPPs and funded occupational schemes may be made to:

- Personal Pension Plans, including SIPP
- Stakeholder pensions
- The receiving spouse's own occupational pension scheme
- S32 buy-out contracts.

The National Employment Savings Trust (NEST) scheme will not accept a transfer from a 'disqualifying pension credit'. This is a pension credit arising from a pension actually in payment at the time the pension sharing order was awarded by the court.

5.5 Scheme charges for administering pension sharing

The Pensions on Divorce Etc (Charging) Regulations 2000 (the text of which can be downloaded from [The Pensions on Divorce etc. \(Charging\) Regulations 2000 \(legislation.gov.uk\)](#)) provides that pension schemes and providers may recover from divorcing spouses their reasonable costs incurred in splitting a fund. The couple must be advised of the likely level of charges at the beginning of the process, and if they are not so advised they cannot be asked for payment at a later stage. The Court may specify whether the charges should be levied on either or both of the parties or on the member alone. Charges will typically range between £750 and £2,550 and may be levied as a cash payment or deducted from the value of the pension. The impact of charges for sharing, and the associated legal costs and whatever charges may be levied by the financial planning professional, may render pension sharing uneconomic where smaller values are involved.

Details of any charges will be included in the information sent out by the pension scheme. Some insurers have decided not to make any charges for the time being, but to review their stance in the light of experience. Others have decided to reserve the right to charge in exceptional circumstances – for example, where a significant amount of specialist actuarial work is involved. Where providers incur any third-party costs, these will normally be passed on to the divorcing spouses. The Pensions and Lifetime Savings Association formerly known as the National Association of Pension Funds (NAPF) has issued guidance to its members on the charges that it recommends they apply to their schemes. Please see: [Pension sharing charges: Pensions and Lifetime Savings Association guidance \(plsa.co.uk\)](#)

Once the scheme has disclosed its schedule of charges, the regulations only allow these to be increased after 12 months in line with inflation.

5.6 Some special situations

There are some special situations which may need to be considered:

- **Existing divorce orders**

It is possible that the pension benefits may already have been subject to an attachment or sharing order, and this possibility will naturally increase with the passage of time. If this situation does arise, the scheme should advise the details when providing the other information requested. It is not possible for a pension sharing order to be made where there is an attachment order in force in respect of the same set of benefits. However, an attachment order can be made against benefits which are shared under a pension sharing order.

- **Forfeiture or bankruptcy orders**

It is possible that the pension benefits may already have been subject to a forfeiture or bankruptcy order. If this is the case, the scheme should advise the details when providing the other information requested. The action

which will need to be taken will depend on the particular facts, but it is important to remember that the benefits remain invested with the trustee in bankruptcy even after the bankrupt has been discharged.

- **Where a pension annuity is already being paid**

Where an annuity has been purchased, a sharing order would involve a redistribution of the annuity benefits between the couple. The former spouse may transfer the benefits to a suitable alternative arrangement, but the annuity contract in respect of the member would remain with the issuing life office. Some annuity providers will allow for the basis of the annuity to be rewritten for example to a single life basis, though there might be a requirement to provide evidence of health.

As an alternative, it may be worth considering applying for an attachment order or treating the annuity as an income stream from which maintenance could be paid. If either of these approaches were adopted, consideration would need to be given to protecting the income of the recipient ex-spouse in the event of the premature death of the paying spouse.

However, if provision were made for the spouse at the time of purchasing the annuity, then investigations would need to be undertaken to establish whether this was created on a named spouse basis or an 'any spouse' basis. If the annuity were on a named spouse basis it is possible that the annuity provider would continue to recognise the former spouse as the financial dependent post-divorce, provided that the former spouse did not remarry.

- **Drawdown pensions**

Following the changes to capped drawdown pension introduced in April 2011, the issuing of the pension sharing order against a drawdown arrangement will trigger a review of the maximum levels of income which could result in a substantial reduction in members' income levels. The introduction of Flexi Access Drawdown (FAD), with no income cap limit, gets around this but presents other issues.

6 Pension sharing: information gathering

The pension sharing process can be broken down into three stages. This section covers the first two of these stages, i.e. satisfying the request for detailed information and valuation, and pre-order notification. The third stage, the receipt and implementation of the pension sharing order, is dealt with in section 7.

6.1 Sourcing the necessary information

We are probably all familiar with the client who arrives with a carrier bag full of pensions information that they have accumulated over many years, including benefit statements and announcements of demutualisation etc. In divorce cases where perhaps the wife has details of the husband's pension arrangements or has a spreadsheet summarising his various investments, we have always taken it in good faith. Following the judgment in Imerman, however, Financial Planners must now act with extreme caution when approached by a client with details of former spouses' financial provision. Refusal to accept this information may make it impossible to rely on it in Court and could result in a substantial claim against the Financial Planner.

It may, however, be more appropriate to obtain the information directly from the relevant pension scheme.

The legislation provides that the 'person responsible' must comply with the requirements as to the provision of information. In the case of occupational pension schemes ('OPS') including the National Employment Savings Trust, the

person responsible will be the scheme trustees; though product providers will be involved in assisting trustees e.g. in providing valuations. In the case of private pensions (including PPP, GPP, SIPP, Drawdown contracts, FSAVCs, S32 buy-outs, S226 Retirement Annuity contracts and assigned OPS policies) the 'person responsible' will be the product provider.

Product provider involvement is likely to begin with a request from the member or the ex-spouse for 'basic information' and/ or a valuation. The request may have come via the scheme trustees of an OPS (or their Financial Planner), or via a financial planning professional or Solicitor acting for one of the parties. In either case it should be accompanied by copies of the relevant matrimonial documents plus information about the member or the ex-spouse. The gathering of this information may either be on a voluntary basis between the parties or be enforced by the Court where one or both parties are not co-operating. The Court Pension Enquiry Form (Form P) Form P: Pension Inquiry Form information needed when a Pension Sharing Order or Pension Attachment Order may be made - GOV.UK (www.gov.uk) can assist with this process. However, many pension providers will charge for the provision of section D information and it may be felt appropriate in these cases not to ask for this section to be completed.

The member and his or her ex-spouse (or financial planning professional) can request basic information in relation to the scheme and/ or policy, but only the member (or his or her financial planning professional) can request a valuation.

There are prescribed timescales within which the basic information and valuation must be provided, as follows:

Request for information from	When no valuation required	When valuation required
Member	Four weeks from receipt of request	Three months from receipt of request
Member and providers/ trustees are notified that divorce proceedings have commenced	Four weeks from receipt of request	Six weeks from receipt of request (or such shorter period as specified by the Court)
Spouse	Four weeks from receipt of request	n/a

The Court can compel the information to be provided at any time.

If the person with the pension rights has already retired, then it is common practice for the pension provider to charge for this information, and this is allowed under the regulations.

Care will need to be taken to ensure that the timescales are met. For example, a member might submit his request for basic information to the trustees of his scheme (which is when the clock starts ticking) and the trustees might then pass the request to their financial planner, who might in turn pass it to the provider. By the time the request is received by the provider several days or more may have elapsed, giving less time to provide the trustees with the information they need to supply to the member.

At the time when the request for basic information is received it will not be known whether the pension rights are to be offset, attached or shared. Only after the divorcing couple have established the value of their pensions and received other relevant information will they, or the Court, be in a position to decide how the matrimonial assets, including the pension, should be dealt with.

6.2 What information is required?

6.2.1 Basic information, including:

- a statement on how the valuation has been calculated and the benefits included in it whether internal scheme membership and/ or external transfer is being offered to the ex-spouse and (if internal), what type of benefits will be available
- a schedule of charges (if any)
- whether a default option might apply (see 7.3).

6.2.2 Pre-order information, including:

- full name and address of the scheme to which the pension sharing order should be sent
- details of any other orders affecting the member's pension rights, e.g. previous pension sharing, attachment, bankruptcy, forfeiture
- whether the member's rights include any pension rights which cannot be shared
- details of any charges and their payment, where not already given

- whether the member is a trustee of the pension arrangement
- whether the scheme administrator or trustees need evidence of the member's state of health
- whether the scheme administrator or trustees will require additional information to enable them to implement a pension sharing order – for example, a completed transfer form with details of the receiving arrangement.

6.2.3 Additionally, in the case of a member of an occupational pension scheme:

- whether or not the scheme is being wound up (and, if so, the date when winding up started and the name and address of the trustees dealing with it)
- whether the CEV which has been notified may be reduced on account of under-funding or on winding-up.

Some providers produce basic information packs, with variations depending on the type of pension arrangement involved, covering all of these requirements.

In accordance with the Family Proceeding Rules 2010, section E of the pension sharing annex seeks confirmation that this information has been provided, and this may cause delay in completing the Court documents.

7 Pension sharing: implementation

This section considers the third stage of the pension sharing process – receipt and implementation of a pension sharing order or provision.

In many quarters it is felt that the implementation of the pension sharing order is a straightforward matter, but evidence shows that a great number of orders have either been implemented incorrectly or implementation has been refused because the correct procedure has not been followed.

If a pension is to be shared, an order will be served on the trustees, who must take one of three courses of action within 21 days:

- issue a notice of implementation
- explain why they are unable to proceed or
- demand payment of any outstanding charges before implementing the order.

Implementation must take place within four months of the pension scheme issuing the notice of implementation. However, following the Pensions Ombudsman determination in *Broughton v Punter Southall*, a pension scheme must undertake to complete the implementation in a speedy fashion, with the four-month implementation period being the maximum period of time allowed before penalties may be incurred.

If it is not possible to complete the implementation within the four-month period, for example because investments may need to be realised, then the Pensions Regulator can be asked to grant an extension.

