Pensions on Divorce:

An empirical study

by

Hilary Woodward

With

Mark Sefton

2014

Cardiff Law School

Hilary Woodward is an Associate of Cardiff Law School, Cardiff University, formerly a family solicitor and mediator.

Mark Sefton is an independent socio-legal researcher and for the purposes of this project was employed as a Research Associate at Cardiff Law School.

Published by Cardiff Law School, Cardiff University

http://orca.cf.ac.uk/56700/

http://orca.cf.ac.uk/56702/

Contents

Foreword

Have the 13 years which have elapsed since the introduction of pension sharing in December 2000 proved to be a missed opportunity? The public and the legal profession should be grateful to Hilary Woodward and the Nuffield Foundation for exploring this issue and other related issues in depth in this report. It comes as no surprise to learn that pension orders on divorce are regarded as being amongst the most complex and least understood of available remedies. However, the findings of the report translate into research data what was known only anecdotally to many judges and practitioners, namely, that the number of pension orders being made is nowhere near original government predictions. Indeed, such orders might in the light of this report be described as family law's best kept secret. The report rejects common possible explanations for this phenomenon, such as low pension values, short marriages and couples divorcing at a young age. Instead, it describes a picture of continuing adherence to the solution of off-setting which existed prior to December 2000. Whilst it would not be correct to say that pensions are being totally ignored on divorce, the impression lingers after reading the report that pensions remains a niche area of family law, even though it may be territory into which all family lawyers must tread. With the virtual withdrawal of legal aid for financial remedy applications in April 2013, the resolution of the problems identified by the report does not appear sanguine. It is clear from the research that pension issues on divorce are usually best addressed and understood where at least one party is legally represented with the possibility of access to expert pensions advice. The report identifies that clear guidance from the High Court or above is lacking on many areas relating to the making of pension orders: notably, practitioners are left without such guidance as to the objective of pension sharing. Should it be to adjust or equalise by reference to capital value or projected income stream? The report makes a number of useful recommendations, one of which is for further training for the profession and judiciary. I commend this report as essential reading to all those concerned with pensions on divorce and express the hope that its real value will lie in serious consideration being given, by government and the professionals involved in this area, to its conclusions and recommendations.

David Salter

December 2013

Acknowledgements and Disclaimers

This study has been funded by the Nuffield Foundation and we are indebted to them for their patience and support. The Nuffield Foundation is an endowed charitable trust that aims to improve social well-being in the widest sense. It funds research and innovation in education and social policy and also works to build capacity in education, science and social science research. The Nuffield Foundation has funded this project, but the views expressed are those of the authors and not necessarily those of the Foundation. More information is available at www.nuffieldfoundation.org

This study would not have been possible without the consent of the Departmental Records Officer, Ministry of Justice, by allowing privileged access to divorce court files and meetings with District Judges. We are very grateful to Adam Lennon, Head of the Family Operations Team at Her Majesty's Courts and Tribunal Service, for his help with the application to the Data Access Panel, in providing the randomised list of file numbers for the survey and his cooperation throughout. We are also enormously grateful to the Family Court Managers and staff at the three courts where we conducted the file survey, and to the District Judges who gave up their time to participate in this study. Our very sincere thanks also go to the 32 practitioners who voluntarily and kindly contributed to this project by sharing their insights and experiences of the issue of pensions on divorce.

The project expert, George Mathieson, has spent many hours assessing the data from numerous court file cases, and his wisdom in this highly specialised field has been invaluable. Mark Sefton shared the fieldwork for both the quantitative and qualitative data, and helped design and prepare all the data collection tools. He has taken major responsibility for the mammoth task of processing and analysing the quantitative data and producing the tables. We are indebted to Erika Baker for her input on the statistical analysis, and to our transcribers, Carol Marks, Helen Williams, Alison McPherson and Asma Khan for their faithful and methodical transcriptions of the practitioner and district judge interviews.

Last but not least we wish to express our huge appreciation to the project's honorary expert, David Salter, to Cardiff Law School and to Professors Gillian Douglas and Richard Moorhead for the time, advice and guidance that they have given throughout all stages of this study.

We take full responsibility for any errors or omissions and for any opinions expressed in this report.

Hilary Woodward and Mark Sefton

Pensions on divorce: an empirical study

Executive Summary

This is the first detailed study into pension sharing since its introduction in England and Wales. It was designed to provide an insight into the manner and extent to which pensions are included in final divorce financial remedy orders. The overall purpose was to investigate any procedural, legal, economic or social factors which might be affecting the use of the court's powers with regard to pensions on divorce. The study was led by Hilary Woodward of Cardiff Law School, Cardiff University and funded by the Nuffield Foundation.

Background

The UK has one of the most complex pension systems in the world, including state, occupational and privately funded schemes. Retirement provision has become increasingly inadequate and unevenly distributed, with divorced women over 65 particularly exposed, only a minority having any income other than the basic state pension, and their numbers are predicted to increase more than threefold between 2013 and 2033. The introduction of pension sharing powers on divorce in 2000 was intended to help address this issue, but the number of pension sharing orders being made is still only one fifth of original Government predictions, with around 8% of divorces resulting in orders with any formal pension provision.

Aims

The aims of this study were to explore:

- The extent to which pensions are considered on divorce
- The circumstances in which pension orders are most likely, or unlikely, to be made
- The alternatives adopted, and the economic rationality and fairness of the orders
- The rationales and objectives behind the orders
- The nature and quality of the financial disclosure relating to pensions
- The circumstances in which judges intervene in response to draft consent orders.

Methodology

The research design comprised four methodological components, both quantitative and qualitative. The fieldwork was conducted between March 2011 and September 2012.

The first, quantitative, limb consisted of a survey of 369 randomly selected divorce files in three courts in the North, South and West of England and Wales, in which i) a petition for divorce had been issued on or after 1 April 2009 and ii) a final financial remedy order had been made on or before 31 December 2010. Anonymised data collected from the files includes the background of the parties and the family, legal representation, the extent of the dispute, the terms of the final order, and the financial resources. The data were processed and analysed with the help of SPSS software.

The second, qualitative, component consisted of one-to-one interviews with 32 family solicitors, purposively selected from the Resolution and Law Society websites to include a range of practice experience, specialisation and size of family team, and spread fairly evenly

across the three geographical areas in which the court file survey had taken place. The interviews were semi-structured and based on a topic guide and vignette, focusing on practitioners' approaches to, and experience of, the issue of pensions on divorce and lasting between 1 and 1½ hours each.

The third limb consisted of four meetings with a total of seven district judges from the three courts in which we had conducted the file survey. The meetings lasted 1 to 1½ hours each, drawing upon a topic guide which was similar to that used for the practitioner interviews but adapted to reflect the views and experience of the judiciary. The meetings with practitioners and judges were digitally recorded, and the anonymised transcriptions were analysed with the help of Atlas Ti software to identify key themes.

The final limb consisted of a pension expert's assessment of the data from 130 of the court files which were broadly representative of those which had disclosed any pensions other than the basic state pension ('relevant pensions'). He assessed most of those cases according to six main points (the numbers vary slightly): the way in which the pensions had been dealt with; the economic rationality of the approach to the pensions; the rationales behind the orders; the apparent objective of the orders; the fairness on balance of the settlement quantum; and the quality of the financial disclosure. His assessments were individually examined and then coded and entered onto the SPSS database for analysis alongside the wider data.

The findings

The extent to which pensions are considered on divorce

Court file cases were categorised into three groups: 20% disclosed no relevant pensions; 66% disclosed one or more relevant pensions for either husband or wife or both but no pension orders; and 14% included one or more pension orders.

Pensions were expressly referred to in the final order in 98% of the cases in which relevant pensions were disclosed, but over three quarters of those were for dismissal purposes only. Pension orders were made in 51 cases, representing 17% of cases with relevant pensions. Pension offsetting (where one party's pension is offset against the other's pension or against a non-pension asset) was expressly referred to in the draft order or accompanying documentation in only 5% of cases disclosing pensions.

The project expert assessed how the pensions had been dealt with in 122 cases. Just under one fifth had pension orders. His view was that several of those with pension orders, and one third of those without pension orders, involved offsetting. In the remaining half it was unclear how the pensions had been dealt with or they appeared to have been ignored.

Few practitioners admitted to ever ignoring the pensions save where the parties were very young and/or the pensions of negligible value. They did not see the issue of pensions as particularly contentious for their clients but did almost universally see it as one of the most complex and least well understood by public and professionals alike. One manifestation of

this complexity was a lack of clarity in the final orders and supporting documents as to how the pensions had been valued and taken into account and the likely effect of the orders.

The circumstances in which pension orders are most likely, or unlikely, to be made
All pension orders in the court file sample except two were in favour of the wife. All were for pension sharing and none for pension attachment. Pension attachment orders were very unpopular with judges and practitioners, mainly because of their lack of finality.

Pension orders were associated with a relatively wealthy socio-economic group when compared to parties in cases with pensions but without pension orders. In those cases where the values were clear, the median of the combined cash equivalent values (CEVs) was £290,000 compared to £109,000; the median value of the parties' combined net capital assets excluding pensions was £329,000 compared to £125,000 and the husband's median annual net income was £31,000 compared to £22,500.

Pension orders in our dataset were also strongly associated with older couples and longer marriages. The average age for both wives and husbands in cases with pension orders was 51, compared to 42 and 45 respectively in cases with no pension orders; the median length of marriage was 25 years to the date of the final order compared to 11 years.

Pension orders were more often made in cases in which proceedings had been issued (i.e. not purely by consent): 39% of cases with pension orders involved the issue of proceedings compared to 23% of those with pensions but no pension order and 15% of cases with no relevant pensions at all.

Pension orders were also more likely to be made in cases in which both parties were legally represented. 23% of cases in which both parties were represented included a pension order compared to 8% of cases in which only one or neither party was represented. It was clear from the qualitative data that pension orders were hard to achieve without professional advice. There was widespread concern about the increasing number of litigants in person and how they would deal with the issue of pensions on divorce in particular.

The alternatives adopted and the economic rationality and fairness of the orders
Offsetting the pension against non-pension assets was far more common than pension orders and was said to be popular with the parties themselves, mainly for pragmatic reasons. Practitioners' views on the merits of offsetting varied widely, as did their methods for calculating the offset. Judges were normally content to approve draft orders involving offsets in uncontested cases but would not make such an order at a final hearing.

The court file survey indicated that other remedies for sharing future income between the spouses were even less popular than pension orders; for example, fewer than 2% of all cases included a substantive spousal joint lives periodical payments order. Practitioners confirmed that a complete clean break was a priority for the vast majority of their clients.

