Pension sharing on divorce: The new procedure

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Abstract This paper gives details of the new procedural forms requiring trustees to provide information when a pension sharing or attachment order may be made, and the new pension sharing and attachment annexes. It explains how requests for information fit within the divorce procedure in a practical context. Finally it gives examples of practical problems that have arisen in relation to pension sharing orders, and how these may be affected by the new procedural changes.

Keywords: *pension sharing, divorce, information, disclosure, ancillary relief*

INTRODUCTION

In 2004, the Office for National Statistics reported that the number of divorces granted in the UK increased by 0.2 per cent to 167,116, from 166,737 in 2003.¹ This is the highest number of divorces since 1996, and the fourth successive annual increase. Over the last ten years, the average age at divorce of the parties in England and Wales has risen from 39.3 to 42.7 years for men, and from 36.7 to 40.2 years for women, partly reflecting the rise in age at marriage. The increasing number of divorces, the increasing ages of the parties at the time of divorce, and the increasing familiarity of practitioners and parties alike with the availability of pension sharing orders on divorce is likely to mean a corresponding increase in the number of such orders in the future.

In October 2000, shortly before the law enabling pension sharing orders came into force on 1st December 2000, the

Secretary of State for Social Security was asked to provide an estimate of the likely number of pension sharing orders that would be made in the financial years ended 2001 and 2002.² He responded to the effect that in the first year the number would be negligible, as it would take a while for proceedings to reach a stage where an order could be made; in the second year, the best estimate was that there would be 20,000 pension sharing orders made. Unfortunately, there are, at present, no reliable statistics for the number of orders made, but anecdotally it seems that pension schemes are now seeing pension sharing orders on a regular basis, albeit not in the numbers originally anticipated. This means that it is more difficult to administer those orders due to lack of familiarity with the complex procedure.

This paper sets out the recent procedural changes to pension sharing and attachment procedure from the

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pension scheme's perspective, and the differences that those changes may make in practice.

THE NEW PROCEDURE FOR THE PRODUCTION OF PENSION INFORMATION

New court forms were introduced by the new Family Proceedings (Amendment) (No 5) Rules 2005 (the new rules) on 5th December, 2005 to facilitate the production of pension information when a request is made in the context of divorce proceedings. Copies of the new forms, the amended page of Form E and the amended pension sharing annex and amendment to the pension attachment annex are attached to the new rules, which are available on the Court service website.⁴ The new rules apply to proceedings commenced on or after 5th December, 2005, and also apply to civil partnerships as well as married couples, and amend the Family Proceedings Rules 1991.

Most pension schemes will be used to receiving letters from solicitors acting for the pension member or their spouse, either asking for information in a general way, or sending the page from the standard form used for disclosure of all the financial circumstances of the parties to a divorce (Form E), or making specific requests in a more informed way under regulations 2 or 4 of the Pensions on Divorce etc (Provision of Information) Regulations 2000 (the regulations).⁵

The procedure for making requests is cumbersome, with various timescales and charging provisions applying to different pieces of information. For example, if the member requests a cash equivalent transfer value (CETV) (regulation 2(2) information) and makes it clear that the information is required for ancillary relief

proceedings (ie financial proceedings on divorce), then it must be provided within six weeks from the date the request is received. If that clarification is not provided, then the deadline is three months.⁶ If the pension member or spouse requests the regulation 2(3) information, it must be provided within one month.⁷

The relevant page of Form E (para. 2.16) currently requires the production of information, most (but not all) of which the pension scheme is under an obligation to provide by virtue of a combination of sometimes three sets of different regulations, depending on the type of scheme. With different timescales applying to each, the regulatory framework is unnecessarily complex and confusing.

Further, a great deal of the information required by Form E and regulations 2 and 4 does little to assist with the resolution of the issues at stake in the majority of cases, and indeed in the case of Form E is often misleading, where the CETV may have been calculated many months ago and yet there is no requirement to confirm the date of that CETV.⁸

Against this background of administrative difficulty and failure to promote proportionate disclosure, reform was long overdue. Although the new procedure does not amend the regulatory framework, it does focus on reducing the number of cases in which detailed information is required to be produced to those where the information is more likely to be useful, and clarifies the procedure to be used, which should assist with uniformity of approach by all involved.