As part of the implementation process, the member's pension rights must be valued again, to determine the actual amount that will be re-allocated to the former spouse (the date on which this is done being referred to as the 'Valuation Day' – see 3.1). The member's pension entitlement will then be reduced, and rights will be created for the former spouse. All the member's rights, including contracted-out rights and AVCs, will be reduced pro-rata. The pension scheme trustees, or provider will be required to notify both parties once pension sharing has been implemented.

7.1 The pension sharing order: England, Wales and Northern Ireland

In England, Wales and Northern Ireland pension sharing can currently only be achieved by Court order. The option of sharing by Minute of Agreement, which is available in Scotland (see section 8), is not available elsewhere in the UK.

The pension sharing order will show the pension share in terms of a percentage of the member's CEV. The order may also set out how any charges are to be apportioned between the parties. Unless stated to the contrary in the order, the member will bear any charges.

A pension sharing order will not come into effect until the divorce has been finalised – i.e. not until the Final Order has been granted and, in any event, not until seven days after the time for appeal of the order has expired (i.e. 28 days in total).

In England and Wales, the pension sharing annex, Form P1, will state whether the receiving spouse or the Court will take responsibility for forwarding the pension sharing order and other documents to the pension scheme trustees or provider. In Scotland, the onus falls on the divorcing parties and their lawyers.

7.2 Timescales for implementation

The following table outlines the action required immediately following receipt of a pension sharing order, or the subsequent receipt of any outstanding information:

Information and Documents	Action required	Timescale
<p>Any information/ 'matrimonial' documents or charges* remain outstanding, or some other reason exists why the order cannot be implemented</p> <p>*Where the person responsible has previously stated that the charges must be paid before the implementation period can commence.</p>	<p>Issue a statement (or notice where charges are outstanding) to the member and ex-spouse setting out either:</p> <ul style="list-style-type: none"> a list of the documents/ information/charges needed in order to begin the implementation, or why the order cannot be implemented, e.g. the order is deficient in some way. 	<p>Within 21 days of receipt of the order by the person responsible.</p>
<p>All information/documents received and charges paid and there is no other reason why the order cannot be implemented</p>	<p>Issue a Notice of Implementation to the member and ex-spouse setting out:</p> <ul style="list-style-type: none"> that all information has been received the start date for the implementation period the date by which the pension credit liability will be discharged 	<p>Within 21 days of the latest of:</p> <ul style="list-style-type: none"> the effective date of the order the date of receipt of all necessary information the date of payment of charges

In the case of occupational pension schemes, if the trustees or managers fail, without reasonable excuse, to send out the appropriate notice or statement in accordance with these timescales, The Pensions Regulator (TPR) may impose penalties of up to £200 (for individuals) and £1,000 (for corporates). Any such penalties must be paid within 28 days.

7.3 The 'default option'

Under the pension sharing legislation, an ex-spouse must be offered the opportunity to discharge the pension credit by transferring to a 'qualifying arrangement' of his or her choice (though this does not apply to unfunded schemes, where only internal scheme membership will be offered). If, however, the ex-spouse fails to designate an arrangement to which the pension credit should be transferred, a default option can be exercised.

Whilst it may sound strange that a 'qualifying arrangement' might not be selected, evidence shows that quite frequently no decision is made and in some cases a decision is deferred for several years.

This may be as a result of the emotional state the parties are currently in, or because they have not understood what action is required. This could result in the trustees or managers making the ex-spouse a scheme member in his or her own right or transferring the pension credit to a qualifying arrangement of the trustees' or managers' choice, e.g. a s32 buy-out plan, which replicates the benefits of an occupational scheme. This action could, of course, be taken without the person responsible needing to obtain the ex-spouse's consent.

The Court Form P1, pension sharing annex, may contain a request at section G for the receiving spouse to nominate a pension arrangement to receive the pension credit and may delay the commencement of the implementation period until a nomination has been made.

7.4 The 'implementation period'

The person responsible for the pension arrangement has four months from the later of (i) the date on which the order comes into effect, and (ii) the date on which all information/ documentation/ charges have been received, to discharge the liability in respect of the pension credit. This is referred to in the legislation as the 'implementation period'.

In the case of an occupational pension scheme, if the trustees or managers fail to implement the terms of an order within the implementation period, The Pensions Regulator can impose penalties of up to £1,000 (for individuals) and £10,000 (for corporates). The trustees or managers of the scheme would also be required to notify the non-discharge of the pension credit to TPR within 21 days from the end of the implementation period. Failure to report the non-discharge to TPR is a separate offence and carries a penalty within the same maximum limits.

Trustees of an occupational scheme may, however, apply to TPR to extend the implementation period. The application must be made before the end of the normal four-month period. Grounds for extension are broadly similar to those that apply when extensions are sought to the time limits for the payment of transfer values, i.e.:

- the scheme is being wound up or is about to be wound up
- the scheme is ceasing to be a contracted-out scheme (prior to 6 April 2016)
- the financial interests of the members of the scheme generally would be prejudiced if the trustees implemented the terms of the order within the normal four-month implementation period
- the member or ex-spouse has disputed the amount of the CE
- the trustees require further information to discharge their liability for the pension credit.

In certain circumstances a divorcing party can appeal against the terms of an order which has already come into effect. This could result in the postponement or suspension of the implementation period until either the person responsible receives confirmation from the Court that the order is to stand or be discharged, or the person responsible receives a copy of the varied sharing order. If the pension sharing order has already been implemented by the person responsible when they receive notification of the late appeal, they must inform the Court of this within 21 days.

The implementation period for a pension credit can also be extended when charges are outstanding (see above) provided that the charges were set out at the information stage, and that it was explained at that time that the charges must be paid before the implementation period would begin.

7.5 Action to be taken during the implementation period

The action to be taken during the implementation period will depend on whether the transfer is to be internal or external. The transfer of a pension credit from a Personal Pension or stakeholder arrangement will always involve an 'external transfer'. If the ex-spouse wishes to remain in the member's Personal Pension scheme, then unless the ex-spouse is already a member (in which case it may be possible to add the pension credit to the existing arrangement) he or she will have to apply for a new arrangement within the scheme. If the ex-spouse holds certain Lifetime Allowance protections (enhanced or any of the fixed protections 2012, 2014 or 2016), these will be lost when a new arrangement is set up. The transfer of a pension credit is not a permitted transfer within Lifetime Allowance protection rules. <https://www.gov.uk/hmrc-internal-manuals/pensions-tax-manual/ptm092410#IDAKYPMB>

For external transfers, the receiving pension arrangement must be able to accept the transfer payment, i.e. the pension credit. It should be taken into account that some pension arrangements cannot accept pension credit payments, for example some product providers will allow pension credits into their stakeholder contracts but not into personal pension contracts which may have greater fund choice and other options.

Where an ex-spouse is being offered internal membership of an occupational scheme, he or she is treated broadly like a deferred member of the scheme from the date when the pension sharing order comes into effect. The rights granted to the ex-spouse must be equal in value to their pension credit, but they do not need to take the same form as the benefits for other deferred members. Decisions would need to be made by the trustees about the benefits to be provided and the scheme rules would need to be amended accordingly.

7.6 Valuation at implementation stage

Even though the Cash Equivalent Value (CEV) of the member's pension will already have been calculated at an earlier stage in the divorce proceedings, a further valuation must be carried out during the four-month implementation period; and it is this which determines the exact amount of the pension debit and credit actually allocated to the parties' pension arrangements. As mentioned in 3.1 and 6.1, the precise date within the implementation period on which the calculation is performed (referred to in the legislation as the 'Valuation Day') is at the discretion of the 'person responsible'. However it is the rights to which the member became entitled on the day before the pension sharing order took effect which are valued on the valuation day, which means that any contributions made after the pension sharing order took effect must be ignored and any income withdrawals made by the member after this date must be added back.

Example – A member's pension was originally valued at £100,000 on 1 February 2016 (at the information stage). The Court decided that the pension should be shared 50:50. A pension sharing order was made, coming into effect on 1 June 2016. On 8 July (the 'Valuation Day' chosen by the person responsible) the pension rights to which the member became entitled on 31 May 2016 (i.e. the day immediately prior to the order coming into effect and excluding any subsequent service or contributions paid) were valued at £110,000. The pension credit payable to the ex-spouse's pension arrangement is, therefore, £55,000 – i.e. 50% of £110,000.

In the case of a member of an occupational pension scheme who was an active member at the time when the pension sharing order took effect, the CEV is calculated by reference to the member's rights on the assumption that he or she left service immediately before the order took effect.

The amount of a pension credit may need to be increased where there has been a delay beyond the implementation period in discharging a liability by means of an external transfer. Additionally, a CEV may need to be increased or decreased in certain circumstances, e.g. by taking into account discretionary benefits, underfunding or winding-up. Where a pension credit is discharged by an internal transfer, however, it should not be reduced on account of underfunding.

7.7 Action to be taken immediately following implementation

Within 21 days of the implementation being completed the person responsible must issue to the member and the ex-spouse a Notice of Discharge of Liability. The contents of the Notice will vary depending on which of a number of different circumstances applies. Failure by the trustees or managers of an occupational pension scheme to send out the prescribed Notice of Discharge of Liability within the set timescale carries the same penalties from The Pensions Regulator as for the notice of implementation (see 7.4).

8 Pensions and divorce in Scotland

8.1 The divorce process in Scotland

In Scotland, as (at least currently) in England, the main ground of divorce is the irretrievable breakdown of the marriage. In terms of Scots law, this can be proven in one of four ways, being: adultery; the behaviour of the other spouse; one year's separation if the other spouse consents to the divorce; or two years' separation (in which case consent is not required). There is only one decree of divorce in Scotland, rather than decree nisi and decree absolute.

