Pensions upon divorce: Financial and other implications for the couple

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Abstract This paper looks at the practices in Scotland and England regarding the sharing of pension rights on divorce prior to the Welfare Reform and Pensions Act. In particular, it focuses on the 'pension offsetting' approach and the 'earmarking' approach introduced under the Pensions Act 1995.

The paper then considers the new 'pension sharing' provisions in the 1999 Act and compares these with the previous two approaches. This is done by examples which show the financial and other effects of each approach on the couple. Finally, it highlights when a particular method may be preferable for the member and the spouse separately. Often, the preferred method for one partner may be different for the other.

Keywords: *pensions on divorce; earmarking; pension sharing*

Introduction

Currently there are over 150,000 divorces each year in the UK, and yet, prior to the Pensions Act 1995, surprisingly little attention was given to the best way of sharing pension rights on divorce. It is surprising because pension rights for long- and even medium-term marriages can be very valuable, and can even exceed the value of the matrimonial home.

In Scotland, it has been a legal requirement to include pension rights in divorce settlements since 1988. Even there, however, the method of doing this and the amounts paid out have often been unfair to both parties. In England, Wales and Northern Ireland the situation

was never properly resolved prior to the Pensions Act, and pension rights were often ignored.

This paper takes a brief look at the practices in each jurisdiction prior to the Pensions Act, and outlines the problems that arose from those practices. It also summarises the provisions of the Pension Act 1995, and shows that there are also problems with these provisions, many of which are yet to be properly clarified.

Following this a summary of the new, valuation provisions in the Welfare Reform and Pensions Act 1999 is given.

Finally, the last section includes two worked examples, which demonstrate how the 'clean break' and earmarking approaches under the Pensions Act work

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in practice. The examples compare the financial effects on the couple of these approaches with the 'Pension Offsetting' and 'Pension Sharing' provisions under the new Act. This section also outlines some non-financial circumstances which might influence a member or spouse when choosing the method for settling his or her pension rights.

Practice prior to the Pensions Act 1995

Scotland

For separations that commenced prior to 19th August, 1996, the sharing of pension rights on divorce was governed by the Family Law (Scotland) Act 1985. This took effect in 1988, and made it a legal requirement to include pension rights in a divorce settlement. However, no clear guidelines were provided on how pension rights should be shared under the legislation, and a number of different practices (and problems) arose as a result.

In general, the former spouse received a payment equal to his or her share of the 'value' of the member's pension rights (normally between 40 and 50 per cent). The 'value' was not properly defined in the Act, and could be anywhere between the member's transfer value and the past service reserve. (The latter reserve is normally higher than the transfer value, as it allows for increases to the member's salary all the way from the date of separation up to retirement date.)

Legal opinion was divided as to which value was appropriate, and also whether the spouse's pensions payable on the member's death should be included. Wide differences could therefore be obtained in the valuations, depending on which method was deemed appropriate.

Also, settlement payments had to be made out of the member's non-pension

assets, either as a lump sum or series of payments. Typically, where the pension rights were substantial, the member ended up losing the matrimonial home in order to pay for the pension rights.

England and Wales

Separations prior to 1st July, 1996 were governed by the Matrimonial Causes Act 1973. This granted the courts a good deal of discretion when dealing with pension rights and other matrimonial property on divorce. The only stipulation was that, in arriving at the settlement, the court had to take account of the 'value of any benefit (for example a pension) which that party will lose the chance of acquiring' following the divorce.

While the courts were obliged to consider pension rights therefore, no established pattern emerged in practice on how to do this. As in Scotland, there was no agreed method of valuing of the pension rights, and the date of valuation could also vary.

In addition, only contributions towards the welfare of the family 'in the foreseeable future' needed to be taken into account in a divorce settlement. The 'foreseeable future' was often limited to the next five or ten years, so where the member was more than ten years away from retirement, pension rights were often ignored altogether. Even when they were taken into account, it was regularly only the spouse's pension that was valued, despite this being a relatively small portion of the member's total pension rights.

As with Scotland, any settlement was payable out of the member's non-pension assets rather than the pension scheme (again often the matrimonial home in the case of large pensions).