The new forms are:

- 1 *A new page for Form E now (para 2.13):*
This is simplified to include only the information to enable the pension

member's pension to be identified, the type of scheme, the CETV, the date when the CETV was calculated, whether the scheme is an occupational scheme that is paying reduced CETVs and, if possible, what the CETV would have been if not reduced, and whether the pension is in payment or drawdown. Form E should be completed in every case, and should include CETVs (and valuations of additional state pension rights) of all and any pension provision of each party.

- 2 *The Pension Enquiry Form (Form P)*: This will usually be used where one or other party is likely to argue that there should be a pension sharing order in a particular case, or where the pension provision is sufficiently significant that more information is required in order for the parties' advisers to assess other issues (eg whether the CETV is an accurate representation of the value of the pension).

Form P asks for the regulation 2 and 4 information, and the information previously required by Form E, although the form specifically provides that the information may be produced in an alternative format if the pension provider has a standard pack.

It is intended that Form P will be used either:

- to obtain information after the first short court appointment (called a 'first directions appointment', FDA), at which the judge orders that information to be produced, or
- on a request by either party where disclosure is being exchanged on a voluntary basis (without formal court proceedings having started), or before the FDA stage where it is clear that the information will be required.

It may also be used by the pension provider to provide the regulation 2 and 4 information if the provider wishes to use it.

THE NEW PENSION SHARING AND ATTACHMENT ANNEXES

The pension sharing annex (Form P1) has been amended and expanded in an effort to try to prevent drafting errors and to ensure that more orders are effective when made and are more readily implemented.

For example, paras. A–C and F–J on the new Form P1 now contain all the information required by regulation 5 to be produced before the implementation period can begin (unless the pension scheme has requested further information about the member's health, or the scheme is an occupational scheme that is in the process of being wound up).

The form also requires a percentage figure to be inserted rather than a formula, to give effect to the pensions industry and government view that the order cannot include what is known as the 'Hallam formula', being 'such % as will equal £x'. Presumably, however, if the pension scheme has no objection and the judge can be persuaded to make the order, then a formula is still possible.

Finally, the form clarifies when the order takes effect, thus preventing the insertion of an incorrect date by family law practitioners or the judge, which might make the order ineffective, and includes a reminder of when the implementation period begins. The new rules also provide that the court may direct whether it is the court or one of the parties who should serve the necessary documents on the pension provider.⁹

The pension attachment annex (Form P2) has also been amended, but not significantly. Paragraph 5 on the new

form contains separate subparagraphs for completion as applicable, depending on whether the order is for periodical payments (under s.25B of the Matrimonial Causes Act 1973), commutation and payment of part or all of the commuted lump sum (also under s.25B) or for payment of death benefits (under s.25C). This should help ensure that there is no confusion about the nature of the order to be implemented.

THE INVOLVEMENT OF PENSION SCHEMES IN A PRACTICAL CONTEXT AND HOW THIS MAY CHANGE

It may assist the pension scheme to understand the circumstances in which a request for information may be made when ancillary relief settlements (ie financial settlements on divorce) are being negotiated or ancillary relief court proceedings are ongoing. These usually fall into three categories:

- 1 *The parties are seeking to resolve a financial settlement without formal court proceedings:* In this situation, the first involvement of the pension scheme usually arises due to a request either by the pension member or their solicitor for some pension information. They may simply ask for a CETV at this stage, or send the relevant page of Form E, or formally request the regulation 2 and 4 information. Whether or not this request constitutes notification that a pension sharing order may be made, thus triggering the requirement for the regulation 4 information to be provided within 21 days, will depend on the wording of the request. The regulations do not require that notification be by service of Form A.¹⁰

It is anticipated that once the new procedure is introduced, and once

family law practitioners have become familiar with the changes, the initial request will either be just for a CETV (perhaps, but not necessarily, by a request for completion of the new abbreviated version of the relevant page of Form E), or in a case where it is anticipated more information will be needed, for the completion of Form P. In this instance, Form P must be signed by the pension member. Unfortunately though, the requirements of regulations 2 and 4 and the relevant time limits are unaffected by the changes to the rules.

There may then be further involvement of the pension scheme when the parties have reached a negotiated settlement and wish to submit an order to the court to be made by consent. The Family Proceedings Rules 1991 rather confusingly require draft consent pension attachment orders, but not pension sharing orders, to be served on the pension scheme at least 21 days before the order is to be made, so that any objections may be raised.¹¹ In most cases, however, good practice dictates that draft pension sharing orders will also be served, giving the pension scheme the opportunity to point out any errors which may prevent the order being effective. In order to reduce administration, it is certainly advisable for such drafts to be considered promptly and objections raised if necessary, rather than risking the further administration involved if the scheme is subsequently being served with an ineffective order.