Unlike English law, divorce and financial provision are dealt with in one application to the court, rather than two separate processes. Scots law uses written pleadings for divorce rather than a standard application form. The relevant document is called a 'Summons' when the divorce is dealt with in the higher court (the Court of Session) and an 'Initial Writ' when the divorce is dealt with in the lower court (the Sheriff Court). Another very important distinction from English law is that in almost all cases, financial matters arising from separation need to be resolved, whether by agreement or by way of court order, prior to decree of divorce being granted. Divorce extinguishes either spouse's ability to make financial claims arising from the marriage.

The financial orders which can be sought are detailed in the Family Law (Scotland) Act 1985 and include orders for capital sums, transfer of property, sale of the matrimonial home, spousal maintenance after divorce (called 'periodical allowance'), pension earmarking and pension sharing.

However, the majority of financial disputes following the breakdown of a marriage are resolved not by the Court, but by the parties entering into a contractual commitment called a 'Minute of Agreement'. When this has been registered in a public register (called 'the Books of the Council and Session') for preservation, this Agreement can be enforced in the same way as an order of court. Unlike an English Consent Order, there is no need for the Court to inspect, approve or even see a Minute of Agreement. Accordingly, it is usual for parties to negotiate; enter into a Minute of Agreement; and only after that Agreement is completed, raise (that is, issue) divorce proceedings. Unlike in England, there is no need for the divorce process to be at a particular stage for the parties to be able to enter into a binding and enforceable financial settlement.

When a solicitor is first consulted, he or she will undertake an investigation into the parties' financial arrangements and will obtain valuations of assets, liabilities and details of income and expenditure. There is however no standard process for disclosure akin to the English Form E. Normally, each party can be expected to co-operate in providing valuations; and failure to co-operate will frequently be the reason why Court proceedings are raised. In the event of continued failure to provide valuations after proceedings have been raised, incidental orders can be obtained from the Court for disclosure from the spouse or third parties (called a 'Specification of documents'). Other reasons for divorce proceedings to be raised before there is agreement on financial matters would include: if negotiations have stalled; if there is a need for protective orders; or if one party wishes to seize jurisdiction.

8.2 The Scottish legislation affecting pensions

The primary legislation relating to financial provision on divorce in Scotland is the Family Law (Scotland) Act 1985. There are various stages to determining financial provision – a very brief summary follows. The first step is to establish the 'relevant date', which is usually the date of separation. The second is to establish what is 'matrimonial property'. Section 4 states: "*the matrimonial property means all the property belonging to the parties, or either of them, at the relevant date which was acquired by them or him... during the marriage but before the relevant date*". The starting point is set out in section 9(1) (a) of the 1985 Act, which sets out the principle of fair sharing of matrimonial property. 'Fair sharing' is usually equal sharing, but there are a number of 'special circumstances' which can be argued for unequal sharing, including the source of funds for the matrimonial property. Further principles in terms of fair division of assets and maintenance post-divorce are set out in sections 9(1)(b) to (e) of the Act. Any order for financial provision on divorce must be justified by one or more of the section 9 principles, and reasonable having regard to the parties' resources.

The Family Law (Scotland) Act 1985 originally gave Scottish Court no power to make an order against a pension scheme. The only option originally available was that of offsetting. This situation was changed by the Pensions Act 1995 Section 167 of which activated Section 12(A) of the Family Law (Scotland) Act 1985, which provided for earmarking orders. The Welfare Reform and Pensions Act 1999 then amended the Family Law (Scotland) Act 1985 to permit pension sharing. There are a number of Scottish statutory instruments dealing with the detail of pension sharing, valuation and implementation.

8.3 Valuing pension rights

Section 10 of the Family Law (Scotland) Act 1985 provides for the valuation of various matrimonial assets. With some exceptions, matrimonial assets are valued as at the 'relevant date'. This will usually be the date on which the parties cease to cohabit.

Section 10(5) of the Act states:

"the proportion of any rights or interests of either party

- a. *under a Life Policy or similar arrangement and*
- b. *in any benefit under a Pension Scheme which either party has or may have, including such benefits payable in respect of the death of either party, and*
- c. *in the assets in respect of which either party has accrued rights under a Pension Scheme which is referable to the period to which subsection (4)(b) above refers shall be taken to form part of the matrimonial property"*

Pension rights, for this purpose, include SERPS benefits.

In practice, the solicitor will request a CETV as at the relevant date from the scheme provider or trustees. If the date on which the request for valuation is received is more than 12 months after the relevant date, then the date for valuing the pension rights is the relevant date. If less than 12 months, the pension provider is only obliged to provide a valuation as at the date of the request.

Regulation 3(2) of the Divorce Etc (Pensions) (Scotland) Regulations 2000 provides that the value of any rights or interest is to be their CEV, based on the assumption that the member's pensionable service terminated at the 'relevant date'. In the case of *Stewart v Stewart* 2001 SLT (Sheriff Court) 114 it was held that this provision did not permit a spouse to argue that a higher

actuarial valuation should be used instead of the CEV. However, in some cases, consideration may need to be given to whether an actuarial report should nevertheless be instructed, with the higher (or lower) actuarial figure used as evidence to seek to depart from equal sharing.

Once the CETV has been obtained, the solicitor would then apportion this valuation on the basis of the duration of the marriage. This involves a simple mathematical apportionment, namely $A \times B/C$, where 'A' is the value of the member's rights or interest in the pension scheme at the relevant date; 'B' is the period of the marriage; and 'C' is the period of membership in the pension scheme before the relevant date. So, for a husband who had been a scheme member for 20 years, but married for only 10, the value of the pension which is "matrimonial property" would be 50% of the total CETV.

The question of how to interpret 'C' in the formula above (ie, the period of membership of the pension scheme) was raised in the case of *McDonald v McDonald* [2017] UKSC 52, and in particular whether this only referred to active, contributing membership of a pension scheme, or pensioner membership. In that case, Mrs McDonald argued that the vast majority of Mr McDonald's pension fell within the definition of matrimonial property as he had been a member of the scheme for 25 years during the marriage. However, Mr McDonald argued that only a small proportion of his pension was matrimonial property, being the part attributable to the five month period when he was actively contributing to his pension during the marriage. The case went to the Supreme Court, which held that 'period of membership' is the whole period of membership in the pension arrangement regardless of whether contributions were made during the marriage. However, it should be stressed that this does not mean that a pension where most or all contributions were made pre-marriage should be divided equally. Instead, the usual argument would be that although this is technically matrimonial property, special circumstances should apply with regard to the

source of funds for the pension, meaning that the pension holder will get credit for pre-marriage contributions, and the pension either divided unequally or be left out of account.

8.4 Offsetting

Offsetting is available in terms of Scots law. One important difference between English and Scots law in this respect is that pensions are not treated as a separate category of assets in Scotland. Instead, the pension CETV is treated as being the same, pound for pound, as any other asset. There is accordingly no 'discount' for a spouse who retains a pension while the other spouse retains or receives liquid assets or a house. A pension with a CETV of £100,000 is seen as equivalent to a house with a value of £100,000, or that sum in a bank account.

It is also not usual practice in Scotland to obtain an actuary's report as to equalisation of pension income on retirement. The focus is instead on equal sharing of the assets, with the pension being treated in the same way as other assets.

8.5 Earmarking

For a number of reasons, earmarking has not proved popular in Scotland, and are accordingly very unusual.

- In Scotland it does not apply to lump sum benefits which are payable at the option of the scheme member in commutation of pension rights. Furthermore, the Court has no power to direct that the commutation rights must be exercised.
- Scheme members are entitled to delay their retirement or to transfer their rights from an occupational scheme with lump sum retirement benefits to a personal pension scheme which lacks such benefits.
- Ex-spouses' rights may be prejudiced by frequent changes in employment and transfers of pension rights by the member.

- These difficulties will be compounded if the beneficiary of the earmarking order moves address and fails to notify the providers or trustees of the scheme.

However, re-marriage does not cause an earmarking order to lapse. To all intents and purposes, it provides a deferred capital sum.

8.6 Pension sharing

Pension sharing can be achieved either by a Court order or by means of a Qualifying Agreement. The term 'Qualifying Agreement' is peculiar to pension sharing. Not all Minutes of Agreement are Qualifying Agreements. For an agreement to be a Qualifying Agreement:

- It must be in a prescribed form and contain the information required by The Pensions on Divorce etc. (Pension Sharing) (Scotland) Regulations 2000 [SI2000/1051]. It will be contained in an annex to the Minute of Agreement for reasons of confidentiality.
- The person responsible for the pension arrangement must have received from the member prior intimation of the intention to share the pension.
- The sharing provision must come into effect on grant of divorce or nullity.
- Documentary evidence (which may be contained in the Agreement itself or could be provided separately by the solicitors involved) must be provided, which shows that the qualifying Agreement has been entered into in order to determine the financial settlement on divorce.

Unlike in England, pension sharing can be either by a specified percentage, or by a specified monetary value. It is far more usual in Scottish cases to have a pension share with reference to a specific sum, rather than a percentage.

After the Minute of Agreement/Qualifying Agreement is finalised, this is then usually sent in draft to the pension provider, for the provider to confirm that they are able to implement the proposed pension share. This can result in some delay between an agreement being reached, and the document being signed by the parties.

Consideration is usually given in the Minute of Agreement to what might happen if the pension share cannot take effect for some reason, including: if the pension holder dies before the share is implemented; if the pension holder transfers the pension out voluntarily prior to implementation; or if the pension share cannot be implemented for any other reason. Pension recipients will commonly seek to insert a 'fallback' provision of payment of a capital sum to them if some or all of these circumstances occur.