In summary, therefore, the former

spouse was likely to receive little or no payment unless the member was nearing retirement. Even where a payment was made, it may well have been substantially less than a 'fair share'.

Recommendations for change — Pensions Management Institute (PMI) Working Group, May 1993

It was in light of the above problems that the PMI, in agreement with the Law Society, appointed a Working Group to look into pensions and divorce in January 1992. This Group comprised experts from the legal and pensions professions, as well as representatives from the DSS, the Inland Revenue and the Equal Opportunities Commission.

The aims of the Group were to establish rules of good practice and, if necessary, recommend revisions or extensions to the legal framework. Written and oral evidence was received throughout the spring and summer of 1992 from all interested parties. Following on from this evidence and several meetings of the Group, a report was issued in May 1993 and presented to the then Conservative Government. The report was also recommended by the Goode Committee for inclusion in the Government's proposals for pensions reform (which ultimately became the Pensions Act 1995).

A number of recommendations were made by the Group, the main ones being:

- a 'clean break' approach should apply wherever possible
- pension rights should be 'split' between the partners, either externally by a transfer payment from the member's scheme, or internally by giving the former spouse a pension within the member's scheme
- any external payment should be made

from the member's pension scheme, unless the partners agree that the payment should be out of the member's other assets, eg, the matrimonial home

- for pensioners, the scheme should pay the appropriate share of the member's pension direct to the spouse
- the valuations should be based on the member's transfer value (cash equivalent)
- the value of SERPS benefits and spouses' pensions should be included in the settlement.

The provisions of the Pensions Act 1995

Despite the recommendations of the Goode Committee and the almost universal support from the legal and pension professions for the Group's proposals, the Conservative Government did not accept them. Indeed, the Pensions Act 1995 originally contained no provisions for the sharing of pension rights on divorce. However, after strong objections from the House of Lords, led by the Labour peer Baroness Hollis, the Government was forced to include some provisions at short notice. As a result, they made the changes shown in Table 1.

As will be seen from the information in Table 1, the Pensions Act provisions allow for 'earmarking' where the clean break approach cannot be adopted, ie, where the member does not have sufficient non-pension assets to pay for the spouse's share of the cash equivalent. So far, only a relatively small number of cases (about 5 per cent) have been settled via earmarking orders, so an established practice has not yet arisen on how these should be framed. Indeed many orders have to date been unworkable, either because the amount of earmarked benefit is higher than the

Table 1

	England and Wales	Scotland
Effective date of legislation	Separations commencing on or after 1st July, 1996	Separations commencing on or after 19th August, 1996
Value of pension rights to be shared	Cash equivalent (ie, transfer value)	Same
Date of valuation	Between date of separation and date of settlement, as determined by the Courts	Date of separation
Value reduced if member was not married throughout membership of pension scheme?	No	Yes
Treatment of spouses' pensions	Included in the valuation	Same
Lump sum death benefits	Not included, but Courts can oblige member to nominate ex-spouse as beneficiary, or direct Trustees to pay benefit to ex-spouse	Same
'Earmarking' if clean break not possible?	Yes, for member's pension and retirement cash sum	Yes, for retirement cash sum only
Earmarking ceases on spouse's re-marriage?	Yes, for member's pension	No
Earmarking ceases on death of member or spouse?	Yes	Yes
Can value of SERPS benefits be included?	Yes, valuation provided by DSS (settled out of non-pension assets)	Same

member is likely to receive, or because the benefits are in a different format to those provided in the scheme, eg, full inflationary increases instead of fixed or no increases.

There are a number of other problems with valuing pension rights under the Pensions Act provisions, as shown below:

(a) General problems

- Where the clean break approach is agreed (known as 'Pension offset'), payment must still be made out of the member's own assets, eg, matrimonial home, rather than from the pension scheme.
- No interest is added to the cash equivalent after the date of valuation.

- No allowance might be made for discretionary benefits, eg, enhanced early retirement's benefits, pension increases granted above the rate prescribed in the Scheme Rules, etc. The former will be particularly relevant for the 'Uniformed Services' Schemes, eg, the Armed Forces, Police and Fire Brigade Schemes, where early retirement is the norm, but no allowance for these valuable early retirement benefits is included in the cash equivalent.
- In England and Wales the courts might not make an appropriate reduction to allow for the period of marriage. This could cause problems for people with multiple marriages, and for people who were married for

only a small proportion of their scheme membership.