The project expert assessed 118 pension cases on whether the approach to the pensions had been economically rational, i.e. whether the order and its likely effect made economic

sense. He considered that fewer than half were economically rational, about one fifth were problematic and one third unclear. A higher proportion of pension order cases than offset cases were considered economically rational – about three quarters compared to two fifths.

Of the 119 cases which the project expert assessed on the fairness of the pension settlement quantum, he considered about one third to be fair, 15% unfair and the remainder unclear. One of the main criteria for fairness was whether the pension division between the parties was approximately equal or otherwise explicable. His assessments indicated that the pension settlement quantum was fair in a higher proportion of cases with pension orders than in offset cases, but he was unable to give an opinion in a substantial proportion of both, mainly because of the poor quality of disclosure.

The rationales and objectives behind the orders

Practitioners and judges did not share a clear view on what the rationales behind pension orders and treatment of pensions in general should be. There was a tendency to blur needs and sharing although some suggested that a needs rationale would apply to the non-pension assets and sharing to the pensions. Arguments frequently arose over whether the objective of a pension order should be determined by reference to the capital or the income value of the pensions, and on the extent to which equality should be departed from when pensions had not been acquired during the marriage. The file survey and expert assessments suggested that capital values were more often determinative of the pension settlements than income values but judges and practitioners expressed a growing preference for the latter.

The nature and quality of the financial disclosure relating to pensions

Only approximately half of the 293 court file cases which disclosed one or more relevant pensions contained unambiguous valuations or CEVs for all pensions. Additional state pensions were expressly referred to in only 12 cases and only half of those included CEVs.

Expert assessment indicated inadequate or unclear pension disclosure in approximately two thirds of the 130 pension cases assessed. Practitioners suggested that more disclosure may have taken place between them than was apparent from the court files. However, in uncontested cases the disclosure shown on the court files was that on which the judges were relying to make decisions, and in many cases it was difficult if not impossible to work out the net effect of the pension orders or the orders as a whole.

There was clear evidence in only ten cases that pension experts had been instructed although it is likely that more had been involved than was apparent from the court files. The quality of financial disclosure and the economic rationality of the approach to pensions were assessed as better when pension experts had been involved. Practitioners and judges suggested that pension issues would usually be resolved once an expert had been instructed but that expert reports inevitably added to the time and cost of the cases.

The circumstances in which judges intervened in response to draft consent orders

Just over three quarters of the court file cases were uncontested, 21% were initially contested but settled and the remainder were fully contested. In 77% of the uncontested

cases the draft consent orders were approved as drawn, 17% were approved following written queries and six percent following attendance at court. Approximately one third of judicial queries included an issue which appeared to relate to pensions, in which judges were either seeking further financial information or questioning the fairness of the order.

Final conclusions

Pension sharing was a positive addition but remains an under-used financial remedy on divorce and the prerogative of a relatively privileged minority. Although it is usually the wives who are the beneficiaries of pension orders, overall it is the husbands who tend to fare better on the income and pension provisions in final orders and the wives on the capital provisions. Greater rigour and transparency in relation to pension disclosure and the intended effect of final orders might reveal, and thus help to redress, some of this gender imbalance. Tighter regulation of statutory time limits and fees for the provision of pension valuations and implementation of pension orders would make pension orders a more affordable remedy for a wider section of the divorcing public. Better training on pension issues and financial remedies would benefit both practitioners and judges. More guidance from case law on pension issues would undoubtedly assist all concerned.

Terminology and Abbreviations

In this report we use the following terms and abbreviations:

Ancillary relief, now known as financial remedy (see below)

ASP, additional state pension, which is any state pension other than basic state pension, and includes the graduated retirement scheme, state earnings related pension scheme and (currently) state second pension

CEV, cash equivalent value, the prescribed pension valuation for a financial remedy order also known as CE (cash equivalent), and previously known as the cash equivalent transfer value (CETV), or cash equivalent benefit (CEB) for a pension in payment

Contested cases, fully adjudicated cases

D81, statement of information for a consent order in relation to a financial remedy

Defined benefit pension scheme, one where the value of the benefits is related to the final or career-average salary of the member, usually a public sector or private occupational scheme

Defined contribution pension scheme, also called a money-purchase scheme, one where contributions are made into a fund which is converted on retirement to provide the pension benefits; personal pensions fall into this category

FDA, First Directions Appointment, the first court appointment following an application for a contested financial remedy order

FDR, Financial Dispute Resolution appointment, the court appointment which follows the FDA in financial remedy proceedings, designed to encourage settlement through discussions and negotiations

Financial remedy, order provided under the Matrimonial Causes Act 1973, previously known as 'ancillary relief'

Form A, a notice of intention to proceed with an application for a financial order

Form B, a notice of application to consider the financial position of the respondent on divorce or dissolution

Form E, the financial statement for a financial order

Form H1 or H, statement or estimate of costs in financial remedy proceedings

Form P, pension enquiry form required when a pension attachment or pension sharing order may be made

Initially contested cases, cases in which proceedings were formally commenced but subsequently settled

Litigant in person, a party who was not legally represented, also sometimes referred to as a self-represented party

Pension, to mean all types of pension scheme and benefits payable

Pension administrators, all pension scheme providers, managers and trustees

Pension attachment order, pension earmarking order made under Matrimonial Causes Act 1973 ss 25B, 25C, 25D (inserted by the Pensions Act 1995), which directs a pension scheme to pay part or all of the benefits arising on retirement or death in service to the other spouse

Pension cases, cases in which relevant pensions have been disclosed for either or both parties

Pension member, the person with the pension rights

Pension order cases, cases in which a pension order was made

Pension sharing order, an order made under Matrimonial Causes Act 1973 ss 24B, 24C, 24D, by which a pension is shared or split on divorce, nullity or dissolution to create a separate pension fund for the other spouse

Practitioners, lawyers and mediators, and the solicitors who participated in this study

Relevant pensions, any pensions other than the basic state pension

SIPP, a self-invested personal pension

SSAS, a small self-administered pension scheme

Uncontested cases, cases which were dealt with purely by consent order, sometimes referred to as consent order cases

Chapter 1: Introduction

The idea for this study originated at a two-day interdisciplinary workshop hosted by the Cambridge Socio-Legal Group in April 2008, the focus of which was to inform the development of private law entitlements and obligations in the light of research data about the financial arrangements between couples, both while living together and following separation.[1] This project aims to fill one of the gaps in research identified at that workshop, namely why relatively few couples make formal arrangements for the sharing of their pensions on divorce, notwithstanding reforms introduced in the 1990s and 2000 which permitted this and the continuing economic disadvantages suffered by divorced women over the age of 65.

In this chapter, we start by briefly outlining the current law relating to finance and pensions on divorce, and then describe the coverage of pensions in the UK and incidence of pension orders in England and Wales. We summarise the previous relevant research, the aims and objectives of this study, and the methodology used. Finally, we outline the format of this report.

1.1 The current law

1.1.1 Finance on divorce

The court has wide powers to redistribute finance and property on divorce, and to make orders for periodic payments in favour of spouse or child, lump sums, property adjustment and pension sharing or attachment. In practice, most arrangements are settled by consent and may or may not involve a court order. If the court is asked to decide on the arrangements, judges have a wide discretion to make the orders that are most appropriate in the particular circumstances of the case, giving first priority to the welfare of any children of the family and taking into account the factors set out under section 25 of the Matrimonial Causes Act 1973. These factors include the income, capital and property resources which the parties have or are likely to have in the foreseeable future, their needs, obligations and responsibilities, the standard of living enjoyed by the family before the breakdown, the age of the parties and length of the marriage, any physical or mental disability, any contribution which the parties have made or are likely to make to the family including looking after the children, the conduct of the parties if it would be inequitable to disregard it, and any benefit which the parties may lose the chance of acquiring by virtue of the divorce. When exercising its powers the court must consider whether it would be appropriate to terminate the financial obligations of one spouse to the other as soon after the divorce as it considers just and reasonable.

The overall objective of the court is to achieve fairness[2] and there have been a number of cases in which the House of Lords has attempted to identify the principles upon which the

[1] The workshop resulted in a book: Miles, J. and Probert, R. (eds) (2009) *Sharing Lives, Dividing Assets,* Hart Publishing

[2] *White v White* [2001] 1 AC 596, [2000] 2 FLR 981

court might exercise its discretion in redistributing assets and income on divorce. We briefly mention just three of the leading cases here. First, the case of *White*[3] rejected the long-held principle of 'reasonable requirements' in favour of checking decisions against the 'yardstick of equality' and not discriminating between husband and wife in their respective roles as breadwinner and homemaker. In the cases of *Miller/McFarlane*,[4] which were heard together, their Lordships[5] agreed that the objective of fairness would be achieved, beyond consideration for the welfare of the children of the marriage, by reference to the following elements: (1) consideration for the present and foreseeable financial *needs* of the parties; (2) *compensation* aimed at redressing any significant prospective economic disparity between the parties arising from the way they conducted their marriage; and (3) the principle of *sharing*, it being emphasised that the 'yardstick of equality' was to be applied as an aid and not as a rule.

In relation to the rationales of needs, compensation and sharing, Baroness Hale said at paragraph 144:

> *Thus far, in common with my noble and learned friend, Lord Nicholls of Birkenhead, I have identified three principles which might guide the court in making an award: need (generously interpreted), compensation, and sharing. I agree that there cannot be a hard and fast rule about whether one starts with equal sharing and departs if need or compensation supply a reason to do so, or whether one starts with need and compensation and shares the balance. Much will depend upon how far future income is to be shared as well as current assets. In general, it can be assumed that the marital partnership does not stay alive for the purpose of sharing future resources unless this is justified by need or compensation. The ultimate objective is to give each party an equal start on the road to independent living.*

On the issue of whether all of a couple's assets, whenever and however acquired, should be considered as 'matrimonial property' for the purposes of equality of division, it was stated that the circumstances of each individual case would dictate whether a particular asset should be included; it was also proposed that, where an asset did not constitute one of the 'family assets', a short marriage would justify departure from equality of division.[6]

1.1.2 Pensions on divorce

The law relating to pensions is complex and involves a mix of trust, taxation, social security, contract, employment and EC law. Pension contributions are drawn mainly from income throughout the member's working lifetime and paid into a capital fund which is subject to extensive regulations. If the member survives to the retirement date, he or she may take up

[3] *Ibid*
[4] *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24, [2006] 1 FLR 1186
[5] Lord Nicholls of Birkenhead, Lord Hoffmann, Lord Hope of Craighead, Baroness Hale of Richmond and Lord Mance (24 May 2006)
[6] For a full discussion of some of these issues, see The Law Commission (2012) *Matrimonial Property, Needs and Agreements A Supplementary Consultation Paper,* HMSO Consultation Paper No 208

to 25% as a tax-free lump sum and the rest is converted back to income and possibly other discretionary benefits. Pension benefits cannot be assigned, traded or mortgaged. Thus, at best, pensions could be described as a contingent asset, or as a promise of income at a later date if the member survives that long, but whichever way you look at them, difficult both to conceptualise and to value. The law relating to pensions on divorce involves yet further layers of complexity and numerous statutes and statutory instruments.