8.7 Implementation of pension sharing

In Scotland, a pension sharing order or provision is deemed never to have taken effect unless the party who stands to benefit provides to the 'person responsible' (the scheme provider or trustees) within two months of the date of the extract of the Decree of Divorce or Declarator of Nullity or (in the case of overseas divorces) the

date of disposal of the application for financial relief, the following:

- copies of the pension sharing order or schedule to the Minute of Agreement
- the relevant Decree of Divorce or Declarator of Nullity and
- any such other information as may be required, in particular the following:

Information	Member	Ex-spouse
All names by which they have been known		
Date of birth		
Address		
National Insurance No.		
Name of pension arrangement to which order relates		
Membership or policy no.		<i>(Where the ex-spouse is also a member of the scheme)</i>
Details of the pension arrangement to which the pension credit will be paid		<i>(For OPS where the ex-spouse is not becoming a member of the same scheme. Details should include the full name and address of the arrangement, the ex-spouse's membership or policy number (if known) and the name or title, business address and telephone number, fax number/ email address (where available) of a person who can be contacted in respect of the discharge of the pension credit)</i>
Any other information		<i>(e.g. a completed and signed transfer application from the ex-spouse)</i>

The 'person responsible' will need to decide promptly whether they are in possession of all the information needed in order to proceed with implementation, and there are then set time limits for the pension share to be implemented by them.

If the relevant information and documents are not received by the pension providers within two months of the date of extract of decree of divorce, the court may, on application, extend that period – however, solicitors are well advised to ensure that such an application not be necessary.

9 The role of the financial planning professional

9.1 The nature of the advice required of the financial planning professional

Today's financial planning professional works on a fee basis either at an hourly rate, on a fixed fee or a percentage of funds basis. In most pensions and divorce cases the financial planner is likely to be working alongside a matrimonial Solicitor acting for one of the parties to the divorce. It will usually be prudent to agree the basis of charging with the Solicitor, who will be able to make a judgment as to whether an additional cost can be justified to the client, having regard to the values involved in each individual situation. It is possible that actuaries might also need to be instructed.

Instead of acting in an adversarial capacity for one party, the financial planning professional might in an increasing number of cases be asked to act as a Single Joint Expert, recommending a possible division of assets, for example to provide equality of income at a specific retirement age. However, before undertaking this type of work it is important that the financial planner should have a thorough understanding of the relevant rules and regulations, including Part 25 of the Family Procedure Rules (see https://www.justice.gov.uk/courts/procedure-rules/family/parts/part_25 re Experts and Assessors).

However, it is probably also worthwhile being aware of the comments made by HHJ Wildblood QC in the case of *M v M* [2015] EWFC B63. Section 49 he was critical of the adviser for the wife as the proposals put forward took no account of the needs of the husband and therefore was considered 'very far from helpful'.

Whether working in a Court related, arbitration, collaborative or mediation case, acting as a joint expert may mean that the financial planner cannot assist with implementing orders due to the potential conflict of interest. Often this decision must rest with the Solicitors and the respective parties.

In some cases, after an agreement has been reached between the parties as to the basis on which assets should be divided, it may be possible for the financial planner to advise one or both parties on how to maximise their respective pension provision. There are strict rules controlling this within a collaborative settlement (see section 10 below), where the financial planner has acted as a financial neutral and can only happen if both parties agree at the end of the process, with either party having the right to veto the ongoing involvement of the financial planner, and there should have been no expectation through the negotiation stages that the financial planner would undertake implementation work. It may not be considered possible in a litigation or arbitration case where the financial planner has acted as a Single Joint Expert due to a potential conflict of interest. The financial planner could alternatively be called upon to advise scheme trustees as to the effect of a proposed sharing arrangement on the scheme.

9.2 Protection of maintenance payments

Divorcing spouses who are awarded maintenance will need to guard against the risk of the payer dying or becoming unable through illness or accident to maintain the payments. The necessary protection could be obtained

through a life insurance or critical illness policy such as a family income benefit plan, covering the period during which payments have been made. The policy could be taken out by the payer on his or her own life as part of the settlement; or alternatively, the recipient could insure the life of the payer, provided that this was done before the divorce was finalised (after the divorce, the necessary insurable interest would no longer exist). If no provision is made for life cover to protect the payments, then in the event of the death of the payer, the payer's estate may be subject to a claim from the recipient for the continuation of payments.

9.3 The impact of pension credit on an individual's pension allowances

Funding to replace lost pension funds

Tax relief rules and annual allowance rules work separately. Both sets of rules must be correctly considered to ensure pension savings are tax efficient.

There is now no legal limit on the amount which individuals can contribute to their pension schemes. However, tax relief is only available on individuals' pension contributions which do not exceed £3,600 per annum (gross, with relief given at source) or, if higher, 100% of annual earnings per tax year, provided in the latter case that the contributions do not exceed an 'Annual Allowance' laid down by the Government, is today, 2022/23 tax year, £40,000.

The AA limit applies to the total monetary value of all defined contribution amounts paid by or on behalf of an individual (includes 3rd party and employer contributions) plus the pension input amounts for any defined benefit schemes.

On 6 April 2016 the government introduced the Tapered Annual Allowance for individuals with 'threshold income' of over £110,000 and 'adjusted income' of over £150,000. Since 6 April 2020 'threshold income' has been £200,000 and 'adjusted income' £240,000. Where both limits are breached, the annual allowance is reduced by £1 for every £2 of adjusted income above

£240,000 to a minimum reduced allowance of £4,000. Carry forward of unused annual allowance may allow a member to absorb or reduce any annual allowance excess paid in the current tax year which, in turn, would reduce any potential annual allowance charge amount. The Annual Allowance excess is subject to an Annual Allowance Charge at the individual's marginal rate of Income Tax which is levied on the individual and serves effectively to claw back the excess tax relief.

The Money Purchase Annual Allowance (MPAA) was introduced with pension freedoms and this limits the amount of money which can be contributed to a money purchase scheme once pensions have been flexibly accessed before a tax charge is payable. For tax year 2022/23 the MPAA is £4,000.

Lifetime Allowance

In addition to the Annual Allowance, a limit has been imposed on the overall value of tax privileged pension funds a member can accrue during their lifetime, before a tax charge applies (the 'Lifetime Allowance'). This was set at an initial figure of £1.5m in 2006/7 and rose to £1.8m by 2010/11 but reduced to £1 million from 2016/17. This is now indexed with CPI from 2018/19 and today 2022/23 is £1,073,000. It is frozen at this level until 2026.

If the ex-spouse is already a member of a pension scheme, it may be possible to add the pension credit to the existing arrangement. Where this is not possible he or she will have to apply for a new arrangement. If the ex-spouse holds certain lifetime allowance protections (enhanced or any of the fixed protections 2012, 2014 or 2016), these will be lost when a new arrangement is set up. The transfer of a pension credit is not a permitted transfer within Lifetime Allowance protection rules.

<https://www.gov.uk/hmrc-internal-manuals/pensions-tax-manual/ptm092410#IDAKYPMB>

An ex-spouse or former civil partner of a member who acquires pension credit rights after 5 April 2006 which derive from a pension

which commenced payment after 5 April 2006 is entitled to apply for a pension credit factor, on the basis that the pension will already have been tested for the purposes of the Lifetime Allowance at the point when it came into payment. The application must be lodged by 31 January following the end of the tax year five years after the end of the tax year in which the individual became legally entitled to the pension credit. See <https://www.gov.uk/government/publications/pension-schemes-enhanced-lifetime-allowance-pension-credit-rights-apss-201>

If the pension credit had been acquired before 6 April 2006, then an application had to be made before 5 April 2009 for the Lifetime Allowance to be uplifted. This enhancement of the Lifetime Allowance was referred to as the 'pre-commencement pension credit factor' and is calculated in a similar way to the pension credit factor, but always by reference to the standard Lifetime Allowance for the tax year 2006/7 – i.e. £1.5 million. The formula is PC divided by SLA, where PC is the pension credit awarded, increased by the percentage increase in the retail prices index from the month in which the rights were acquired until April 2006; and SLA is the standard Lifetime Allowance for the tax year 2006/7.

9.4 Impact of pension debit on entitlement to 'primary protection'

Those whose pension funds were in total worth more than the £1.5m Lifetime Allowance on 5 April 2006 were permitted on or before 5 April 2009 to register with HMRC for 'primary protection'. HMRC then issued a certificate entitling the individual to a percentage uplift on the Lifetime Allowance equal to the percentage by which the fund exceeded £1.5m at 5 April 2006.

If after 5 April 2006 an individual who had applied for primary protection becomes subject to a pension debit as a result of a pension sharing order, the protection will be reduced in proportion to the level of the pension debit or,

if the pension debit results in the deemed fund value as at 5 April 2006 reducing to less than £1.5 million, the protection will be lost.

Individuals who have applied for primary protection and subsequently become subject to a pension debit must notify HMRC, and if primary protection has not been lost on account of the pension debit, HMRC will issue a new certificate.

9.4.1 Impact of pension debit on entitlement to 'Individual Protection 2014'

Those whose pension funds were in total worth more than the £1.25m Lifetime Allowance on 5 April 2014 are permitted on or before 5 April 2017 to register with HMRC for 'Individual Protection 2014'. HMRC then issued a certificate entitling the individual to a personal Lifetime Allowance equal to the total pension funds (the 'relevant amount') at 5 April 2014 or £1.5m if lower.