The new procedure should assist with reducing the number of incorrectly drafted orders being sent to pension schemes, since as indicated above, both the pension sharing and pension attachment annexes have been simplified and redrafted to address

some of the common mistakes made, and to ensure that the necessary information is produced to enable implementation to take place promptly.

- 2 *There are formal court proceedings commenced by Form A being issued at court:* The first involvement here of the pension scheme should be on receipt of Form A, which the applicant (who may be the pension member or the pension member's spouse) should serve on the scheme.¹² As indicated above, regulation 4 of the regulations has not been amended, and therefore where a scheme is served with a Form A, the information specified in regulation 4(2) must still be provided, despite the new forms.

However, often the non-pension member applicant will not have sufficient information about the scheme to be able to serve Form A, or will not be aware of the requirement to do so. Then the first the pension scheme may know of the application may be on receipt of a request for information under regulation 2, which should be made by the pension member within seven days of receipt by them of notification of the date of the FDA. This will also trigger the requirement for the pension scheme to send the regulation 4 information.¹³

It is possible, however, that the pension member also fails to make this request, either deliberately, or due to lack of awareness of the requirement to make the request. It may therefore be somewhat later in the proceedings that the scheme becomes involved; perhaps after an order is made by the judge at the FDA for information to be provided, which should be served on the scheme by the party seeking that information or by later service of an amended Form A in which details

of the scheme are inserted when the information becomes available.

Under the new procedure, the provision of information should be more straightforward. The pension scheme is likely to receive a request for either the new page of Form E to be completed, or Form P to be completed, or possibly both.

The difficulty that may be encountered with pension sharing or attachment orders made following a contested hearing is that there is no requirement to serve the pension scheme with a draft order (although as a matter of good practice, some family law practitioners may serve a draft order in anticipation of seeking an order at a final hearing), and therefore there is more scope for an ineffective order to be made. Again the new procedure should assist with reducing the number of incorrectly drafted orders being made, as both the pension sharing and pension attachment annexes are simplified and redrafted to address many of the common mistakes made.

- 3 *The parties have tried to reach agreement without proceedings, have been unsuccessful and therefore Form A has been issued subsequently:* This scenario is not uncommon, and is likely to result in a combination of (1) and (2) above. For example, if only selected information was sought by the pension member for the purposes of negotiations on a voluntary basis, then a further request for all the regulation 2 and 4 information may follow, or be triggered by service of Form A. Again, the new procedure should assist with simplifying the production of information, and the pension scheme will often receive only a request for a CETV (or for the new page of Form E to be completed) and/or possibly for Form P to be completed.

The position in relation to consultation over any draft order is (and will be) as (2) above.

PRACTICAL DIFFICULTIES WITH PENSION SHARING ORDERS

The following situations are examples of actual difficulties encountered by, and advice given to, a couple of different occupational schemes. If the advice would have been different, had the impending procedural changes explained above already been in force, that different advice is outlined.

- 1 A large occupational pension scheme receives a letter from solicitors acting for Mrs Smith in divorce proceedings, and enclosing a Form A with the box ticked indicating that an application for an order under ss.24B, 25B or 25C of the Act of 1973 has been made in relation to pensions belonging to Mr Smith. The cover letter asks for any comments in relation to the application. (a) What information needs to be provided within what timescale in response to the letter, and (b) must a CETV must be provided at this stage?
 - a) The regulation 4 information needs to be provided within 21 days, but to the pension member (who is Mr Smith), not to Mrs Smith's solicitors.¹⁴ Mrs Smith's solicitors could have asked for the regulation 2(3) information, which should be provided within one month of such a request, but they have not asked for that information.¹⁵
 - b) A CETV does not need to be provided at this stage because the member has not requested the regulation 2 information, although as it is likely to be requested at some point, it might be sensible to produce it to the member. When a request for a CETV is made by the member who notifies the scheme at the time that the information is needed in connection with ancillary relief proceedings, the information must be provided within 6 weeks.¹⁶
- 2 In relation to protected rights within an occupational scheme that are subject to a pension sharing order and an internal transfer, (a) when can they be paid, and (b) what index-linking applies?
 - a) Protected rights become known as safeguarded rights when they comprise part of a pension credit arising by virtue of a pension sharing order. The trustees or managers of the scheme must make provision for those rights to be identified, and payment of those rights should not commence before the recipient of the pension credit's 60th birthday, and must commence not later than their 65th birthday.¹⁷
 - b) The part of the safeguarded rights attributable to contributions from the member's earnings before 6th April, 1997 must increase in line with the retail price index subject to a maximum of 3 per cent, and that part attributable to earnings on or after 6th April, 1997 must increase in line with limited price indexation (LPI).¹⁸
- 3 The scheme has been served by Manchester County Court with a pension sharing order and the decree absolute. The order is dated 3rd October, 2005, and the pension