- The cash equivalent valuation may well be inappropriate if one or both partners are in ill health.
- The method of dealing with pensioners is not prescribed, and actuarial advice (payable by the couple) will probably be required.
- If the member's scheme is under-funded and full cash equivalents are not being paid out by the scheme, appropriate reductions should be made in the settlement.
- The treatment of unapproved schemes and Small Self-Administered Schemes is not entirely clear.

(b) Earmarking problems

Further problems arise if the earmarking approach is chosen, as follows:

- How should the earmarked benefits be calculated? For final salary schemes, the member's future salary increases will not be known. For money purchase and personal pension arrangements, the amount of retirement benefits will not be known until the member's retirement date.
- In England and Wales, earmarking ceases if the spouse remarries. This may well cause problems, especially if the earmarked benefits are large.
- How much tax should be deducted from the member's pension, given that the rate of tax will not be known until the member's retirement date?
- How should the earmarked benefits be adjusted if the member retires early or late? Will the spouse understand these adjustments, and will they comply with the earmarking orders?
- Can (or should) the earmarked benefits be adjusted if the pension scheme rules are changed after divorce?

The above list of problems is not exhaustive, and other difficulties may arise with the Act's provisions. The earmarking approach is likely to cause more problems than the 'pension offset', for the added reasons given in (b), and because it moves away from a 'clean break'. As a result, it was not considered appropriate by the PMI Working Group, and the Conservative Government received substantial criticism for using this approach in the Act.

New provisions under the Welfare Reform and Pensions Act 1999

Background

As a result of the problems with the Pensions Act provisions and the resulting criticism, the Conservative Government issued a Green Paper for discussion in July 1996. They followed this with a White Paper in early 1997, which outlined proposed legislation for 'splitting' pension rights.

However, the 1997 election prevented these proposals being implemented. Instead, the new Labour Government invited and received comments from the legal and pensions professions regarding the treatment of pension rights on divorce. Subsequently they published the Welfare Reform and Pensions Bill in February 1999, which contained brand-new provisions.

After an eight-month consultation period, the Bill received Royal Assent on 11th November, 1999. Its provisions endorse most of the recommendations of the PMI Working Group, in particular the 'splitting' of pension rights (which the Government now refer to as pension 'sharing'). This is to be achieved either externally by a transfer payment from the member's pension scheme, or internally

by providing the former spouse with a pension in that scheme. Pension sharing will allow a 'clean break' settlement to be achieved and will avoid many of the problems outlined earlier.

Timetable

Changes to the current provisions have required extensive further primary legislation. The DSS is also having to adjust its computer system radically to enable SERPs benefits to be shared after divorce. As a result, two 'Appointed Days' were announced, relating to the implementation of the new proposals.

The First Appointed Day (FAD) was 10th May, 2000, which was 21 days after the Inland Revenue and DSS Regulations were laid. After the FAD, no scheme will be given Revenue approval, unless it has incorporated into its Rules provisions for pension sharing. The Inland Revenue has published some draft model rules to help with this.

The Second Appointed Day has been set as 1st December, 2000, after which all new divorce proceedings will potentially be subject to a pension-sharing order or agreement (DSS computer permitting!).

The new valuation provisions

The main provisions under the Act relating to the valuation of pension rights are now described.

(a) Scope of regulations

In addition to private and public sector occupational pension schemes, the new provisions will also apply to SERPS and the State Second Pension (S2P), Unapproved Schemes, Small Self-administered Schemes, Personal Pensions, Stakeholder Pensions and

pensions in payment. They will not apply, however, to the Basis State Pension or survivors' pensions.

(b) Valuation basis

The value is to be the Cash Equivalent (proportioned in Scotland for period of marriage) at a valuation date chosen by the pension scheme administrator. The valuation date must be within three months of the member's request. Information must then be provided to the member within ten working days thereafter. These deadlines may well be reduced by the Court, in order to ensure that the cash equivalent reaches the member at least six weeks before the date of the hearing.