If after 5 April 2014 an individual who has applied for individual protection 2014 becomes subject to a pension debit as a result of a pension sharing order, the relevant amount will be reduced by the pension debit (although the debit amount may be reduced by 5% for each complete tax year elapsed since 2013/14 to the date of the pension debit) or, if the reduction results in the deemed fund value as at 5 April 2014 reducing to less than £1.25 million, the protection will be lost.

9.4.2 Impact of pension debit on entitlement to 'Individual Protection 2016'

Those whose pension funds were in total worth more than the £1.0m Lifetime Allowance on 5 April 2016 are permitted to register with HMRC for 'Individual Protection 2016' at any time prior to taking benefits. HMRC provide a protection reference number entitling the individual to a personal Lifetime Allowance equal to the total pension funds (the 'relevant amount') at 5 April 2016 or £1.25m if lower.

If after 5 April 2016 an individual who has applied for individual protection 2016 becomes subject to a pension debit as a result of a pension sharing

order, the relevant amount will be reduced by the pension debit (although the debit amount may be reduced by 5% for each complete tax year elapsed since 2015/16 to the date of the pension debit) or, if the reduction results in the deemed fund value as at 5 April 2016 reducing to less than £1.0 million, the protection will be lost.

9.5 Holistic financial education and planning

Often during the period of a marriage the finances are dealt with by either the husband or wife and on divorce the need to be able to manage monies and understand future budgeting requirements can be difficult particularly in view of all the other stresses that are being faced at this difficult time. This is often relevant to the wife who is now receiving a large settlement either in the form of investments, cash and or pensions, and their greatest concern is their future financial security. Often, they have had no previous experience of dealing with investments.

The financial planner may need to spend some time helping the client understand the issues that may be considered as basics within financial planning, and that the selection of products and investment funds are dealt with at a later date whilst the monies are held in cash deposits. This enables some clients to ‘get their life back’ before feeling compelled to make important decisions. For example, just because they now have a sizeable pension share does not mean that they have had any previous knowledge of how a pension arrangement operates.

The following are some of the areas in which a financial planning professional can provide assistance

9.5.1 In relation to pensions

- Commenting on the nature and value of each party’s pension rights.
- Reviewing financial information already gathered, to identify errors or omissions. For example, a final salary pension scheme such

as the Teachers’ Pension Scheme may have been asked for, but may not have provided, details of AVC benefits.

- Finding a ‘fair value’ for final salary schemes.
- Giving an indication of what split would be needed to achieve (for example) equality of income for the parties in retirement.
- Advising the client on which pensions should be retained and which shared in order to minimise leakage of value.
- Advising on the merits of giving away pension assets as opposed to other assets (e.g. availability of tax relief on pension contributions, effectively part-subsidising reconstitution of pension funds).
- Helping to find ways to share esoteric schemes (e.g. SIPPs holding commercial property).
- Liaising with an Actuary on the preparation of a suitable response to queries requiring actuarial input e.g. in relation to the Armed Forces and Police Pension Schemes.
- Considering the question of timing – for example, whether applying for pension sharing should be delayed until some point in the future when the pension credit benefits can become payable immediately.
- Considering the merits of internal and external transfers as sharing options for the transferee.
- Advising transferees on the selection of a pension wrapper to act as the receiving scheme for an external transfer.
- Advising transferors on the options for rebuilding their pension rights after divorce within the confines of the Annual Allowance rules, perhaps by means of Additional Voluntary Contribution schemes (‘AVCs’).
- Advising clients in receipt of pension shares on setting up their own pension arrangements.
- Project managing the implementation of a pension sharing order within a public sector scheme

9.5.2 In the wider context of financial planning

- Providing clients with financial planning advice to ensure that the client embraces their new financial independence and is not daunted by the prospect of it. Explaining the implications of various settlement options. Assisting clients in drawing up a realistic financial budget or in developing an income plan or long- term cash flow analysis so they know how much they have to live on and assessing ‘What if?’ comparisons of alternative financial strategies.
- Assisting clients with financial disclosure. This is the most time-consuming part of the Financial Remedies process. Parties need to prepare a Form E, in which they disclose all their assets, income and liabilities to their spouse.
- Busy clients with complex financial/ business affairs often need to rely on their financial planning professional to identify and collate this information and to deal with questions raised by the other side. Similarly, the analysis of the other assets may also prove very useful when working out a viable settlement.
- Valuing endowment policies included in Form E. Valuations would usually be based on the surrender value quoted by the insurance company, but a financial planner will be able to ascertain whether an increased value could be obtained from selling the policy on the second- hand market. Consideration might also be given to the merits of assigning endowments and investment bonds
- Clients in receipt of capital settlements may have little or no experience of investments. Specialist guidance is invaluable not only in relation to which investment arrangements may be most appropriate in the circumstances, but also in relation to the use where appropriate of tax-efficient vehicles such as offshore bonds.
- Advising on the tax aspects of different forms of current and future income. Immediate

concerns might include the triggering of Capital Gains Tax liabilities, but there could also be longer term planning issues, such as how best to mitigate Inheritance Tax when there is no longer a spouse exemption available for planning purposes.

- Discussing, and ensuring that clients have a full understanding of, risk. This does not relate purely to risk associated with investments but can encompass, for instance, the risk inherent in opting for shadow membership within a final salary pension scheme (see 5.4 above) instead of transferring rights to an alternative scheme, and the risk associated with retaining or selling certain assets and the merits of dividing assets in specie so that the risk of volatility is shared – a key theme in financial negotiations in the current climate.
- Determining the cost of replacing items under an employee benefits package for the ex-spouse (e.g. life cover, critical illness cover, private medical insurance).
- Advising as to potential borrowing capabilities and assisting with the funding of costs. There may be a lack of liquidity, or simply an imbalance of wealth between the parties. Parties often appreciate assistance in obtaining a bespoke loan facility and providing required information about your client to the lender.
- Assisting employees to consider the effect of divorce on the following employer benefits:
 - Private medical insurance
 - Health Screening
 - Personal accident insurance
 - Dental insurance
 - Life assurance
 - Permanent health insurance
 - Critical illness insurance
 - Spouse’s pension on death in service
 - Spouse’s pension on death in retirement
 - Dependent’s pension on death in service
 - Subsidised mortgages.

10 Alternative dispute resolution methods

Over recent years a number of methods have been developed as alternatives to Court proceedings to help clients avoid the time, cost, stress and apprehension about going to Court.

Some of the current alternative methods can be summarised as follows:

10.1 Self representation

Following the global financial crisis of 2008, there has been a significant increase in the number financialin person.

Whilst it may be perceived that this reduces costs, there may be certain aspects such as the preparation of a letter of instruction for pensions expert and all the preparation of a pension sharing order on which assistance from a family lawyer will be required. There is nothing to stop a party taking advice from a lawyer in the background to be as informed as possible whilst still representing him or herself. Additionally, both parties may want to work together in a cooperative attempt to reach agreement or narrow the issues. Again, background advice by either for both can add to the quality of decision making without necessarily increasing conflict.

If one party is self-represented and the other party is legally represented it places a greater onus and possible cost on the legal representatives of the other party to ensure that the Court procedures are followed fully.

10.2 Mediation

Mediation can be used for settling various issues including financial matters. It involves the appointment of an independent third- party mediator, who facilitates discussions between the parties to try and reach an agreement.

The mediator is not able to provide legal advice to either party, and it would normally be recommended that the parties consult with legal advisers to confirm the outcome of the mediation.

Mediation permits an agreement to be reached on finances which both parties can influence, whereas if the matter were to go to Court the judge would decide, and this might result in an outcome that neither party would have wished for. More details on mediation can be found at <http://www.familymediationcouncil.org.uk>

10.3 Early Neutral Evaluation (ENE)

Early neutral evaluation, or sometimes known as private FDR hearings, involve the appointment of an experienced evaluator who encourages the parties towards a settlement but, unlike a mediator, is also able to give an opinion on the likely outcome of the dispute. However, the evaluator does not have the power to make an order if the parties cannot agree.

The advantages of an ENE are:

- quicker than waiting for a Court listing
- the parties can appoint an evaluator who has the requisite knowledge of the issues to be discussed, such as pensions or business valuations
- the evaluator has sufficient time to read the papers and prepare generally, which sometimes may not happen within the Court system due to time and cost pressures.

10.4 Arbitration

Unlike mediation and early neutral evaluation, the arbitrator who is appointed by the parties has the power to make decisions which are binding on each party to virtually the same extent as the Court would.

An advantage of the Court process is that the outcome remains confidential. It may be that only certain parts of the divorce are to be dealt with by arbitration and other aspects are settled through the alternative methods available.

More information on arbitration can be found at <http://ifla.org.uk/>

10.5 Collaborative

The collaborative divorce methodology has developed over the past twenty years. This powerful process enables the couple going through separation to resolve all outstanding issues without the specter of Court proceedings overshadowing their negotiations. The impact upon relationships as the couple separate and then post- separation can be profound.

Within collaborative divorce, both parties continue to be represented by their lawyers. The lawyers and the couple hold one or more meetings in order to collaborate with one another and design highly bespoke, and often very creative, solutions to fit that family's requirements.

There are several distinctive features of the collaborative process that merit attention and differentiate it from straightforward negotiations or round-table meetings

10.5.1 The participation agreement

At the beginning of the collaborative process both partners, their lawyers and other professionals such as financial planning professionals, therapists or coaches, agree to be bound by and sign up to a participation agreement.

It is the aim of this document to set out expectations and guidelines on how the subsequent settlement discussions will be conducted.

It obliges the parties to be forward-looking, rather than trawling through what has gone wrong. It also explicitly places the interests of the children, where there are any, as being a primary consideration. This is in keeping with the Matrimonial Causes Act, which has a similar priority.