There are several types of pension, ranging from the basic state pension to complex self-administered schemes, public sector and private sector schemes, occupational, personal and hybrid schemes, defined benefit (e.g. final salary) and defined contribution schemes (e.g. personal pensions). They are all very different animals, with their own rules, benefits and methods of valuation, and are hard to compare with each other. This is the context within which practitioners and clients work when they are considering financial remedies on divorce. Below is a very simple potted history of the development of the law relating to pensions on divorce.[7]

S25(2)(a) Matrimonial Causes Act 1973 as amended by s25B(1)(a) specifically requires pensions to be taken into account as one of the parties' resources. Pensions are one of the resources which can be lost on divorce[8] and they are one facet of the whole financial picture. Increasing media and public awareness in the 1990s of the disadvantages suffered by women following divorce resulted in the court's powers on divorce being extended in two ways, first in 1996 with the introduction of pension attachment,[9] and then, in 2000, with pension sharing.[10] A *pension attachment order* directs the pension administrators or trustees to pay part or all of the member's benefits to the ex-spouse on the member's retirement or death, but the pension remains owned by the original member. A *pension sharing order* provides for part or all of the member's benefits to be legally transferred as a pension fund from the member spouse to the other on divorce. Almost all types of pension apart from the basic state pension may be the subject of a pension order (of either kind) and the benefits may include the pension income, the tax-free retirement lump sum and/or the lump sum payable on death. The same powers exist in proceedings for nullity and dissolution of civil partnership but only pension attachment is available in judicial separation proceedings, and there are no equivalent powers at all for separating cohabitants.

It remains unclear in case law whether pension orders should be seen as fitting a need, compensation or sharing rationale.[11] All may be relevant. A spouse's future *needs* may be met from the pension to be provided; equally, the spouse may be *compensated* for having foregone the opportunity to build up their own pension provision; and finally, *sharing* the

[7] There are several excellent textbooks providing a full explanation of the law and procedure relating to pensions on divorce. See for example: Salter, D., Rae, M. and Ellison R. (2009) *Pensions on Divorce, Law, Practice and Precedents*, Lime Legal; and Hess, E. and Hay, F. (2008) *Pensions on Divorce: A Practitioner's* Handbook, Hammicks.

[8] Also on nullity or dissolution of Civil Partnership, both of which are outside the scope of this study.

[9] Pensions Act 1995 s166

[10] Welfare Reform and Pensions Act 1999

[11] see *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24 [2006] 2 AC 618

pension rights created during the marriage may be seen as recognising the partnership principle underlying the marriage tie. Whichever rationale takes priority can have wide social and economic consequences.[12] Dnes has argued that, depending upon the rationale adopted and the approach taken to valuation, the provision of pension orders may be vulnerable to incentives for opportunism in divorce behaviour (which he terms the 'greener-grass' and 'Black-Widow' effects). He suggests, for example, that husbands from wealthier families, and wives from moderate asset-based families, would be more likely to benefit from a needs-based settlement.[13]

Cases such as *Martin-Dye*[14] and *Maskell*[15] emphasised the different nature of pensions to other assets and encouraged the use of pension sharing orders wherever practicable. However, it is not always possible to treat pensions in isolation from the rest of the assets, especially when there are not enough resources to meet both parties' capital and income needs and provide a home for the children. Prior to the reforms referred to above, the main way that pensions were taken into account on divorce, if at all, was by *offsetting*. Offsetting is a mechanism whereby one spouse (usually the wife) compensates for loss of the other's pension benefits by taking a larger share of non-pension assets such as the family home; another way of looking at it is that one spouse (usually the husband) sacrifices (part of) his share of non-pension assets in return for keeping his pension intact. Offsetting remains a popular remedy.

There is no clear guidance in case law as to how to calculate the value of an offset, or of any discount that might apply to take account of the illiquidity of pensions, their taxable status and other factors. Aggregating pension assets with non-pension assets has generally been disapproved of because this is not comparing like with like,[16] although there have been limited circumstances in which it has been regarded as acceptable.[17]

Other remedies which sometimes feature as alternatives to pension sharing or attachment orders include: postponing the divorce or not divorcing at all so that a spouse can remain a potential beneficiary under the terms of the pension scheme; a joint lives spousal periodical payment order or secured periodical payment order; a nomination or letter of wishes in respect of the member's death in service benefits; an insurance policy or provision for the ex-spouse under a will; and a claim under the Inheritance (Provision for Family and Dependants) Act 1975.[18] Unlike a pension sharing order or offsetting, most of these

[12] Dnes, A. (1997) *The Division of Marital Assets Following Divorce with Particular Reference to Pensions,* Lord Chancellor's Research Series 7/97, LCD

[13] Dnes, A. *ibid* and Dnes, A. (2009) 'Rational Decision Making and Intimate Cohabitation' in Miles, J. and Probert, R. (eds), *Sharing Lives, Dividing Assets,* Hart Publishing

[14] *Martin-Dye v Martin-Dye* [2006] 2 FLR 901

[15] *Maskell v Maskell* [2003] 1 FLR 1138

[16] See in particular Thorpe LJ in *Maskell* at 1140 para [6]

[17] Dyson LJ in *Martin-Dye* at para [85]

[18] In the absence of a clause in the final order dismissing future inheritance claims, a spouse who has not remarried is entitled to claim against the former spouse's estate if he or she believes that reasonable financial provision has not been made. Inheritance (Provision for Family and Dependants) Act s1 (1) (b) and (2) (b)

alternatives will fail if the spouse hoping to benefit remarries, and they may in any event be at the discretion of the pension trustees or subject to other risks and uncertainties.

1.2 Pension coverage in the UK

The UK has one of the least generous state pension schemes and one of the most complex and developed systems of privately funded schemes in the world. In a context of rising life expectancy, it is widely recognised that provision for the UK population on retirement is increasingly inadequate to meet its needs. Investment in private schemes is diminishing and such provision as exists is very unevenly distributed.[19]

Pensions can only ever be held in one person's name. The adequacy of an individual's pension provision, whether state, occupational or private, depends largely on that individual's work and earnings history. Significant gender disparities in earnings persist among couples in all income and educational strata. Historically, women have been more likely to take on unpaid caring roles within the household and part-time or low paid work outside of the household. Women who have children are particularly likely to be dependent on their partners for household income and correspondingly less likely to be investing in their own pension funds.[20]

Women make up a substantial majority of the retired population - 58% of the over 65s, and 77% of the over 80s. They are more likely than men to depend on the state for their income and receive less on average.[21] In 2006 only 31% of women aged between 65 and 69 received a full basic state pension (currently £110.15 per week) compared to 85% of men.[22] Separated, widowed and divorced women are least likely of all to have anything other than state pension provision.[23] Although women in general may benefit from some of the changes proposed to the state pension scheme, referred to below, numerous studies have shown that divorced women over 65 are particularly exposed and will continue to be so.[24] The number of divorced women over the age of 65 in 2008 was 401,000, and this is predicted to increase to approximately 1,309,000 by 2033.[25]

---

[19] Ch 3, *Pension: Challenges and Choices, First Report,* Pensions Commission, 2004, www.pensionscommission.org.uk

[20] Price, D. (2009) 'Pension Accumulation and Gendered Household Structures: What are the Implications of Changes in Family Formation for Future Financial Inequality?' in Miles, J. and Probert, R. (eds) *Sharing Lives, Dividing Assets* Hart Publishing

[21] ONS (2008) *Pension Trends,* Ch 5, www.statistics.gov.uk/cci/nugget.asp?id=2239

[22] Altmann, R., (2006) www.rosaltmann.com/womenPensionsWorld.htm

[23] Price, D. (2009) *ibid*

[24] See for example the Eighth Annual Scottish Widows Women and Pensions Report 2012, www.scottishwidows.co.uk ; the Phoenix Group Press Release 25 June 2013, *Divorced Women and Pensions*; and Arber, S. and Ginn, J. (2004) 'Ageing and Gender: Diversity and Change' in *Social Trends 34,* TSO, who reported that the median income of divorced women over 65 was below the poverty line.

[25] ONS 2008-based Marital Status Population Projections for England and Wales.

1.3 The incidence of pension orders on divorce

The reforms from the 1990s might have been expected to address some of the inequalities in pension provision in England and Wales for divorced women, but pension attachment has never proved popular and pension sharing orders have nowhere near matched up to government predictions of 50,000 a year.[26] Even in 2011 (the latest year for which confirmed data are available), pension orders of any kind, including both sharing and attachment, numbered only 9,973 and represented just over 12% of all financial remedy disposals made in that year.[27] These figures have increased very little over the years. In 2007, for example, pension orders represented just under 11% of total disposals.[28] Furthermore, only approximately 37% of divorces include a financial remedy order of any kind,[29] and as any pension adjustment between husbands and wives can only take place if it is the subject of an order, the estimated proportion of divorces which result in formal pension provision is even lower at about 8%.[30]

There is also evidence to suggest that additional state pensions (State Earnings Related or Second State Pensions, referred to below as 'ASP') are rarely the subject of orders, despite the fact that they can amount to over £150 per week, or over £100,000 in capital value[31] and virtually everyone will have accrued some ASP.[32] A Freedom of Information response[33] showed that in the tax year 2012/13, although the Department for Work and Pensions processed about 10,000 pension share valuations for ASP, it received court orders for pension shares in only about 150 cases – that is the equivalent of 0.0012 of all divorces, based on the (provisional) decree absolute figures for 2012.[34] The Government now proposes to withdraw the option of sharing ASP from 6 April 2017 as part of its fundamental review of the state pension scheme. For those who reach state pension age after that date,

---

[26] DSS, (Department of Social Security) (1998) *Pension Sharing on Divorce: Reforming Pensions for a Fairer Future, Part 1: Consultation* (London, DSS)

[27] Ministry of Justice, Judicial and Court Statistics tables Ch 2 – 2011. See footnote 28 below. Each type of disposal relates to a different type of financial remedy order (e.g. property adjustment or pension sharing) and there may be more than one disposal within each final order/case.