In Scotland, the valuation date reverts to the date of service of the Summons if the member's request is more than one year after that date. This would appear to offer some selection by the member against the spouse. It could also provide windfall surpluses to the Scheme if an external transfer is paid. (The author is sure this was not intended when the legislation was drafted, and the Regulations may yet be changed to allow the valuation date to be the date of settlement).

(c) Pension Sharing Orders/implementation

The scheme will receive a Pension Sharing Order (or Qualifying Agreement in Scotland) allocating a proportion of the cash equivalent to the ex-spouse. This proportion need not be 50 per cent, but cannot exceed 100 per cent. (An actual amount can be specified in Scotland rather than a proportion.) The scheme (and the couple) have 21 days after receipt of the order to appeal against it.

Once the 21 days have elapsed, the 'implementation period' begins. The scheme then has four months to

Table 2: Scotland

Husband (and wife) aged 45, salary £20,000, 20 years in Pension Scheme
 Cash equivalent at date of separation = £40,000
 Cash equivalent at date of settlement = £47,000
 Husband's cash sum at retirement = £32,000
 Husband's pension at retirement = £11,000 pa

	Pension offset	Earmarking	Pension sharing (‘internal transfer’)
A. Payment by husband to wife	£20,000 (<i>pre</i> 1/12/2000) £20,000–£23,500 (<i>post</i> 1/12/2000) ⁽¹⁾	£12,500	Nil
B. Husband's retirement benefits ⁽²⁾	Cash Sum £32,000 Pension £11,000 pa	Nil £11,000 pa	£16,000 £5,500 pa
C. Wife's retirement benefits	Cash Sum NIL ⁽³⁾ Pension NIL ⁽³⁾	£32,000 ⁽⁴⁾ Nil ⁽⁵⁾	£15,500 ⁽⁶⁾ £5,500 pa ⁽⁶⁾

NOTES:

- (1) Amount of payment will depend on date of calculation. This will be backdated to the date of separation if this is more than 1 year before the date of request.
- (2) Husband will also receive cash and pension benefits built up outwith period of marriage.
- (3) Wife can invest Payment in (A) to provide a pension and cash sum.
- (4) Wife's cash sum benefit is payable when *husband* retires, and ceases if he or wife dies before retirement.
- (5) Wife can invest payment of £12,500 to provide a pension or a dependant's pension.
- (6) Benefits are payable from husband's scheme. Alternatively, wife can transfer 50% of cash equivalent (£20,000–£23,500) to her own pension scheme to provide an alternative pension and cash sum ('External Transfer').

implement the order and, once it has been implemented, 21 days to notify the couple of the ‘pension share benefits’.

If the pension-sharing order is not implemented within the four-month deadline, then the external transfer will become the higher of (a) the new updated cash equivalent transfer value, and (b) the old cash equivalent transfer value plus interest at Base Rate plus 1 per cent per annum.

Before implementation, Scheme administrators can ask for evidence of health if there is any likelihood of selection against the scheme. Requirements for medical evidence must be outlined in the initial information given by the scheme.

(d) Transfers/pension credits

Schemes will have to offer external transfers, but need not offer internal transfers (unless they are unfunded or underfunded). If an internal transfer is

offered, the spouse will be entitled to a ‘pension credit’. The value of the pension credit will be equal to the value of the pension debit.

Trustees are able to determine some of the benefit terms for the pension credit, eg, a normal retirement age between 60 and 65, spouse's benefits and discretionary pension increases.

Given the complexities and the potential large amounts of money involved, spouses will require independent financial advice will be required for many of these cases.

(e) Pension debits

The scheme member will have a negative deferred pension or ‘pension debit’ assigned to his or her benefits. The pension debit can be split into the same tranches as the member's total pension, with different revaluation and escalation rates, applying to each tranche. Alternatively, the debit can have only

Table 3: England and Wales

Husband (and wife) aged 45, salary £20,000, 20 years in Pension Scheme
 Cash equivalent at date of separation = £40,000
 Cash equivalent at date of settlement = £47,000
 Husband's cash sum at retirement = £32,000
 Husband's pension at retirement = £11,000 pa

