Pensions

This guide has been produced to provide basic information relating to pensions. This is a complicated area and further elaboration and discussion will be required.

1. Why do I need to consider my pension position?

A person's pension can be quite substantial, particularly if they have been paying into it over many years. Save for the family home, a pension fund is, for many people, the largest financial investment they will make. This can be a major asset which, in a sense, will be lost by the non-pension member upon divorce. It is therefore important to consider both spouses' pension provision when reaching a just and equitable settlement. Upon divorce, the non-member spouse may lose the right to death benefits and the right to share in the pension i.e. the monthly payment which the member receives from their retirement date and the lump sum which, in many schemes, is awarded on retirement.

2. Is the division of accrued pension rights always 50:50?

No. It is not always appropriate for an order to be made in respect of a person's pension, for example, if the separating couple are very young or it has been a short marriage. Where it is appropriate to consider pensions, it is up to the two spouses with the help of their solicitors to agree on a mutually acceptable percentage or proportionate split. Ultimately, as always, if such agreement proves impossible, it will be for the Court to determine what, in their view, is the equitable method of settling the claim.

3. What options are available for dealing with the pension?

There are various options available for dealing with a pension and it will depend on the particular circumstances of each case as to which solution is the most appropriate. As with most things, there are advantages and disadvantages to each of the following solutions. It must be emphasised that the following solutions are not available or indeed appropriate in every case.

Solution 1 - Do not divorce.

This may be suitable for those approaching retirement where neither party wishes to remarry. Financial affairs may be regulated by a Deed of Separation or a Decree of Judicial Separation.

Solution 2 - Offsetting

This has historically been the most popular way of dealing with the pension issue. Offsetting involves a spouse receiving money or assets in order to compensate for loss of pension rights. This is useful where there are sufficient funds or assets available to compensate. This will allow the person who receives the set off to use the money or assets as he or she pleases at the time of the divorce. The pension member will retain their pension fund intact.

Solution 3 - Pension attachment (earmarking)

It is possible to have a lump sum attachment order or a periodical payment attachment order which will become payable upon retirement age. The Court can also order a lump sum attachment order from death benefits. If an attachment order is made, the effect of this would be that the manager of the pension scheme would earmark certain payments under the pension fund to be paid not to the member of the pension scheme, but to the spouse.

i. **Attachment for income purposes.**

   This is appropriate where a pension in payment is, either now or at some time in the future, to be earmarked to provide periodical payments. This is inappropriate if the parties wish there to be a clean break. The attachment will also be liable to variation in the event of a change of circumstances and will cease upon the remarriage of the non-pension member, or the death of the pension member. For this reason it may be appropriate for the non-pension member to insure the member against death.

ii. **Attachment for a capital sum.**

   A non-pension member can receive a deferred lump sum from the pension member's entitlement. Again, this can be varied although it may still be possible to have a clean break.

iii. **Attachment order in respect of death in service benefit.**

   This may be appropriate where the non-member is financially dependent on the pension member either for periodical payments or for payments in respect of any children. On the death of the pension member before retirement, any lump sum payment payable on their death, or part thereof, would be paid to the non-pension member. Again this can be varied.

There are particular disadvantages to an attachment order which have been dealt with above. In addition, a Court cannot compel a pension member to retire and also the Court has no control over the member's future contributions to the scheme. Both a periodical payments attachment and a lump sum attachment can be varied by a further application to the Court.

Further, an order for periodical payments will automatically terminate if the non-member spouse remarries. However, an order for a lump sum will (subject to a variation application) potentially survive when a non-member spouse has remarried, unless the order contains a proviso for the lapse on remarriage.

Solution 4 - Pension sharing

This solution enables the Court to split a pension at the time of divorce so that the spouse without a pension can either become a member of the member's scheme in their own right i.e. the wife will become a member of the husband's scheme (internal transfer) or alternatively take a transfer of a designated amount into their own pension scheme (external transfer). It depends on the terms of the pension scheme which is being shared as to whether an internal or an external transfer is permitted.

In theory, this could be the cleanest method of dividing the value of the pension claim. When a pension sharing order is made, it will award a certain proportion of the scheme member's benefits to that person's divorcing spouse.

Pension sharing and offsetting appear to offer broadly the same advantages and disadvantages to the parties to the divorce: immediate settlement and increased certainty of payment. Simply, the spouse knows that they have acquired pension credit which will not usually be forfeited in the event of their death or the death of their spouse. Nor will there be a risk if they remarry or cohabit (as is the case with earmarking orders). The pension credits are transferred irrevocably to the spouse although it must be remembered that the benefits are not available until a specified minimum age determined by the pension scheme rules as opposed to the set off when the spouse gets the money or assets to do with as he/she pleases immediately.

Solution 5 – Adjournment

If no immediate solution to the pension problem is possible, perhaps because of lack of resources, it may be desirable to adjourn the application, however, this may be undesirable as it will leave those claims open for the future.

Solution 6 - Use of periodical payments

In the situation where a clean break might otherwise be the appropriate solution, a wife may be able to resist such an order as a means of achieving compensation for loss of pension rights.

Solution 7 - Use of insurance

A new or existing endowment policy on the pension member's life maturing on their normal retirement date may be a means of enabling a spouse to purchase an annuity. Similarly, a term insurance policy expiring, for example, at the husband's retirement date could provide a substitute for loss of death in service cover. This solution can only be currently achieved through agreement by a consent order since the Court has no power to order the taking out of a life insurance policy.

Solution 8 - Nomination/letters of wishes

This solution can assist in relation to death benefits. The Court can now order a party to nominate the other in respect of death benefits.

Solution 9 - Contract to leave by Will

It is possible for a Testator to bind himself personally as to the contents of his Will, even though a Will, by its nature, is always revocable. It is also possible to enter into a covenant not to revoke a Will or a particular clause in a Will.

4. Do I need to involve a pension expert?

When looking at pension schemes, it is important that an accurate transfer value is obtained. Often, the true value of a fund is higher than the transfer value provided. It is therefore our recommendation that a report is obtained from a Pension Actuary to ensure that the valuation provided is accurate. Without such a report, it would be impossible to say whether an order is fair and what pension income you would be likely to receive under any potential Pension Sharing Order.

5. Warning! Drawdown of funds

On 6 April 2015, the rules in relation to pension funds changed, and it became possible to withdraw lump sums from certain pension funds. Those with a defined contribution pension heading towards retirement will now be able to take their whole pension pot as a lump sum rather than buying an annuity which pays out an income over time. This means there are a whole host of options for those aged over 55. In addition, some people with a defined benefit pension will also be able to swap this for a defined contribution scheme to take advantage of these new freedoms.

If you believe your spouse is in a pension scheme that enables them to take an early pension or is in a standard pension scheme whereby they can take a lump sum from the age of 55 years, and they are approaching that time, then it would be our advice to obtain an undertaking (a legally binding promise) from your spouse that they would not withdraw any lump sum pending agreement or Court Order. Without this undertaking, they may withdraw a lump sum and dispose of it, thereby defeating an element of your claim in relation to the pension fund.

Conclusion

This is by no means intended to be a complete guide to the law on pensions however we hope it provides you with some basic information in this area of law.

We do recommend that you seek independent financial advice with regard to pension provision. If you would like us to make a referral on your behalf to a local firm of financial advisors then please do let us know.

In addition, the Government have set up a free and impartial service – Pension Wise - to help people understand their pension options. You may wish to visit their website – www.pensionwise.gov.uk to consider matters further.