[28] Judicial and Court Statistics 2007 (2008), TSO. Tables 5.5 and 5.6 http://www.official-documents.gov.uk/document/cm74/7467/7467.pdf

[29] https://www.justice.gov.uk/downloads/statistics/courts-and-sentencing/csq-q4-2012/csq-q4-2012-tables.xls, Tables 2.8 and 2.9. The numbers are not strictly comparable as the financial order may have been made in a later year than the decree absolute, but they are a guide and the percentage has remained close to 37% over the three year period between 2010 and 2012. Further, our survey suggested that the gap in time between the decree absolute and the final financial order was small. See Chapter 2

[30] *Ibid*

[31] *B v B (Assessment of Assets: Pre-marital Property)* [2012] 2 FLR 22

[32] The only people who will not have accrued any ASP will be those who have never earned more than the NI threshold, always been self-employed or always contracted out.

[33] FOI 2013 – 3353 www.gov.uk/government/uploads/system/uploads/attachment_data/file/226560/foi-3353-2013.pdf

[34] https://www.justice.gov.uk/downloads/statistics/courts-and-sentencing/csq-q4-2012/csq-q4-2012-tables.xls Table 2.8

the Government is also withdrawing the power to substitute the ex-spouse's National Insurance record following divorce where their record is better.[35]

Various reasons have been suggested for the generally low take-up of pension orders on divorce. First, on the legal side, case-law has made clear that there is no requirement that a pension order be made simply because a pension pot exists - a court is only obliged to *consider* whether the existence of a pension may affect any orders to be made, and the answer may be 'not at all'.[36] Secondly, the association between lack of finality, ownership and control with pension attachment orders has almost certainly contributed to their unpopularity. As Wilson LJ commented,[37] 'In a sentence, the problem is that, notwithstanding divorce, the wife who has the benefit only of an attachment order remains hitched to the husband's wagon.'

Socio-economic factors may also have affected the take-up of pension orders. For example, the average (mean) age at divorce for men is 44.5 and for women 42.1[38] so that, for a large proportion of the divorcing population, retirement remains relatively remote and retirement circumstances and benefits correspondingly unpredictable. These factors have been reflected in the case law.[39] Further, only around two thirds of the adult population has contributed to a non-state pension,[40] so for a significant minority there is little to share or attach. In addition to all these factors, significant increases in home ownership and property prices over the last few decades have meant that the family home commonly represents the only asset of any significance on divorce, apart from the pension, but with insufficient equity to fund the purchase of two properties, offsetting may have more immediate appeal than a pension order.

Another factor which may have affected the take-up of pension orders is the time and cost of valuing the pension fund. A pension fund has to be valued before a court can order either pension attachment or sharing. Valuation of an occupational final salary (or defined benefit) pension fund is complex and requires the services of a pension actuary. Personal pensions, on the other hand, are easier to value but may vary enormously in value depending on the timing of the valuation and implementation of the pension order, and different schemes offer different benefits and performance records. The standard valuation required by the courts, the cash equivalent or 'CEV', was not designed for divorce proceedings and does not always accurately reflect the cost of purchasing similar benefits elsewhere.[41] Different life

[35] DWP (2013) 'The single-tier pension: a simple foundation for saving', www.gov.uk/government/uploads/system/uploads/attachment_data/file/181229/single-tier-pension.pdf
[36] *per* Singer J in *T v T (Financial Relief: Pensions)* [1998] 1 FLR 1072 at p 1084H
[37] *R (Smith) v Secretary of State for Defence and Secretary of State for Work and Pensions* [2004] EWHC 1797 (Admin) [2005] 1 FLR 97 at [15]
[38] ONS, Divorces in England and Wales – 2011, Statistical Bulletin 20/12/12
[39] (see, for example, *T v T* (above) and *Burrow v Burrow* [1999] 1 FLR 508, in both of which the court considered that retirement was too far off into the future to enable a reliable split of pension benefits to be determined
[40] Clery, E., McKay, S., Phillips, M. and Robinson, C. (2006) *Attitudes to Pensions: the 2006 Survey*, DWP Research Report No 434, National Centre for Social Research and School for Social Sciences, Birmingham
[41] Muirhead, I. (2008) *Pensions on Divorce, The Role of the Financial Advisor,* SIFA

expectancies for men and women mean that the same size fund will produce a smaller annual income for women than for men.

The process of implementing pension sharing orders similarly costs time and money, and contains some traps for the unwary. For example, once the order takes effect there is a four month window within which the pension administrators must revalue and implement the order, in return for an often hefty fee to be paid by one or both of the parties.

In the following chapters we examine all these and other factors to try and gauge the extent to which they influence the uptake, or non-uptake, of pension orders on divorce, and the apparent merits of the alternative remedies.

1.4 Previous empirical evidence on pensions and their treatment on divorce

Perry and Douglas's study of financial arrangements after separation found that for mothers immediate housing needs took priority over longer-term financial security and that the parent seeking to stay in the matrimonial home was likely to give up any claim to a share of the other's pension or investments as a trade-off for the home.[42] Arthur and Lewis's study[43] similarly suggested a clear preference on the part of divorcing couples for offsetting rather than pension attachment, but also a lack of consistency as to the rationale behind the approach to pension orders. They found that there was an unsystematic approach to valuation and disclosure and an acknowledged lack of understanding of pensions on the part of the legal advisors. However, both these studies took place before the introduction of pension sharing on divorce and relatively soon after the introduction of pension attachment, so they were unable to assess the impact of the former as an additional form of provision.

Clery's study of the public's knowledge of pensions in general showed that only 5% of a sample of nearly 2,000 adults aged between 18 and 69 described themselves as having good knowledge of pensions and 25% thought they knew little or nothing. These self-descriptions were mostly matched by scores on an objective knowledge test, age being the most significant factor.[44] Males of all ages were more confident than females.

A more recent Australian national survey found that, following the introduction of pension sharing provisions in December 2002, an unexpectedly low proportion of former spouses had pension sharing orders, mirroring the position in England and Wales. Divorcing spouses who took the opportunity to have a pension sharing order were more likely to be over 55 and from relatively wealthy marriages. However, it was also found that a high proportion of the total sample had taken pensions into account in their negotiations, with the result that, in comparison to a survey carried out some years earlier, the pool of wealth had increased and,

---

[42] Perry, A., Douglas, G., Murch, M., Bader, K., Borkowski, M. (2000) *How Parents Cope Financially on Marriage Breakdown* Joseph Rowntree Foundation and Family Policy Studies Centre, p 30-32; Perry and Douglas were concerned with the broad range of financial allocation on divorce, and so their focus and evidence upon pensions was limited in its scope.

[43] Arthur, S. and Lewis, J. (2000) *Pensions and Divorce: Exploring financial settlements.* Department of Social Security Research Report No.118, Crown Copyright, HMSO pp 16 and 58

[44] Clery, E., McKay, S., Phillips, M. and Robinson, C. (2006) *Ibid*

overall, women's share of it had changed.[45] Sheehan et al also found, however, that the cost and complexities of valuing the pension fund were factors affecting the settlement outcomes.

Moorhead and Sefton[46] found that as many as one third of litigants in divorce financial remedy proceedings in England and Wales were unrepresented at some stage.[47] Both Arthur and Lewis and Sheehan et al's studies have shown that parties who are unrepresented are the least likely to take pensions into account at all on divorce.

1.5 Aims, objectives and key research questions

Pension sharing provisions have been in force for over twelve years. During that period, no study has been conducted in this jurisdiction to determine the extent to which pensions are considered on divorce, or the circumstances in which pension orders are likely to be made. Nor, in the absence of any recent empirical study, has it been possible to ascertain the extent to which costs and procedural issues are limiting the use of pension orders, whether their lack of popularity has an economically rational basis (in the sense that each party's post-divorce financial benefits are justifiable in their circumstances) or whether there are more deep-seated influences such as traditional gender roles in which men seek greater ownership of those assets associated with their sphere of work and women of those assets associated with the domestic sphere.

The aim of this study has been to provide detailed information on the reasons for the use and non-use of pension orders in divorce financial settlements in those cases which come to the attention of the court or solicitors, and on the extent to which other measures such as offsetting and lifetime maintenance orders are utilised instead.

The key research questions were:

1. In what circumstances are pension orders most likely to feature in divorce financial remedy orders and what sort of orders are they?
    - What is the background of the parties involved?
    - What types of pension are they?
    - Are they pension sharing or pension attachment orders, and if the latter, do they relate to the income, lump sum or death in service benefits?

2. Where pension assets exist but no orders have been made, what, if any, alternatives have been adopted?
    - Offsetting; if this, how has it been achieved?
    - Long-term maintenance provision

[45] Sheehan. G., Chrzanowski, A. and Dewar, J. (2008) 'Superannuation and Divorce in Australia: an evaluation of post-reform practice and settlement outcomes', *International Journal of Law, Policy and the Family 206*

[46] Moorhead, R. And Sefton, M. (2005) *Litigants in person: Unrepresented litigants in first instance proceedings.* Department for Constitutional Affairs Research Series 2/05, p.26

[47] See also Trinder, E. et al, *Litigants in person in private family law cases,* for Ministry of Justice (2013 forthcoming)

- Other

3. What is the apparent rationale behind the approach to pensions and the financial order?
    - Needs
    - Compensation
    - Sharing
    - Other, or a combination of the above

4. What is the nature and quality of the parties' financial disclosure on pensions?
    - Is the information up to date?
    - Does it include details of the additional state pension?
    - Is the method of valuation based on income or capital?
    - Is it supported by independent documentation?
    - Are there any expert reports or additional information?

5. In what circumstances do judges intervene in response to draft consent orders and pension issues?
    - When information is inadequate or conflicting
    - When the proposed order on the face of it looks to be unfair
    - When either or both of the parties have not had legal advice.

The findings will, we hope, be of relevance and interest to practitioners working in this field including family lawyers, mediators, the judiciary, actuaries, financial and pension advisors, academics, policy makers and those responsible for reviewing pension and financial remedy regulations, and, last but not least, to those experiencing divorce.

1.6 Methods

This project has involved a combination of four methods to answer the research questions, both quantitative and qualitative.[48] First, a survey of court files has provided basic information on the incidence and nature of pension orders on divorce and the circumstances in which they are likely (or unlikely) to be made . Secondly, we interviewed family solicitors to obtain in depth information about their approach to pensions and pension orders. Thirdly, we met with District Judges to feed back some of the preliminary findings of the study and to ascertain their approaches to pensions in both contested and uncontested cases. Lastly, we called on the services of a well-established expert in the field of pensions and divorce to examine anonymised data from a sub-sample of the court files and give his opinion on the nature and quality of the final orders and the financial disclosure.