	Pension offset	Earmarking	Pension sharing (‘internal transfer’)
A. Payment by husband to wife	Nil (<i>pre</i> 1/7/1996) £20,000–£23,500 (<i>post</i> 1/7/1996) ⁽¹⁾ £23,500 (<i>post</i> 1/12/2000)	£2,000–£2,500 (<i>post</i> 1/7/1996) ⁽¹⁾ £2,500 (<i>post</i> 1/12/2000)	Nil
B. Husband's retirement benefits ⁽²⁾	Cash Sum £32,000 Pension £11,000 pa	£16,000 ⁽³⁾ £5,500 pa ^{(3),(4)}	£16,000 ⁽³⁾ £5,500 pa ⁽³⁾
C. Wife's retirement benefits	Cash Sum NIL ⁽⁵⁾ Pension NIL ⁽⁵⁾	£16,000 ^{(6),(7)} £5,500 pa ^{(4),(6),(7)}	£15,500 ⁽⁸⁾ £5,000 pa ⁽⁸⁾

NOTES:

- (1) Amount of payment will depend on date of calculation.
- (2) Husband will also receive cash and pension benefits built up outwith period of marriage.
- (3) Benefits are expressed in the Court Order as 50% of the husband's deferred benefits.
- (4) Pension is paid net of husband's rate of tax on total pension (£11,000 pa).
- (5) Wife can invest Payment in (A) to provide a pension and cash sum.
- (6) Wife's retirement benefits are payable when *husband* retires, and cease when he or wife dies.
- (7) Wife can invest Payment of £2,000–£2,500 to provide an additional pension, or a dependant's pension.
- (8) Benefits are payable from husband's scheme. Alternatively, wife can transfer 50% of transfer value (£23,500) to her own pension scheme to provide an alternative pension and cash sum (‘External Transfer’).

LPI revaluation and escalation applying throughout.

Members will have their pension debit offset against their Revenue Maximum benefits. They will not be allowed to re-build their Revenue Maximum benefits, unless they were earning less than a quarter of the Earnings Cap (currently £91,800) in the tax year prior to divorce. In that event, any rebuilding will be done through AVC or FSAVC arrangements.

Examples

Comparison of financial effects of Pension Sharing methods

Examples are given in Tables 2 and 3 which provide a comparison of the financial effects of the various methods, ie, ‘Pension Offset’, ‘Earmarking’ and

Pension ‘Sharing’, on the member (assumed to be the husband) and the spouse. The figures are approximate, based on typical cash equivalent valuations and typical UK final salary pension schemes. For simplicity, they assume that (a) the settlement is divided equally between the couple, ie, each is entitled to 50 per cent of the accrued pension rights, and (b) the couple were married throughout the member's service in the scheme.

Scotland

The example in Table 2 shows that, where the member has insufficient non-pension assets to pay for the ‘Pension Offset’ settlement, Earmarking will allow him or her to pay out a lower amount at the date of settlement. However, the member will receive a lower cash sum at

Table 4: Divorce Settlements – (A) Probable preferred method for members

	Pension offset	Earmarking	Pension sharing	No divorce
1. Member had a short marriage, or is under 30, or can afford to pay settlement from his own pocket.	☒			
2. Member has insufficient resources to pay for pension offset.		✓ (Possibly, if sufficient money available)	☒ (If insufficient money for Earmarking, and/or clean break is desired)	
3. Member is seriously ill, and (a) Wife and children are dependent on member. (b) Wife and children are not dependent on member.			✓ (Change nomination form, if necessary)	✓ (Change nomination form, if necessary)
4. Wife is likely to remarry.		✓ (England and Wales)	☒ (Scotland)	
5. Wife is seriously ill.				✓
6. Member is in one of the Uniformed Services Schemes.			☒ (For CETV benefits)	

☒ Same as probable preferred method for spouses.

retirement, and the Earmarking problems will again arise.

The new Pension ‘Sharing’ arrangements will nearly always be more favourable than Earmarking. Should the couple agree to go down the ‘Pension Offset’ route, the new arrangements will allow the value of the member’s SERPs pensions (if any) to be included, in addition to the Pension Scheme Benefits.

If the cash equivalent at date of *separation* is used for the spouse’s ‘external transfer’, the scheme will benefit because the cash equivalent at date of *settlement*, should have been used, ie the scheme will only pay out £20,000 instead of £23,000.