The agreement also usually stipulates that the parties will resist the temptation to discuss matters outside the collaborative meetings or with people who are not a part of the process. Where exceptions to this are agreed, these can also be recorded within the agreement.

10.5.2 The disqualification clause

A fundamental part of the participation agreement is the disqualification clause. This is as integral to the collaborative process as it is contentious.

The clause states that if the collaborative process fails and either partner chooses to apply to the Court instead, then both lawyers, and their respective firms, are disqualified from acting further. Both parties in those circumstances will need to instruct alternative lawyers to carry on with the Court process.

This can cause anxiety, and it raises questions as to whether instructing new lawyers will incur additional costs, and whether the client might lose their lawyer of choice just because their partner has opted out.

On the costs front there would inevitably be a modest duplication of work and possible extra costs incurred by the new lawyer becoming familiar with the matters. These costs can be moderated, however, particularly if the new and the former lawyer co-operate with full summaries. This may well be done by the lawyers meeting to discuss what has happened so far, at handover.

The risk that a client may have to go to another lawyer is unfortunate but is not an insurmountable problem. Although clients and lawyers have special relationships built upon empathy and trust, the reality is that the new lawyer and the client should soon be able to create a similar understanding, especially if the outgoing lawyer carefully considers who they might recommend to take over in their place.

The disqualification clause is not an issue in the vast majority of cases. Most cases that have been entered into the collaborative process proceed to a successful settlement.

Some professionals question the need for the disqualification clause. However, it imposes a helpful formality, and disincentive to either partner downing tools and walking away from the collaborative meetings with the emotive words “I’ll see you in Court.”

In this sense it can be seen as a speed bump. It slows down what might otherwise be an impetuous gesture made or stated in the heat of the moment that might otherwise condemn the couple to many months of painful litigation.

Some practitioners in the family law profession claim to be conducting collaborative divorce work without a disqualification clause. However, it is impossible to do so. The participation agreement, complete with the disqualification clause, is an integral part of collaborative divorce.

Non-compliant processes are sometimes called co-operative divorce or “Little c” collaboration. However, such meetings are no more than the round table meetings of the sort that lawyers have been holding for many years, and there is a peril within them that if no agreement can be reached, then the very same lawyers who were eliciting the most candid of viewpoints from their client’s spouse or partner, can then shape the future litigation of the case with full knowledge of the other partner’s case and priorities.

The result is that the client and both lawyers may well be cautious, and rightly so, about being fully transparent in the same way that they could be if they had the assurance that there would be a changing of the lawyers should the matter go to Court.

It is important, therefore, for a financial planning professional to be clear when joining a collaborative team, that the participation agreement, together with the disqualification clause, has been signed.

10.5.3 The benefits of the collaborative divorce process

Collaborate divorce has many benefits.

In particular it enables couples to resolve matters without having to apply to the Court. The only time the Court becomes involved is if a sealed financial agreement needs converting into a final Court order. If there are divorce proceedings, then the Court will still need to deal with those formalities also.

Collaborative divorce cases operate without the delays inherent in correspondence passing between lawyers and their respective clients. Almost everything is done around the table within the collaborative divorce meetings.

This dynamic enables misunderstandings, or contentious issues, to be flagged up right away and cleared, thus avoiding the risk of rapidly escalating acrimony rather than serving to fill the gaps between corresponding lawyers’ letters.

There may be a couple of months, weeks or even days between one collaborative divorce meeting and the next. The timetable is determined by the clients and not by the sometimes-scarce availability of Court time.

There are suggestions that celebrity or high net worth couples may be choosing the collaborative divorce process to increase confidentiality and discretion, thus avoiding the media circus such as that which surrounded the Paul McCartney case in recent years.

10.5.4 The financial planning professional’s role within collaborative divorce

Financial planning professionals have a unique role within collaborative divorce and one that many find attractive. Their role is no longer partisan or loyal to only one of the couple. Instead they can assimilate up-dating documentation, summarise assets, income and pensions, and take a broad view of both parties’ interests.

This in turn enables financial planners to consider more creative options for financial distribution and settlement. It might be possible, for example, to develop arrangements that prove to be tax efficient, particularly when dealing with the allocation of pension assets. Forecast reports can also be prepared for both parties using the same data and projections.

Many financial planners would have managed a couple’s portfolio throughout their marriage and this role can enable them to do so post-separation as well, enabling continuity despite the separation.

It was initially felt advisable that financial planners involved in the collaborative process would hand on the implementation of any settlement agreed to other financial planners. It had been thought this was desirable to avoid conflict of interests. However, this is not now the case as experience has shown that the high

level of professionalism of Resolution accredited financial planners, combined with the benefit of continuity of advice and reduced costs, results in it being preferable for a single financial planner to act throughout the process.

There are significant opportunities for financial planning professionals to take an earlier and more central role in family separation Negotiations. The benefits that this can offer to the families are obvious. By being able to explore pension options upon separation much earlier, financial planners can play a fuller role in shaping the division of the assets and not simply be asked to implement pre-agreed arrangements.

11 Divorce case study

Throughout this case study we investigate:

- **Divorce**
- **Mechanics of sharing assets**

Scarlett is 47 years old and works as an Accounting Manager in Bristol. She has three children (ages 12, 10 and 5) with her husband Tom (61). Tom works for Bristol City Council. Unfortunately, their relationship has broken down and after sixteen years of marriage they are seeking to divorce.

Scarlett and Tom both earn above the average UK salary, but they also have a lot of expenditure due to childcare needs. Tom has two pensions. He annuitised an old Retirement Annuity Plan he had at age 60 as it allowed him to take advantage of a generous annuity rate at that age. He is also an active member of the local government defined benefit pension scheme. Scarlett needs to work out the financial implications of her divorce including the impact on her and her husband's pensions.

Assets and liabilities at time of separation

House: value £800,000, £500,000 mortgage outstanding

Defined contribution occupational pension scheme (Scarlett): £42,000 (6% employer and 6% employee contributions)

Shares (Scarlett): £34,000 (base cost £21,000). Yield 3.5%

Cash ISA (Tom): £25,000

Onshore bond (joint): £11,000

Annuity (RPI linked) paying £4,000pa (Tom): cash equivalent £250,000

Defined Benefit Pension (Tom): cash equivalent £200,000

Current income and expenditure

Income

Salary (Scarlett): £58,000

Salary (Tom): £36,000

Pension (Tom): £4,000

Share dividends: £1,190

Child benefit: £2,636

Expenditure

Childcare: £20,000

Mortgage: £18,000

General household expenditure: £28,000

Tom has recently moved out and it is important to look at the advice requirements on an individual basis for Scarlett who is the client.

Income tax calculation for Scarlett (current)⁽¹⁾

	Income	Savings income	Dividends	Total
	£	£	£	£
Income				
Salary	58,000			58,000
Child benefit	2,636			2,636
Dividend income				
Dividends			1,190	1,190
Total	60,636		1,190	61,826
Personal allowance ⁽²⁾	(12,570)			(12,570)
Pension contribution paid gross	(3,480)			(3,480)
Child benefit tax free	(2,636)			(2,636)
Taxable	41,950		1,190	43,140
£37,700 taxable salary @ 20%	7,540			7,540
£4,250 taxable salary @ 40%	1,700			1,700
£1,190 dividends at 0%	0		0	0
Child benefit tax charge ⁽³⁾	1,502			1,502
Income tax payable	10,742		0	10,742

Notes: 1. As Scarlett resides in Bristol, she will be subject to UK taxation in respect of all of her taxable income.

2. Standard Personal Allowance (2022/23) subject to reduction for income in excess of £100,000.

3. The child benefit tax charge calculation is explained next.

Child benefit calculation	£
Adjusted net income (for allowance/ benefit purposes)	55,710
Income in excess of limit	5,710
Excess in multiples of £100	57
Number of children	3
Child benefit	2,636
Child benefit tax charge (57%)	1,502
Net child benefit	1,134
Net child benefit 1,076	10,742

Income tax calculation – implications for Scarlett

Scarlett's income is sufficient to fully absorb her personal allowance of £12,570 in 2022/23. Her taxable income uses up the £37,700 of the basic rate band and £4,520 of the higher rate band meaning that she will be taxed at both 20% and 40% respectively.

Tax rate	Income band (adjusted net income)
Basic 20%	Up to £50,270
Higher 40%	£50,271 – £150,000
Additional 45%	Over £150,000

As a working parent with a great deal of expenditure, Scarlett doesn't have any savings income.

After non-savings income (and given her lack of savings income), Scarlett's dividend income is then considered. In view of the £2,000 dividend nil rate, she will pay no tax on the first £2,000 of dividend income. The dividends do however count as taxable income and use up some of her higher rate tax band. As Scarlett only has £1,190 of dividend income then she won't pay any additional tax. The rates of income tax on dividends received above the allowance are;

- 8.75% for dividends taxed in the basic rate band
- 33.75% for dividends taxed in the higher rate band
- 39.35% for dividends taxed in the additional rate band

Therefore, if Scarlett were to receive dividends which exceeded the £2,000 allowance, the excess above the dividends nil rate would be taxed at 33.75% (subject to it not exceeding the additional rate band).

Tax relief on pension contributions – Net Pay basis

Scarlett is a member of her company's occupational pension scheme. This means that her member contributions are paid over to the administrator by the sponsoring employer. This is an example of a net pay contribution.

Under net pay, Scarlett's contribution is deducted by her employer from her salary before her tax is calculated.

Her taxable income is reduced by £3,480. Scarlett receives full tax relief immediately and does not need to self-assess to claim her higher rate tax relief.