[48] See Appendix 1 for full details of the methods used, p 187

1.6.1 Court file survey

This first stage of the project was quantitative. We secured the permission of Her Majesty's Courts and Tribunals Service (HMCTS) Data Access Panel and then collected data from files in three different county courts across England and Wales, based on a randomised list provided by HMCTS of 420 files from a total pool of 788 on which a petition for divorce had been issued on or after 1 April 2009 and on which a final financial remedy order had been made. We excluded files relating to judicial separation, nullity and civil partnership on the basis that they might throw up a different set of considerations and their numbers were very small. A national survey of courts was clearly not feasible for cost and other reasons but, in order to allow for possible differences in court culture,[49] we selected three contrasting courts, in the North, South and West of the jurisdiction, where members of the staff and judiciary were willing and able to assist. All three courts had a substantial through-put of divorce cases, served a wide area, and had a rich demographic mix of urban and rural, ethnic and socio-economic populations. The court file data collection was carried out between March and July 2011.

A total of 369 cases fitted our criteria. We systematically collected data from all 369 court files using an anonymised data collection form (see Appendix 3, p 198), checking all available documents on the court files, including the petition for divorce, statement of arrangements for the children, application for ancillary relief[50] (Form A), financial statement (Form E), statement of information supporting a draft consent order (D81), decrees, orders, expert reports and correspondence. The data included:

- the background characteristics of the family involved, such as the parties' ages, health, occupations, dependent children, length of marriage, intention to remarry
- the extent of any dispute
- whether either or both of the parties were represented
- the basic financial information disclosed, including the capital and income resources
- the nature of any pension assets, such as the type of pension scheme (funded or unfunded, defined benefit or defined contribution, occupational, personal, state or additional state, etc), whether it was in payment or not
- the value of any pension assets, including the cash equivalent and projected benefits
- interventions by the district judge, particularly if they related to the pensions
- the terms of the final order
- the type of pension order made, if any
- the combined costs of the financial proceedings

[49] See for example Hitchings, E. (2009) 'Chaos or Consistency: Ancillary Relief in the 'Everyday' Case' in Miles, J. and Probert, R. (eds) *ibid*;
[50] Now known as 'financial remedy'

We piloted the data collection form on a total of 22 files across the three courts and consulted with our advisory team before finalising it.[51]

We categorised the cases into the following three broad groups:

1. those where no relevant pensions were disclosed
2. those which disclosed relevant pensions but no pension order had been made
3. those where a pension order had been made

By 'relevant' we meant any pension other than the basic state pension, on the basis that virtually all pensions except the basic state pension can be the subject of a divorce pension order. We kept a record of the number of files which fell into each category in each court. We then entered the data from each case separately, coded and analysed it using software, SPSS,[52] to gain a full picture of the key variables, associations and differences which pertained at that point in time.

1.6.2 Interviews with practitioners

For the second, qualitative, stage of the project, we wrote to a sample of family lawyers to invite them to take part in the study. We purposively selected the sample from the Resolution[53] and Law Society websites to include a range of practice experience, type of firm and client base, spread fairly evenly across the three locations served by the courts referred to above. A total of 32 were interviewed on a semi-structured basis for one to one and a half hours each using a topic guide[54] and a standard vignette.[55] The preliminary court survey results informed the content and format of the topic guide, so that we could explore possible reasons behind the findings or gaps in the information. We asked practitioners about their approach to pensions, the advice which they gave, the circumstances in which they would or would not recommend a pension order and/ or further expert help, their experience of the local judiciary's approach and the responses of their clients, including those who did not seek any financial remedy order at all. It was not within the scope of this study to interview the clients themselves, but we did ask solicitors for their views and experience of their

[51] Previous studies of matrimonial court files have revealed that there could be a lack of reliable financial information. See, for example, Davis, G. et al (2000) *Ancillary Relief Outcomes* CFLQ Vol 12, No 1, describing a study conducted in 1999 and based on court files from 1996. The statement of financial information was not always fully completed, or the parties held conflicting views about the existence, value or relevance of some assets and the outcome of any such dispute was not apparent. The Family Proceedings Rules 1991 as amended in 1999 streamlined both the conduct of ancillary relief proceedings and the content and format of the financial information required, and should have led to significant improvements in the information available. One aspect of this study was to see how far the previous unsatisfactory situation had in fact improved, what information was available and how often District Judges intervened if it appeared inadequate or conflicting. The Family Procedure Rules 2010 introduced in April 2011 have made further amendments to the statement of information.

[52] SPSS is an application tool for statistical analysis, data management and presentation.

[53] Resolution is the main association of family lawyers in England and Wales and has about 6,500 members.

[54] The topic guide is shown in full at Appendix 3, p 200

[55] The responses to the vignette form the subject of Chapter 10, p 163

clients' approach, and of any procedural, legislative or social factors which might have limited their take-up of pension orders.

All except one of the interviews were conducted on a face to face basis between December 2011 and February 2012 and the other was over the telephone in March 2012. With the practitioners' consent, we digitally recorded and transcribed verbatim all but two of the interviews on an anonymised basis; we made detailed notes from the other two very shortly afterwards. We then analysed the transcriptions to identify key themes and findings using software AtlasTI.[56]

1.6.3 Meetings with District Judges

The third, also qualitative, limb of the study included four digitally recorded meetings lasting one to one and a half hours each with a total of seven District Judges from the three courts where we had surveyed the files. These meetings took place between April and September 2012. We used a semi-structured topic guide[57] which was similar to that used with the practitioners, and asked the judges about their general approach to, and experience of, pension applications on divorce, both by consent and otherwise. The recordings were transcribed anonymously and analysed with the help of AtlasTi to identify the key themes.

1.6.4 Evaluation by the project expert

The project expert was George Mathieson, a financial advisor who for many years has specialised in providing expert witness reports on pensions for divorcing couples. We provided him with full, anonymised data from 130 of the court file cases which had disclosed one or more relevant pensions and which were broadly representative of the wider sample in terms of location, whether they included a pension order or not and whether proceedings had been issued. He gave his opinion on the approach to the pensions, its economic rationality, the fairness of the settlement quantum, the apparent basis of, and rationale behind, the settlements, and the adequacy of the financial disclosure in each case, taking into account all relevant factors. In addition he provided technical advice, information on relevant pension developments and general contributions towards the discussions about the data collection and findings.

1.7 Format of the report

Chapter 2 profiles the cases in the full court file survey in terms of the basic background and financial remedy orders. Chapter 3 profiles the pension membership across the whole dataset, and then focuses on the characteristics of the cases with pension orders and compares them to the cases with pensions but no pension orders, interweaving the observations of the practitioners and judges where relevant. Chapter 4 discusses the question of the financial disclosure in both contested and uncontested cases, drawing on the evidence from the file survey, interviews with practitioners and judges and the opinion of the

[56] Atlas Ti is computer software designed to assist with the processing and analysis of qualitative data.
[57] See Appendix 3 for a full copy of the topic guide, p 203

project expert. Chapter 5 examines the role of the pension expert, principally from the perspective of the practitioners and judges. Chapter 6 looks at the rationales and objectives behind the approach to the pensions and at the arguments about pensions as matrimonial and non-matrimonial property, touching on the project expert's assessments but principally describing the views of the practitioners and judges. Chapter 7 focuses on the contentiousness of pension issues and the process of settlement, including the questions of legal representation, judicial interventions in consent cases and differences between the court locations from all perspectives. Chapter 8 discusses offsetting and other alternatives to pension orders, including the extent to which pensions may have been left out of account. Chapter 9 explores the general level of understanding of pensions and pensions on divorce from the perspective of the project expert, practitioners and judges. Chapter 10 describes the vignette used in the interviews with practitioners and their responses. Chapter 11 draws together the main findings of the study, some of the difficulties which we encountered and the implications for future policy, practice and research. The appendices describe the methods more fully and include tables for some of the quantitative analysis.

Chapter 2: A Profile of the Court File Survey and Financial Remedy Orders

In this chapter we set the context by profiling the court file sample, which included 369 files spread fairly evenly over three divorce county courts: one in the North, one in the South and one in the West of England and Wales. The two criteria for selection were that a) a divorce petition had been issued on or after 1 April 2009, and b) a final financial remedy order had been made no later than 31 December 2010, files meeting those criteria then being selected randomly.[58] We outline the dataset in terms of the divorce itself and the background of the parties. Where the data is available, we compare our sample to the nearest equivalents described by ONS. We then summarise the financial circumstances of the parties and the terms of the final financial orders.

2.1 The divorce proceedings

In approximately two thirds of cases, the petitioner was the wife (68%) and in approximately one third, it was the husband (32%).

The most common fact relied on for the divorce was behaviour (in 60% of cases), followed by adultery (20%) and two years separation and consent (16%). 4% of petitions were based on five years separation. None relied on desertion. This pattern was fairly similar to the national picture for all divorces in 2010 but our sample involved a greater proportion of petitions based on behaviour, and smaller proportions based on two and five years separation.[59] One possible reason for this is that our sample was based on cases with a final financial order whereas the ONS figures were based on all divorces regardless of whether there was a financial order or not. Parties seeking financial remedies at the end of the marriage may choose facts which allow them to divorce straight away rather than waiting two years or more; alternatively, cases involving financial proceedings may be generally more contentious than those without.[60]

Where the petitioner was the wife, the petition was more likely to be based on behaviour (67%, compared to 45% where the husband was the petitioner). Where the husband was the petitioner, the petition was more likely to be based on two years separation and consent (25%, compared to 12% where the wife was the petitioner). Both these differences were statistically significant. Whilst the percentages differ, both these features appear consistent with the national pattern for all divorces in 2010, in which wives relied on behaviour more

[58] See Chapter 1 for more detail and Appendix 1 for the methodology, p 187

[59] The ONS figures were: adultery 16%, behaviour 48%, two years separation and consent 25%, five years separation 10%, desertion < 1%.

[60] See Hitchings, E., Miles, J. and Woodward, H. *Assembling the Jigsaw Puzzle: Financial Settlement on Divorce,* [2013] Appendix B who conducted a similar court file survey of cases with final financial remedy orders; their sample also contained a higher percentage of behaviour petitions than amongst the general divorcing population.

often than husbands (55% as compared to 36%) and husbands relied on two years separation and consent more often than wives (32% as compared to 21%).[61]

Of the petitions in our sample which were based on behaviour, 21% included clear allegations of domestic violence. In five out of six of these cases (84%) the wife was the petitioner and cited violence by the husband.[62]

2.2 The marriage and the family background

2.2.1 Length of marriage

Measured to the date of decree absolute, the median length of marriage in our sample was 13 years. Compared to ONS figures[63], the proportion of marriages in our sample that lasted less than 10 years was slightly smaller, and the proportion that lasted 20 years or more was slightly higher. We believe that the difference may be accounted for by the fact that our sample was based on divorce cases with a final financial order whereas the ONS figures include all divorces whether or not a financial order was made. It seems that the slightly longer marriages are more likely to result in a financial order than the shorter ones.