England and Wales

The example in Table 3 is similar to

Scotland. However, it shows that the spouse is likely to do substantially better than before the Pensions Act under all three options, especially if the member is more than ten years away from retirement (when she would probably have received nothing).

‘Pension Offset’ is still the simplest method and achieves a clean break, but where the member has insufficient non-pension assets to pay for this, the new Pension ‘Sharing’ proposals will again be preferable, and will avoid many of the problems of the Earmarking provisions outlined previously.

The cash equivalent paid to the spouse as an ‘External Transfer’ will be calculated at date of settlement, so no windfall surpluses will go to the member’s Pension Scheme.

Table 5: Divorce Settlements — (B) Probable preferred method for spouses

	Pension offset	Earmarking	Pension sharing	No divorce
1. Member had a short marriage, or is under 30, or can afford to pay settlement from his own pocket.	☒			
2. Member has insufficient resources to pay for pension offset.			☒	
3. Member is seriously ill, and (a) Wife and children are dependent on member. (b) Wife and children are not dependent on member.			✓ (If dependant's pension payable. Court order to ensure payment to wife and children)	☒ (If Widow's pension only is payable) ✓
4. Wife is likely to remarry.	✓ (England and Wales)		☒ Scotland	
5. Wife is seriously ill.	✓			
6. Member is in one of the Uniformed Services Schemes.	✓ (For 'top-up' value of benefits)		☒ (For CETV benefits)	

☒ Same as probable preferred method for members

Non-financial factors

Tables 4 and 5 give the types of circumstances when it may be advantageous for a member or a spouse to use a particular method for settling his or her pension rights on divorce, assuming there is not an overriding need for a 'Pension Offset' approach (eg, spouse needs matrimonial home). As you will see, the preferred method for the member could often be different from that for the spouse (ie where no boxes are shown).

These tables illustrate that it may not be only financial circumstances which dictate when a particular method should be used. Specific actuarial advice or valuations may be required to determine the best method for the member or the spouse. In particular, actuaries should be consulted in the following circumstances:

- member or spouse is in ill-health
- it is an established practice for the Scheme Trustees to offer discretionary benefits or increases
- member is in one of the Uniformed Services Schemes
- member's scheme has had a change in its benefits basis (eg. from $\frac{1}{60}^{\text{th}}$ to $\frac{1}{80}^{\text{th}}$)
- member has transferred-in benefits relating to service outwith the marriage.

Summary

Neither of the UK jurisdictions was particularly fair to divorcing couples prior to the Pensions Act, even though both allowed a 'clean break' settlement to be achieved. In England and Wales, the system often tended to favour the member, because the spouse would

receive little or no payment in respect of pension rights (unless the member was close to retirement). In Scotland, on the other hand, the system tended to favour the spouse, as he or she received an up-front payment from the member, regardless of whether the spouse remarried or died before the member's retirement date.

The provisions under the Pensions Act 1995 are generally fairer to spouses, especially in England and Wales, provided the member has sufficient non-pension assets to allow a 'clean break' settlement to be achieved. However, the provisions have introduced a number of new problems, especially where Earmarking orders are imposed. Many of these problems have still to be fully addressed by the Courts, and have resulted (and are likely to continue to result) in unworkable orders for pension scheme Trustees and administrators. Even where the Earmarking orders can be complied with, there is a substantial extra administrative burden for the member's pension scheme.

The fairest and most practical methods are likely to be those for Pension

'Sharing' included in the Welfare Reform and Pensions Act 1999. As a result, few Earmarking orders are likely to be issued after the Act comes into force. 'Pension Offset' is still likely to be a favoured option, however, especially where the member can afford it (eg, short marriages) or where the spouse has an immediate need for the monies (or matrimonial home).

There are a number of circumstances when one particular method may be preferable for a member or the spouse, and 'specific' actuarial advice or valuations should be obtained. Spouses will also need financial advice when they are considering a Pension 'Sharing' approach.

Given all of the changes, it will be no surprise that trustees and administrators (not to mention actuaries, divorce lawyers, judges and the DSS) will have to undergo a lot of education and training, if they are to be ready to implement the provisions for divorces commencing after 1st December, 2000.

Well, no one said divorces would be easy!