High income child benefit tax charge

Child benefit is a universal benefit, so Scarlett receives £2,636 per year for her three children.

However, if someone:

- has adjusted net income of more than £50,000, and
- lives with a partner, in a household where Child Benefit is claimed or claims themselves, and
- is the partner with the highest adjusted net income

then they will incur a tax charge which removes or partially removes the benefit of receiving Child Benefit. The definition of partner includes those married, in civil partnerships or couples living together as if married or civil partners.

Adjusted net income is the measure currently used to work out entitlement to personal allowances. Adjusted net income is, broadly, taxable income (it should be noted that this includes all rental income, dividends, full amount of bond gains and any other taxable income).

Certain deductions are allowed, such as the gross value of personal pension contributions, gift aid and trading losses.

For those with child benefit and adjusted net income between £50,000 and £60,000 then the charge will be 1% of the total child benefit for every £100 of income over £50,000.

The charge applies to the partner with the highest adjusted net income regardless of who actually receives Child Benefit. As Scarlett has adjusted net income of £55,710 she is liable to a tax charge of 57% of the benefit received i.e. £1,502.

The charge is collected through self-assessment or PAYE.

The recipient of Child Benefit may decide not to receive benefit payments which would mean that they or their partner will not be liable to the tax charge. However, claims should be completed for new children born so that entitlement to National Insurance credits is not lost.

However, as there is some child benefit remaining after the tax charge, it is still more beneficial for Scarlett to receive the child benefit.

Scarlett could ask for the child benefit to be paid to Tom as he is a lower earner and no longer living in the family home. However, if Tom were to receive Child Benefit for the children (and they are living some of the time with Scarlett) and Tom contributes at least an equal amount towards the children's upkeep then the charge will still apply to Scarlett.

Divorce

Splitting the assets

Scarlett and Tom will need a solicitor to deal with the divorce due to the complexity of the financial arrangements and the fact they have children under 16. However, financial advice at this time is also crucial.

Often couples know the value of assets such as investments and houses, but they don't know the value of their pensions and these could be the largest asset to be dealt with on divorce. Scarlett and Tom will need to sit down with their solicitors, not only to discuss how their children's

welfare will be dealt with but also to consider how their assets should be split on their divorce. As Scarlett and Tom live in Bristol, the laws of England and Wales applies and all reference in this case study is to the law of England and Wales.

The value of state pensions can often be overlooked on divorce. Each party obtained a state pension forecast and it was found that they were broadly comparable so were excluded from the settlement.

Asset	Value for the purpose of divorce
House	£300,000 equity
Scarlett's pension scheme	£42,000 fund value
Tom's pension in payment	£250,000 cash equivalent
Tom's defined benefit pension scheme	£200,000 cash equivalent
Scarlett's shares	£34,000
Tom's cash ISA	£25,000
Onshore bond	£11,000
Total	£862,000

There are three ways in which pensions can be dealt with on divorce; offsetting, attachment (earmarking) order or pension sharing order. Scarlett's solicitor explains the three options.

Offsetting

This involves getting the value (usually the cash equivalent or transfer value) of the pension benefits as at the date of the divorce. This value would then be included in the total value of the matrimonial estate to be divided on divorce.

The value of the pension is offset against other assets. Pre April 2015 pensions were not usually valued on a pound for pound basis with other assets, due to the lack of access to the full value. In practice the value apportioned could be anything between 25% and 80% of the fund value and it could depend on how close retirement was. This was discussed in the case of *Maskell v Maskell* [2001]. The County Court Judge had suggested that the pension could be compared on a like for like basis. On appeal, Lord Justice Hope stated that the Judge had made the "elementary mistake of confusing present capital with a right to financial benefits on retirement, only 25 per cent of which maximum could be taken in capital terms, the other 75 per cent being taken as an annuity stream".

However, for those 'silver divorcees' who are over 55, there is now total access to defined contribution pension funds. This may lead to value parity with other assets. If so, the tax and future contribution issues surrounding accessing flexibility may need to be addressed in the settlement.

Once the value has been decided then the ex-spouse receives another asset or share of another asset instead of a share of the pension. For example, this might mean the ex-spouse receiving a larger share of the matrimonial home to compensate for the pension share.

Offsetting is common especially for those clients with many assets. Also, clients who value their pensions may be willing to give up access to more liquid assets to retain control of their pension.

For Scarlett and Tom, offsetting might not be the obvious choice. Although Tom is the lower earner, between them his two pensions make up more than 52% of the total assets. If it was decided that a 50% split was needed then not only would Tom have no disposable assets and no way of buying another property due to the lack of a deposit, but he would also need to find some money to give to Scarlett.

Attachment order

An attachment order (also commonly referred to as earmarking) is effectively deferred maintenance. This is not as common as it was before the introduction of pension sharing due to the disadvantages.

The court instructs the member to get a valuation of the pension benefits. The court will use the cash equivalent basis and all pension benefits, potentially including those earned before marriage, may be taken into account (except any already earmarked from an earlier divorce).

The benefits that can be earmarked in England and Wales and Northern Ireland are;

- a specified percentage of the pension benefits when the member starts to draw their benefits
- a share of the lump sum available when benefits are accessed
- a specified percentage of any lump sum death benefit in the event of the death of the member before retirement

There are disadvantages to attachment orders. The main one is that there is no 'clean break'. In addition, the order lapses on the;

- Remarriage of the ex-spouse in relation to pension payments
- Death of the member (unless the Court Order specifies otherwise)

The ex-spouse has no control over when benefits are taken and what investments the fund is in. The pension is taxed as the member's income and attached payments are paid after tax. If the member is a higher rate taxpayer and the ex-spouse is a non or basic rate taxpayer, then this could mean less cash for the ex-spouse. In addition, the method of valuation for divorces could have serious consequences for those who marry late in their working life, if the courts allow the pre marriage assets to be taken into account or for those who have been divorced more than once.

Pension flexibility may have a significant impact on the application of attachment orders – potentially leaving scope to circumvent the requirements set out in the order, unless the details in the order are very specific. However, very specific orders can also mean that providers can't allow the member to go into drawdown.

For these reasons, an attachment order would not be a sensible option for Scarlett and Tom.

Pension sharing

The aim of pension sharing is to separate the ex-spouse's pension entitlement from the member's pension so that there is a clean break, in contrast to earmarking.

Pension sharing is available to couples divorcing throughout the UK but isn't compulsory.

However, in England and Wales, this can only be achieved by a court order which means there is an added cost implication.

The Court instructs the member to get a CE along with certain other information about benefits. If a CE has been provided within the last 12 months, that figure can be used. The Court will decide how much of the pension rights should be allocated to the ex-spouse and the member's pension rights will be reduced by a corresponding amount. This reduction is known as a 'Pension Debit'. Again, in England and Wales this must be a percentage of the total value. This is then allocated to the ex-spouse and becomes a 'Pension Credit' if paid from uncrystallised funds and a 'disqualifying pension credit' if paid from previously crystallised funds.

It's worth noting here that Tom's existing pension income (already in payment) could be subject to a pension sharing order but once the disqualifying pension credit was received in Scarlett's scheme, she'd need to wait until she reaches normal minimum pension age or satisfies the ill-health conditions before she could take any benefits.

However, on implementation, there would be an immediate reduction in the pension income payments Tom would receive which may make it more difficult for him to manage his general expenditure.

Sharing Tom's uncrystallised Defined Benefit scheme pension rights would seem the sensible option for Scarlett and Tom. It means that there is a clean break in pension terms. It would also allow Tom to still have access to a capital sum from his share of the other assets.

An existing pension scheme can choose to allow the ex-spouse to join the scheme, OR to take the transfer value to another registered pension scheme.

Other assets

Scarlett owns some shares and Tom owns a cash ISA. The first question to discuss with the solicitor in relation to these assets is if the assets are actually a matrimonial asset. It is possible

that they could be pre-acquired assets. There is no statutory definition of what a pre-acquired asset is, and case law suggests that it can include a wide range of assets acquired in different circumstances including assets bought by one party before the marriage and assets gifted to or inherited by one spouse.

However, this can be a contentious issue for those with much larger assets and also inherited assets. It will be up to the court to determine if the assets are matrimonial property or non-matrimonial property and case law suggests that this is dependent on the facts of each case. Although generally a pre-acquired asset will not be taken into account, it does depend on the financial needs of the parties and other facts such as when the property came into existence, the length of the marriage, how it was treated during the marriage and so on.

The introduction of pension freedom may also have an impact in this area. Dependents, nominees and successor flexi access drawdown can't be subject to a pension sharing order. However, if an adult child was the beneficiary of a large nominee drawdown and income was withdrawn from that fund to fund family living expenses, it could be that it would be considered a matrimonial asset. Although this scenario existed pre-freedom for a dependant – it would have needed a bereaved spouse in dependant's drawdown to remarry and then get divorced and that was more unusual. However, the likelihood of an adult child divorcing is higher.

In this scenario, Scarlett received the shares though her work share scheme and the cash ISA was paid into from the couples joint account and therefore both Scarlett and Tom are happy that they are considered matrimonial property.

What has been decided

It has been established by case law that the sharing principle should apply on divorce. This means that assets will normally be divided equally between the two parties unless there

is good reason not to do this. The court will consider a variety of different factors though and when children are involved then this will always be the first consideration. Other areas that are considered are length of the marriage, income and financial resources, financial needs, standard of living during the marriage, contribution to the home, care of the children and so on.

With the help of their solicitors, Scarlett and Tom have agreed that they will split assets 50/50. They have also decided to share custody of the children 50/50. Scarlett has agreed to pay 60% of the childcare costs as she is the higher earner.