2.2.2 Ages of the parties

ONS also reports on the age of the parties on divorce, again based on the date of decree absolute. Our data did not allow for the adoption of exactly the same measure here.[64] However, based on best available estimates of the parties' ages at the date of the final financial order, the averages in our sample were fairly similar to, but slightly higher than, the national figures for all divorces in 2010.[65] The mean age as at the date of the final order in our sample was 43.3 for wives and 46 for husbands, compared to 41.7 and 44.2 at the date of decree absolute as recorded by ONS. As with the length of the marriage, this possibly reflects the fact that our sample only included divorces in which a final financial remedy order was made.

The pattern of distribution of the parties' ages in our sample was also fairly similar to that for all divorces in 2010, with both wives' and husbands' ages most frequently being within one

[61] ONS Statistical Bulletin, Divorces in England and Wales 2010. http://www.ons.gov.uk/ons/dcp171778_246403.pdf

[62] We checked for allegations of domestic violence in case it had any impact on the incidence of pension orders, which we discuss in Chapter 3, p 22. Our threshold for categorising a petition as including allegations of domestic violence was set quite high: it was whether the behaviour cited clearly included physical assault. Figures here exclude seven cases which appeared borderline, in that the behaviour may not necessarily have included assault but might otherwise be regarded as violent (threats, abuse, intimidation, throwing things). The figures also exclude four other cases in which the data was unclear or missing.

[63] See Table A2.1 Appendix 2, p 195

[64] We calculated ages with reference to the date of the final financial remedy order rather than decree absolute. This was because the most common source of information here was statements of information for consent orders, which asked for age rather than date of birth, and there appeared likely to be a greater nexus with the date of the final order than with decree absolute.

[65] See Table A2.2 Appendix 2, p 195

or other of the bands between 35 and 59. However, the percentage of both wives and husbands in the 50 to 59 band was slightly higher in our sample than in the ONS sample.[66]

2.2.3 Occupations of the parties and whether economically active

Information regarding occupation was available from two sources: the divorce petition and, in most cases in which proceedings had been issued, Form E. This was used to create a variable for which the parties were allocated to groups, based on an approximation of the three class version of the National Statistics Socio-economic Classification (NS-SEC).[67]

Using this measure, approximately a third of wives and almost half of husbands were classified as having managerial and professional occupations (34% and 47% respectively). The wife's occupation was classified as intermediate in 27% of cases, compared with 19% for husbands. Both of these differences were statistically significant. It was not possible to allocate 21% of wives and 17% of husbands to any of the three main classes.[68]

Based on data regarding occupation, we also constructed a variable indicating whether parties appeared to be economically active. Most wives, and most husbands, did appear so (80% and 86% respectively). A greater proportion of wives appeared not to be economically active for reasons other than retirement (19% compared to 9% for husbands). Some of this difference seemed attributable to 7% of wives being described as 'homemaker', 'full time mother' or similar.[69]

There was some variation between locations in terms of socio-economic status. The wife's occupation was less likely to be classified as managerial and professional or intermediate, and more likely to be classified as routine and manual in the South than in the North and West. Her occupation was also less likely to be unclassifiable in the South.

2.2.4 Children of the family

There were children of both parties and/or of the family, of any age, in 257 cases, equal to 70% of cases. In 20% of the total sample, all the children were 18 or over at the date of the final financial remedy order, and in 50%, there were children aged under 18 at that date. In almost half of cases involving children under 18, there were two under 18 (48%).[70]

[66] ONS bands for age in the divorce statistics are 20 to 24; 25 to 29; 30 to 34; 35 to 39; 40 to 44; 45 to 49; 50 to 59; and 60 and over. In our sample, 21% of wives and 27% of husbands were in the 50 to 59 band, compared to 15% and 19% respectively in the ONS statistics.

[67] Due to limitations of the data, and the methods employed, findings using this variable should be treated with some caution. This is discussed at Appendix 1, p 190

[68] See Table A2.3 Appendix 2, p 196 and Appendix 1, p 190 where the reasons for treating parties as not classified are discussed. We were unable to find any national data with which to compare our sample.

[69] Table A2.4 Appendix 2, p 196

[70] Table A2.5 Appendix 2, p 197

In cases in which there were children under 18, the youngest child was under 11 in a majority (61%), and under 16 in nine out of ten cases (89%). Children under 16 at the date of the final financial remedy order featured in 163 cases (44%).[71] Although not directly comparable, patterns regarding the presence of children appeared broadly similar to the national picture for all divorces: ONS figures indicate that in 2010, 50% of divorcing couples had children under the age of 16.[72]

Information on the parent with whom children under 18 would be living after the divorce was available for 153 out of the 183 relevant cases. In four fifths of these (83%) it was the mother/ wife. In 5% (just eight cases) it was the father/ husband. In 12% there were to be some other arrangements; these mostly involved care being either shared or divided between the parties.[73] In cases in which there were children under 16, the percentages were very similar: the children would be living with the wife in 85% of cases, the husband in 4%, and 10% involved some other arrangements.

2.2.5 Cohabitation/remarriage intentions

Based on data from Form Es and statements of information for a consent order, 13% of wives and 20% of husbands disclosed that they intended to cohabit with a new partner, were already cohabiting, intended to remarry or had already done so. This difference was statistically significant.[74] Although this statistic does not tell us how many eventually actually re-partnered, it is of interest in this study given that re-partnering appears to be one of the main factors which helps to improve the economic positions of women following divorce.[75]

2.3 The parties' financial circumstances

2.3.1 Net income

Data on net income was missing in a small number of cases (fewer than 10 each for husband and wife). It was unclear in a number of others: in some cases, only gross figures were given, and in others figures were given without an explicit reference period (e.g. per week, month or year). In some of these cases, it was possible to estimate net income based

[71] See Table A2.6 Appendix 2, p 197 where we put children into four bands approximating to the ages at which children will commonly be pre-school, and move through primary and secondary school.

[72] 59,309 out of 119,589. ONS statistics are based on children under 16, at the date of the divorce petition. The ONS figures show that 44% of divorcing couples with children had one child, 40% had two, 12% had three, and 3% had four children. When banded by age, 21% of relevant children were under 5, 43% were aged 5 to 10, and 36% were aged 11 to 15. ONS, Divorces in England and Wales 2010 Statistical Bulletin, *ibid*

[73] i.e. in some cases, arrangements akin to 'shared residence', in others, one or more children living with one party, and one or more living with the other, which is sometimes referred to as 'split residence'. Of the 30 cases in which post-divorce living arrangements were unclear or missing, the children had previously been living with the wife in 19 cases, with both parties in five cases, and with the husband in one case.

[74] Chi-square test (with Yates Continuity Correction): p = .037. These figures are excluding cases in which information regarding intentions was unclear or missing (11 cases for wives, 15 cases for husbands).

[75] Fisher, H. and Low, H. (2009) 'Who wins, who loses and who recovers from divorce?' in *Sharing Lives, Dividing Assets*, *ibid*

on standard tax rates and allowances, and in others it was felt realistic to assign a reference period based on the available figures and occupations.

In other cases, it was not possible to apply either of these measures. This was mainly due to one or more of (in no particular order): disclosed income including welfare benefits for which there were no figures (and which could not be calculated); figures being given for some sources of income but not others; a mixture of gross and net figures being given; approximate or variable figures being given; income being expressed in foreign currencies; there being discrepancies between figures supplied on different documents on the court file.

Overall, it was necessary to treat the wife's and the husband's net income as missing in 37 and 52 cases respectively. This was equal to 10% for the wife, and 14% for the husband.

In those cases for which figures for both parties were available, the husband's net income was more likely to be the higher of the two: the husband's income was higher in 64% of cases, and the wife's in 35%. Incomes were equal in 1% (three cases).

Median net annual income for wives was £15,300, compared to £21,996 for husbands. This difference was statistically significant.[76]

There was some variation between locations in terms of median incomes. This appeared significant for wives, but not for husbands. Median net income for the wife was lowest in the South, at £13,308 and higher in the North (£15,564) and West (£15,996).[77] The husband's median net income was £21,996 in the North, £23,322 in the South, £21,594 in the West.

2.3.2 The total net value of non-pension assets including the family home ('total net capital')

The total net capital in the matrimonial 'pot', excluding pensions, was calculated by combining net capital disclosed by the wife and by the husband, together with any net equity in the former matrimonial home. [78] It was possible to calculate the net capital in 338 cases (92% of the total sample). In the other cases figures were either missing completely or too unclear to reliably attribute a value. We did not separate out here the wife's net capital from the husband's because some of the assets were jointly owned and for others it was difficult to determine the legal ownership.

Based on those cases where figures were available, the median total net capital was £113,515. There was modest variation amongst the locations on the median total net capital: in the North it was £110,772, in the South £122,400 and in the West £113,515.

[76] Quartile points for the wife's income were £9,144, £15,300, and £22,551. For the husband they were £13,710, £21,996 and £31,284.
[77] A Kruskal-Wallis Test revealed a statistically significant difference across the three locations: p = .016.
[78] Figures here should be treated with some caution due to the quality of disclosure in some cases.

2.3.3 The total cash equivalent value of the pension assets (CEVs)

We discuss the issue of the value of the parties' pensions in more detail in Chapter 3, and the quality of the disclosure in Chapter 4, but briefly state here that it was possible to calculate the total CEVs for the wife's pensions in 48% of the cases in which she disclosed one or more relevant pensions and in 56% for the husband. In those cases the median total of the wife's CEVs was £36,316 and of the husband's, £72,889.

2.4 Financial remedy orders

As well as data on how any pensions were dealt with, we collected data on the main types of provision commonly contained in final financial remedy orders: property adjustments in respect of the family home where it was owned; lump sum payments; and periodical payments. We also collected summary data on whether other property, other specific assets, policies and unsecured liabilities were dealt with. Table 2.1 below summarises the frequency with which such matters featured in final orders.[79]

Table 2.1 Main types of provisions contained in final financial remedy orders

	N	%
Property adjustment in respect of owned family home	300	83.8
Lump sum	180	49.2
Pension orders	51	13.8
Spousal periodical payments	46	12.5
Child periodical payments	60	33.1
Property adjustment in respect of other owned property	52	14.2
Other specific assets excluding policies	180	49.2
Policies	43	11.7
Unsecured liabilities	64	17.5

[79] In respect of the family home and child periodical payments, the figures in Table 2.1 exclude cases in which the relevant provision was not applicable (the family home was rented in eight cases, and there were no children under 18 in 184 cases). In most instances, the figures also exclude two or three cases in which data was unclear or missing (the effect of such cases on the figures was negligible). The totals add up to more than 100% because orders usually included more than one remedy.

2.4.1 The family home

As one might expect, the majority of final orders included provisions in respect of owned former matrimonial homes. As indicated in Table 2.2 below, of the 300 relevant orders, the vast majority were for a sale or for an outright transfer from one party to the other. Just 6% involved arrangements whereby one party was entitled to occupy the home and realisation of the other's interest was deferred to a future event or (in one case) a specified date. Of the 5% which involved other types of disposals most were cases in which the family home was simply to be retained by one party, in whose name it was already was.