The new procedural changes do not change the scheme's obligations to provide the regulation 4 information on receipt of a Form A.

sharing annex (form P1) states that the order is to take effect from 17th October. The annex also states that the benefits are to be valued as at the date of the order. The decree absolute is dated 19th October. (a) Is there any problem with those dates, and (b) what is the relevance of the requirement that the benefits are to be valued at the date of the order?

- a) The dates are incorrect. The order can take effect no earlier than seven days after the period for filing notice of appeal against the order, and then only if the decree absolute has been made and there is no appeal.¹⁹ The period for filing notice of appeal in the county court is 14 days. It is 21 days in the High Court. The 14-day period does include non-business days, and the seven-day period does not include non-business days. This order therefore cannot take effect until 26th October, 2005. The pension scheme would be advised to notify the court and the solicitors for both parties that the order is ineffective and that the date needs to be corrected before implementation can take place.
- b) The statement that the benefits are to be valued as at the date of the order is irrelevant. The critical dates are the date the order takes effect, which is known as the transfer day, and the valuation day (which is the date specified by the scheme within the four-month implementation period).²⁰ The percentage should be applied to the CETV of the relevant benefits (which are those to which the member is entitled immediately before the transfer day)²¹ as at their value on the valuation day.

The problem encountered at (a) above

should not happen when the new procedural rules apply, in that the new pension sharing annex specifies when the order may take effect. However the timing will be slightly different. There is some confusion in the new rules, which provide for a 21-day period irrespective of whether the proceedings are in the High Court or county court, and which would be calculated to include nonbusiness days. It is anticipated that this discrepancy will be rectified in due course.

References

- 1 Office for National Statistics (2005) 'Divorces-fourth successive annual increase in UK', accessed 26 September, 2005. See: www.statistics.gov.uk/cci/nugget.
- 2 See [http://www.publications.parliament.uk/cgibin/newhtml_hl?DB=semukparl&STEMMER=en&WORDS=pension%20sharing&ALL=pension-sharing&ANY=&PHRASE="pension-sharing"&CATEGORIES=&SIMPLE=&SPEAKER=&COLOUR=red&STYLE=s&ANCHOR=01030w10.html_spnew6&URL=/pa/cm199900/cmhansrd/vo001030/text/01030w10.htm](http://www.publications.parliament.uk/cgibin/newhtml_hl?DB=semukparl&STEMMER=en&WORDS=pension%20sharing&ALL=pension-sharing&ANY=&PHRASE=), accessed 26 September, 2005. House of Commons Hansard written answers for 30th October, 2000.
- 3 SI 2922/2005.
- 4 See www.hmcourts-service.gov.uk.
- 5 SI 2000/1048.
- 6 Regulation 2(5).
- 7 Regulation 2(6) .
- 8 Rule 2.70(5) Family Proceedings Rules 1991 SI 1991/1247.
- 9 Rule 2.70(16) Family Proceedings Rules 1991 SI 1991/1247.
- 10 Regulation 4(1).
- 11 Rules 2.70(11) and (12), but see rule 2.61(dd) which seems to envisage that a draft pension sharing order should also be served at least 21 days in advance.
- 12 Rule 2.70(6) Family Proceedings Rules 1991 SI 1991/1247.
- 13 Regulation 4.
- 14 Regulation 4(1).
- 15 Regulation 2(6).
- 16 Regulation 2(5).
- 17 Pension Sharing (Safeguarded Rights) Regulations 2000, regulation 7.
- 18 Pension Schemes Act 1993, s.109, and Pensions Act 1995, s.51.
- 19 Divorce etc (Pensions) Regulations 2000, regulation 9, and Matrimonial Causes Act 1973, s.24B(2).
- 20 Welfare Reform and Pensions Act 1999, s.29(2).
- 21 Welfare Reform and Pensions Act 1999, s.29(4).