Scarlett will keep the matrimonial home, but this means Tom will need access to some cash to put down a deposit on a new home. The trade-off for this is giving up some of his defined benefit pension scheme.

The details of the split are:

Asset	Scarlett	Tom
House	£300,000 equity	
Scarlett's pension scheme	£42,000 fund value	
Tom's pension in payment		£250,000 cash equivalent
Tom's DB pension scheme	£72,000 cash equivalent	£128,000 cash equivalent
Scarlett's shares	£17,000	£17,000
Tom's cash ISA		£25,000
Onshore bond		£11,000
Total	£431,000	£431,000

Mechanics of sharing the assets

The court order has been granted and the assets now must be physically shared.

House

The mortgage for the house will need to be changed from joint names to Scarlett's name. The bank will also have to agree that Scarlett has the salary to pay the mortgage by herself. As Scarlett has a reasonable salary then this should be acceptable to the mortgage company. Her solicitor will need to be involved in drafting a new mortgage deed.

Tom's pension scheme

Tom is a member of the Local Government Pension Scheme. As such, Scarlett will be given the choice of having a 'pension credit' set up in the LGPS or having her share transferred to another pension scheme.

Even though Scarlett has the choice of securing guaranteed benefits under the scheme, it is important to consider the implications of remaining within the scheme versus transfer.

On the subject of transfer the FCA confirmed in FG21/3 (Advising on pension transfers) that a pension credit is not regarded as safeguarded benefits (or money purchase or cash balance benefits) or a transfer payment but as a right in itself. This applies whether the ex-spouse is offered membership of the DB scheme or not. However, while it may not be classed as a transfer, it may be prudent to treat such cases as if they were DB transfer cases to ensure good outcomes and no potential future issues.

When the pension trustees receive the Pension Sharing Order:

- they have 3 weeks from receipt to appeal against any order/ agreement
- they can delay the start of the implementation period until charges are paid or whilst relevant information is outstanding (or whilst an appeal is being decided)
- they have 4 months in which to implement the Pension Sharing Order. This implementation period involves discharging the Pension Debit/ Credit by way of an internal or external transfer.

It is very important that Scarlett instructs the trustees quickly, and if she wants an external transfer value this should include details for where she wants the pension money to go. Once the trustees have this requirement satisfied, and any other requirements, then the order can be implemented.

For annual allowance purposes an external transfer is not a contribution. However, if Scarlett held certain lifetime allowance protections (enhanced or any of the fixed protections 2012, 2014 or 2016) then this will usually be lost due to the setting up of a new arrangement.

Scarlett's financial adviser advises her that the occupational scheme has guaranteed benefits which are very valuable.

Scarlett's retirement is still many years off, so her retirement income needs are not known at this time. The scheme will also provide dependants pensions for the children should anything happen to Scarlett. Scarlett is in good health and has a history of longevity in her family. Because of the uncertainty of her future requirements and it is likely the guaranteed benefits from the scheme will be very valuable to Scarlett it is decided a transfer to her own arrangement would be unsuitable and she should become a member of the scheme in her own right.

Scarlett's shares and onshore bond

A proportion of the shares are being assigned from Scarlett to Tom and the bond is moving from joint ownership to being owned by Tom. This will not cause a CGT issue as the assignment is not for money or money's worth where the Court has made an Order:

- formally ratifying an agreement reached by the parties that deals with the transfer of assets including the policy, or
- for Financial Remedies under the Matrimonial Causes Act 1973 (or financial provision under the Family Law (Scotland) Act 1985) which results in a transfer of rights under the policy from one spouse to another.

Tom also gets a proportion of the base cost in respect of the percentage of shares assigned. This is used to work out any capital gains tax due when he elects to sell those shares.

Other issues

Expression of wish forms and wills

At the point of separation, Scarlett's solicitor and financial adviser advise her to consider making a will and amending her expression of wish form for the pension scheme to make sure that her wishes are known.

In relation to the expression of wish form, a separated spouse is still technically a dependant in HMRC terms. Scarlett's occupational scheme is set up on a discretionary basis and the scheme administrator will investigate before deciding who should benefit. An up to date expression of wish form will help them with this task. If Scarlett died, she might not want Tom to receive any death benefits and instead the whole benefit be shared between her dependent children.

However, she might also want Tom to benefit to some extent as he would have to look after the children and pay all of the childcare. It is important that Scarlett carefully considers this.

Scarlett will need to complete another expression of wish form for the benefits she will have when she becomes a member of Tom's pension scheme.

Scarlett also needs to consider making a will. If Scarlett died without a will before the divorce was finalised, then the law of intestacy states that the first £270,000 of her estate and all personal chattels would pass to Tom together with one half of the rest of the estate. This may not be what she would want to happen. If she would like the children to benefit then she needs to decide who should look after the money for them until they are old enough.

In summary

Going through a divorce is a difficult time emotionally and financially. Legal advice is crucial at the point of the divorce, but financial advice is also necessary and good financial advice will have an impact for years to come. For Scarlett this means help in dealing with the additional pension which she will receive from Tom, making sure that the assets are dealt with correctly when they are split and thinking about her retirement plans and what might happen if she died.

Appendices

Appendix A: Glossary of Terms

Affidavit

A written 'statement of fact' made on oath and signed in the presence of a Solicitor.

Acknowledgment of Service

A form sent with the divorce application to the Respondent. When the form is completed and returned, receipt of the petition is acknowledged, and service is complete.

Financial Remedies

The financial claims that arise between spouses that are ancillary to the main suit of divorce.

Clean break

A final settlement of income, capital, property and pension during life and on death so that further claims are dismissed.

Child Maintenance

Financial maintenance of minor children by one or both parents.

Consent Order

Financial order filed with the Court setting out the terms of the financial agreement between the parties which the District Judge is invited to approve.

Conditional Order

Pronounced on the application of the Petitioner. The District Judge can approve a Consent Order on or after a Conditional Order.

Final Order

The final divorce order, which brings the marriage to an end. Available on application six weeks after the date of the Conditional Order (or on application by the Respondent three months after the date on which a sole Applicant could first have applied).

Financial Dispute Resolution Meeting

Part of the Financial Remedy process.

Form A

The Notice of Application for Financial Remedies (i.e. for financial orders), which can be filed by either the Applicant or the Respondent in divorce proceedings in order to start financial proceedings. A party seeking a pension sharing or pension attachment order should specify this on Form A.

Form E

The form upon which financial disclosure is completed either voluntarily, pre issue of Form A, or by way of Court timetable post issue of Form A. The parties are required amongst other matters to give comprehensive information regarding income, capital assets, pension provision, liabilities and an indication of the order(s) being sought.

Form P

If the Form E discloses significant pension assets, then a Form P may be requested from the pension administrators to provide more detailed information.

First Appointment

The first hearing fixed following the filing of a Form A. Each party has to file a Form E not later than 35 days in advance of the First Appointment. The District Judge will consider the financial disclosure supplied at First Appointment and decide whether to direct that any questionnaires filed on behalf of either party should be answered in whole or in part.

Judicial separation

A decree of the Court that pronounces two parties legally separate without dissolving the marriage. Can include financial settlement. The decree releases the spouses from the duty to cohabit.

Maintenance

Financial support given by one party to the other during and/or after a divorce. It is ordinarily in the format of regular income payment but can be capitalised to a lump sum.

Maintenance pending suit

An interim Court order for one spouse to provide financial support to the other pending the final divorce decree.

Mediation

A process involving a trained mediator as a neutral facilitator to assist the parties to reach agreement.

Respondent

The person who receives the divorce application.

Service

The act of presenting a spouse with a document (e.g. a divorce application) in such a way that delivery and receipt can be proved.

Separation

A term used to indicate that parties no longer live together prior to divorce and which may include a financial agreement or may not.

Appendix B: Useful Web Sites

Pruadviser

www.pruadviser.co.uk/knowledge-literature/technical

Court Service

www.gov.uk/divorce

Family Law /Jordans

www.jordanpublishing.co.uk

Family Law Bar Association

www.flba.co.uk

Family Law Week

www.familylawweek.co.uk

Law Society

www.lawsociety.org.uk

Acts of Parliament

www.legislation.gov.uk/ukpga

Statutory Instruments

www.legislation.gov.uk/uksi

Resolution (SLFA)

www.resolution.org.uk

Statute Law Database

www.statutelaw.gov.uk

Expert Witness Training

www.bondsolon.co.uk

SIFA Professional Directory

www.sifa-directory.info

Appendix C: Useful Publications

At a Glance

FBLA

Pension Sharing in Practice

David Salter

Pensions and Family Breakdown

David Davidson

Family Breakdown and Pensions

Robin Ellison and Maggie Rae

Unlocking Matrimonial Assets on Divorce Pensions on Divorce

David Salter, Maggie Rae and Robin Ellison

Pensions on Divorce: A Practitioner's Handbook

District Judge Edward Hess and Fiona Hay

Dictionary of Financial Remedies

District Judge Edward Hess and Peter Duckworth

Guide to the Treatment of Pensions on Divorce

Pension Advisory Group

About Resolution

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Resolution was founded in 1982 as an association for family lawyers in England and Wales who believed that a non-confrontational approach to family law issues would produce better outcomes for separating families and their children.

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We publish the level of knowledge and experience (the competencies) you need in order to pass the accreditation in the Prospectus. This means you can assess whether you feel you are ready to apply or not. Our assessors mark against the same competencies that you can read in the prospectus, the process is open, transparent and robust.

Portfolio assignments are available in the following subjects:

- Pensions (this is a mandatory unit)
- Cashflow modelling and budgeting
- Taxation and state benefits





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