Table 2.2 Final order: how family home dealt with

	N	%
Sale	114	38.0
Transfer – outright	153	51.0
Occupation by one spouse and deferred realisation of the other's interest, or similar provision	18	6.0
Other	15	5.0
Total	**300**	**100.0**

In just over half of the 114 cases involving the family home being sold (52%), the wife received the greater share of the net proceeds of sale. The division was equal in 38%, and more in favour of the husband in 11%.[80]

Of the 153 cases involving outright transfers, the family home was transferred to the wife in 60% and to the husband in 40%. Almost a quarter of such transfers (23%) were 'stand alone', in that they were not explicitly in return for some other provision. Two thirds (66%) were in return for a lump sum. In 16 cases (11%) the family home was transferred in return for something else; this mostly involved transfer of other owned property in the opposite direction, in some cases also in conjunction with a lump sum payment.[81]

The 18 cases involving deferred interests provided for one of the parties to occupy the family home until the first of certain 'trigger' events to occur. In most of these cases, it was the wife who would be occupying the family home, and there were children under 18 who would be living with her. Deferment of the parties' ability to realise their interests therefore appeared

[80] These figures exclude ten cases in which the data was unclear or missing, including one case in which the family home was in negative equity.
[81] These figures exclude three cases in which the data was unclear or missing.

designed to allow for the children to continue living in the family home.[82] Trigger events commonly included the occupying party dying, remarrying, cohabiting for a specified period of time, or vacating the property; also, where there were children, the youngest child reaching the age of 17 or 18 or finishing full time secondary or tertiary education. Such provisions, known as '*Martin*'[83] or '*Mesher*'[84] orders, were usually formalised either by means of a transfer into the occupying spouse's sole name with a legal charge in favour of the other spouse (known as a 'chargeback'), or the property remained in joint names with a trust for sale. Both of these mechanisms would have defined the respective spouses' shares, which would not necessarily have been equal.[85]

Overall, there were 136 cases in which there were children under 16 and in which the owned family home was dealt with in the final order. In 82 of these, there was either an outright transfer or a *Mesher*-type order, and in 51 of these cases it was clear that the family home would be occupied by the party with whom the children would be living.[86]

2.4.2 Lump sums

Of the 180 cases in which lump sums featured, the wife was the recipient in 61%, and the husband in 38%.[87]

One half of lump sums (50%) were straightforwardly expressed as being in return for a transfer of the former matrimonial home. The others were fairly evenly divided between those which were stand alone provisions (26%) and those which were in return for one or more other provision (24%). Such provisions included the division of other specific assets such as other property, policies or bank accounts; in 15 cases, the lump sum was linked to disposal of the family home as well as other assets. There was just one case in which a lump sum was expressly referred to as forming part of an offset in respect of the parties' pension assets.

2.4.3 Spousal periodical payments

Spousal periodical payments were in favour of the wife in 43 of the 46 cases (94%) in which they were ordered, and in favour of the husband in three cases. The terms of orders provided for a variety of durations.[88] In eight cases,[89] spousal periodical payments were

[82] This was so for 13 of the 18 cases, and appeared likely to be so in a further two cases. In one case the wife was to occupy the family home and residence was to be shared. In two cases, the wife was to occupy the family home and there were adult children; in one of these, the child was 18 and would be living with the wife, and in the other the adult child was described as independent.

[83] *Martin v Martin* [1978] Fam 12; [1977] EWCA Civ 7

[84] *Mesher v Mesher and Hall* [1980] 1 All ER 126

[85] The associated deeds would normally also include terms as to payment of the mortgage and other outgoings, maintenance and repairs, arrangements for sale etc

[86] This was the wife in 47 cases and the husband in 4 cases.

[87] In one other case, the lump sum was payable to children of the family; in another, it was payable to a third party, and in a third case, lump sums were payable to both parties.

[88] Figures regarding duration of payments exclude six cases in which data was unclear or missing (either because it was missing or unclear on the court file or because of data collection omissions.)

temporary measures, for example ceasing on sale of the family home or on implementation of a pension order, or linked to the wife securing employment.[90] In ten cases, the payments were for fixed terms of less than ten years,[91] and in a further eight cases they were for fixed terms of ten years or more. In several of these, the longer duration of spousal periodical payments was linked to the duration of periodical payments in respect of children. However, in six of the cases with fixed terms of ten years or more, payments were to be nominal.

In 14 cases, spousal periodical payments were potentially for life, as they were open-ended, ceasing only on certain 'trigger' events which included the death of either party. However, the other trigger events were ones which were much more likely to occur before death – remarriage, cohabitation for a defined period, and/or the youngest child reaching 18 or completing full time education. Furthermore, in eight of these cases, payments were nominal (for example £1 per annum).[92] Therefore, there were just six cases (less than 2% of the total sample) in which spousal periodical payments appeared designed to provide a substantive income potentially for life (all in favour of the wife). The amounts in these cases ranged from £3,000 to £24,000 per annum.[93]

In general it was not possible to calculate with any reliability what the net income effect of the final orders would have been following the divorce, mainly because, as is apparent in the next paragraph, the arrangements for child support were often not specified in either the order or the financial statement. However, it seems likely, given the difference in total net incomes between the wives and the husbands and the rarity of substantive spousal periodical payment orders, that the husband's net income would have remained higher than the wife's more often following the divorce.[94]

---

[89] These included two of the cases in which payments were in favour of the husband.

[90] In this case, the wife was studying for a professional qualification, and it appeared to be presumed that she would have her own earning capacity in the near future, which would negate the need for maintenance; periodical payments were to last for approximately a year, or until six months after she secured employment.

[91] Included in these ten cases was one in which payments were fixed for three years, then became nominal for a further 12 years.

[92] Including the third case in which payments were in favour of the husband.

[93] In all but one of these cases the wife was in her 40s or 50s and on a low income compared to the husband, the marriage had lasted at least 14 years and their total net capital was relatively substantial. The husband was a company director in all but one of the cases, and in all but two cases his pension assets were modest. In both of the cases in which the husband's pension was substantial (one of approximately £180,000 and the other £480,000) the wife appears to have received other capital assets in lieu of a share in it. The sixth case was a consent order and somewhat of an anomaly: the wife was aged 34 and the husband 38; they had been married for eight years and had two children aged five and two; the wife had a modest pension and the husband apparently none; neither party was legally represented but she was a legal executive and he was a car salesman and they were on similar net incomes. There was no periodical payments order in relation to the children but one in favour of the wife for £3,000 per annum net.

[94] Analysis based on data from the first fifteen years of BHPS comprising approximately 5,000 households, Fisher and Low have shown that there are marked differences between men's and women's income following divorce: the income of men increases by about 23% whilst the income of women decreases by about 31%, 'Who Wins, Who Loses and Who Recovers from Divorce?' in Miles, J. and Probert, R. (eds), (2009) *ibid*

2.4.4 Periodical payments for children

Periodical payments for children featured in 60 of the 183 cases in which there were children under 18 at the date of the final financial remedy order (33%).[95] In all of these cases, the payments were to be made by the husband to the wife. Such orders can only be made by consent and therefore do not reflect the overall likelihood of payments being made for the children. In addition, in many cases, payments would have been made through the Child Support Agency or under a voluntary arrangement but these details were often not available on the court files.

2.4.5 Property other than the family home

The 52 cases in which property other than the family home was dealt with included 14 in which there were two or more other properties. Overall, these cases involved a mixture of orders for sale (10 cases), transfer (22 cases) and other disposals (20 cases). These other disposals mostly involved properties being retained by one party in whose name they already were, but also included a case in which a property was to be placed in trust for children, and cases in which there was more than one other owned property and the disposals were varied.[96]

Overall, the split between who benefited from disposals in respect of other properties was quite even: in 15 cases it was the wife, in 17 cases the husband, and in 17 cases both parties.

2.4.6 Other specific assets (except policies)

Although other specific assets were dealt with in 180 cases, in 81 of these (45%), the only relevant provision related to the contents of the family home and/or contents of other property. Here, orders commonly provided simply that the contents should be retained by the party in whose possession they were, or should be divided by agreement between the parties.

Other specific assets dealt with most often, included bank accounts (43 cases), vehicles (33 cases), and investments and savings (26 cases).

2.4.7 Policies

Of the 43 cases in which policies were dealt with, 10 involved their being surrendered and/or the proceeds being divided on maturity in the very near future. Policies were assigned or retained for the benefit of one or both the parties in 28 cases, and dealt with in some other way (such as being placed in trust for children) in four cases.[97]

[95] This is excluding three cases in which data on child periodical payments was unclear or missing.
[96] E.g. one property was sold and the other transferred or retained.
[97] These 28 cases included one in which new policies were to be taken out. The nature of the disposal in one case was unclear.

2.4.8 Pensions

Pension sharing orders were made in a total of 51 cases, representing 14% of the total sample and 17% of the cases which disclosed one or more pensions other than the basic state pension.[98] In all but two cases, the pension sharing orders were made in favour of the wife; however, in the vast majority of cases, no orders were made in respect of the pensions other than dismissal and in most of those cases, that meant that the husband retained the greater proportion of the total value of the pensions.

2.4.9 Unsecured liabilities

The 64 cases in which unsecured liabilities were addressed covered a wide range of borrowing, including: overdrafts; loans; credit, charge and store cards; informal loans from family or friends; statutory liabilities such as tax; legal costs; and liabilities arising from businesses. It was not possible to consistently identify from final orders the amounts involved, who had previously been responsible, or who was to assume greater responsibility for discharging these liabilities (in several cases, debts were to be settled from the proceeds of the sale of the family home, before the net proceeds were divided).

2.4.10 Costs

In almost all cases (98%) costs in respect of financial remedy matters were clearly addressed on the face of the final order. Where costs were addressed, the vast majority of orders were either 'No order for costs' (71%) or for each party to bear their own costs (22%). Just 24 cases (7% of all cases) included an order that one party pay all or part of the other's costs (most often involving the husband paying), or some other order such as costs to be shared equally. [99]

2.4.11 General note

The overall net effects of the final orders appeared to be that the wife benefited more often from the property and capital provisions. Despite the fact that she was also more often the beneficiary of pension and periodic payment orders, the husband retained a larger share of the combined net income and of the total pension pot more often than the wife.

2.5 Key points

- **The wife was the divorce petitioner in two thirds of whole sample, the husband in one third; 60% of petitions were based on behaviour, 20% on adultery, 16% on two years separation and 4% on five years separation**

[98] See Chapter 3 for a detailed comparison between the cases in which pension orders were made and those which disclosed relevant pensions but no pension orders were made, p 37

[99] The actual amount of the costs, however, was so infrequently specified that we did not attempt any analysis on that point.

- **The median length of the marriage was 13 years; the mean age at the date of the final order was 43.3 for wives and 46 for husbands; approximately one third of wives and half the husbands were in a managerial or professional occupation; 80% of wives and 86% of husbands were economically active**
- **In 70% of cases there were children of any age; in 20% they were all over 18 and in 50% under 18; in about four fifths of the cases the children were to live with the wife following the divorce, 5% with the husband and 12% in another arrangement such as shared care**
- **20% of husbands said they were intending to remarry or cohabit, or were already doing so, compared to 13% of the wives**
- **The median net income for wives was £15,300 per annum and for husbands £21,996; median combined total net capital including the family home was £113,515; the median of the wife's total pension CEVs was £36,316 and for the husband £72,889**
- **The wives benefited from the property and capital provisions in the final order more often than the husbands; the husbands retained a larger share of the combined income and pensions more often than the wives.**

Chapter 3: Cases Disclosing Pensions and Cases with Pension Orders

In this chapter we identify from the court file survey the key features of the cases in which pension orders were made ('pension order cases'). We start with the basics of how many cases out of the total sample of 369 disclosed any pension other than the basic state pension ('pension cases'). We then move on to how many pension orders were made, what sort of orders they were and who was sharing with whom. We compare pension cases with pension order cases as a way of identifying the circumstances in which pension orders were most likely to be made, taking as our base sample here those 293 court cases which disclosed one or more relevant pensions. At each stage, we consider the comments of the practitioners and judiciary, the factors which they saw as most relevant when they considered the issue of pensions, and the characteristics of the cases they thought most likely to result in a pension order.

3.1 The court file survey and pension membership

One of the reasons commonly advanced to explain the relative rarity of pension orders is simply that many divorcing parties do not have any pensions. In this first section, therefore, we address the question of how many wives and husbands out of the total sample of 369 disclosed any relevant pensions. By 'relevant pensions' we mean any pension other than the basic state pension. We excluded the basic state pension mainly because it is one of the very few types of pension which cannot be the subject of a pension order. We treated all other pensions as relevant, including the additional state pension ('ASP'). We use the word 'disclosed' here advisedly: for these purposes we had to rely on what the parties or their representatives disclosed by way of pension provision. The quality of that disclosure is discussed in more detail in Chapter 4. We analyse pension membership in terms of gender, age, socio-economic class, net income and court location. The differences referred to below are statistically significant unless otherwise stated.

3.1.1 The number of parties who disclosed relevant pensions

One or both parties disclosed one or more relevant pensions in 80% (293) of the total sample of cases. 20% (75) had none.

3.1.2 Pensions and gender

As shown in Table 3.1 below, the most common scenario, which applied to almost half of cases in the survey sample, was that both parties had relevant pensions. However, cases in which the husband had relevant pensions and the wife did not were twice as frequent as those in which the position was reversed.[100]

[100] This table excludes one case in which it was unclear whether any pensions were disclosed.

Table 3.1 Who, of the husband and wife, disclosed relevant pensions?

Who disclosed relevant pensions	N	%
Both parties	176	47.7
Husband only	81	22.0
Wife only	36	9.8
Neither party	75	20.3
Unclear/ missing	1	0.2
Total	**369**	**100.0**

Overall, the wife had one or more relevant pensions in 212 cases (58%), and the husband in 257 cases (70%).

3.1.3 Pension values and gender

It was possible to calculate the total of the cash equivalent values of the wife's pensions in 101 (48%) of the 212 cases in which she disclosed one or more relevant pensions and in 145 (56%) of the 257 cases in which the husband disclosed one or more relevant pensions. For those which we could calculate, the median for the total value of the wife's pensions was £36,316, with the highest being £1,396,882. The median for the total value of the husband's pensions was just over double the wife's at £72,889, with the highest being £806,388.

3.1.4 Pensions and age[101]

Looking at both parties within the total sample, those who had relevant pensions were slightly older than those without. The median ages for wives and husbands who had relevant pensions were 44 and 46 respectively, compared to 42 for both wives and husbands who had no relevant pensions. Although in simple numerical terms, the differences between medians were fairly small, both were statistically significant.[102]

Similarly, as shown in Table 3.2, when the parties were split into three age groups, fewer than half (44%) of the wives under the age of 35 at the date of the final order had any

[101] Age is age as at the date of the final financial remedy order (see Chapter 2, p 15).
[102] Mann-Whitney U Test: for wife, U = 13,152, z = -2.657, p = .008; for husband, U = 9016, z = -4.474, p < .001.

relevant pensions compared to 70% of those over the age of 55. For husbands, 57% under the age of 35 had relevant pensions compared to 86% of those over 55.[103]

Table 3.2 Who disclosed relevant pensions by age at the date of the final financial remedy order

Party	Whether disclosed relevant pensions	Age at date of final financial remedy order							
		Under 35		35 to 54		55 and over		Total	
		N	%	N	%	N	%	N	%
Wife	Yes	28	44.4	151	59.0	28	70.0	207	57.7
	No	35	55.6	105	41.0	12	30.0	152	42.3
	Total	63	100.0	256	100.0	40	100.0	359	100.0
Husband	Yes	24	57.1	162	68.6	65	85.5	251	70.9
	No	18	42.9	74	31.4	11	14.5	103	29.1
	Total	42	100.0	236	100.0	76	10.0	354	100.0

3.1. 5 Pensions and socio-economic classification by occupation

Based on the total sample of court cases, there was an association between the parties' socio-economic classification[104] and pension membership. As indicated in Table 3.3, which excludes parties whose occupations could not be classified, both wives and husbands had relevant pensions most often when their occupations were classed as managerial and professional (77% and 81% respectively) and least often if they were classed as routine and manual (37% and 49%).[105]

[103] The differences for the under 35 age groups were statistically significant for both wives and husbands, the difference for the 55 and over groups was significant for husbands but not quite significant for wives. (Chi-square test: for wives p = 0.028, for husbands p = .002, adjusted standardised residuals for wives under 35 = -2.3, for husbands under 35 = -2.1, for husbands 55 and over 3.2, for wives 55 and over = 1.7)

[104] Socio-economic classification in this report is based on an approximation of the occupation-based National Statistics Socio-economic Classification (NS-SEC). Appendix 1 explains how this was derived, p 190

[105] Chi-square test: p < .001 for both wives and husbands. (Adjusted standardised residuals for managerial and professional, for wives = 4.4, for husbands = 3.8, for routine and manual, for wives = -5.0, for husbands = -4.4)

Table 3.3 Who disclosed relevant pensions by socio-economic classification

Party	Whether disclosed relevant pensions	Socio-economic classification							
		Managerial and professional		Intermediate		Routine and manual		Total	
		N	%	N	%	N	%	N	%
Wife	Yes	98	77.2	61	62.2	24	36.9	183	63.1
	No	29	22.8	37	37.8	41	63.1	107	36.9
	Total	127	100.0	98	100.0	65	100.0	290	100.0
Husband	Yes	141	80.6	50	70.4	29	49.2	220	72.1
	No	34	19.4	21	29.6	30	50.8	85	27.9
	Total	175	100.0	71	100.0	59	100.0	305	100.0

3.1.6 Pensions and annual net income

Those who disclosed pension provision tended to have higher net incomes than those who did not. The median net income for wives with pensions was £18,000 per annum compared to £13,200 for wives with no pension provision.[106] Similarly, the husband's median net income was higher, at £24,000, in cases in which the husband had relevant pensions, and lower, at £15,678,[107] in cases in which he did not.[108]

Wives were least likely to have pensions if their annual net income was within the first (lowest) or second quartiles (51% and 49% respectively), and most likely to have pensions if their income was in the fourth quartile (81%).[109][110] Similarly, husbands were least likely to have pensions if their annual net income was within the first quartile for husbands (49%) and most likely to have pensions if their income was within the third or fourth quartiles (81% and 87% respectively).[111]

[106] The gross equivalents are very approximately £24,000 and £17,000 respectively.
[107] The gross equivalents are very approximately £33,000 and £21,000 respectively.
[108] Mann-Whitney U Test: for wife, U = 9,500, z = -4.357, p < .001; for husband, U = 6,215.5, z = -5.723, p < .001.
[109] Quartile points for the wife's net income were £9,144, £15,300, and £22,551.
[110] Chi-square test: p < .001. (Adjusted standardised residuals for first quartile = -2.0, for second quartile = -2.3, for fourth quartile = 4.5)
[111] Quartile points for the husband's net income were £13,710, £21,996 and £31,284. Chi-square test: p < .001. (Adjusted standardised residuals for first quartile = -4.7, for third quartile = 2.3, for fourth quartile = 3.8)

3.1.7 Pensions and capital wealth (excluding pensions)

Combined net capital wealth[112] in cases in which either or both parties disclosed pensions tended to be much higher than in those cases in which neither party disclosed a pension, the median in the former being over three times higher (£145,750) than the latter (£40,309).

3.1.8 Pensions and the basis of divorce

We looked briefly, and without testing for significance, at whether there was any apparent association between pension membership and the fact used to prove the breakdown of the marriage. We could see no obvious associations or anomalies, save i) a slightly higher proportion of cases in which the basis of divorce was two years separation / consent disclosed pensions than across the sample in general (85% compared to 80%); ii) in contrast, a lower proportion of cases with behaviour petitions which included allegations of domestic violence disclosed pension ownership than across the sample in general (69% compared to 80%).

3.1.9 Pensions and court location

There was little variation amongst the court locations in terms of whether the parties disclosed any relevant pensions. The percentage of cases in which neither party had pensions was 16% in the North, 21% in the South and 23% in the West; however the differences here were not statistically significant. Similarly, there were no statistically significant differences between the court locations in terms of the proportions of cases in which wives, husbands, or both parties had relevant pensions.

There were, however, some differences[113] between the locations in the total value of both the wife's and the husband's pensions as shown in Table 3.4. The total median value for both wives and husbands was lowest in the South and highest for both wives and husbands in the West. In the North the total median value for wives and husbands was closest to the overall median and the gap between the wife's and the husband's values was the widest. We discuss the differences between the locations and court cultures in more detail in Chapter 7, but observe here that these values appear to be somewhat at odds with those given later in this chapter where we discuss the circumstances in which pension orders were most likely to be made.

Table 3.4 Total Pension CEVs (£) for Wives and Husbands by Location

Location	Wife CEV median totals (£)	Husband CEV median totals (£)
North	37914	80441
South	24796	56644
West	54857	82734
Total	36316	72889

[112] Net capital wealth includes the total of all capital assets including the family home disclosed by either party.
[113] These figures should be viewed with some caution given the substantial number of cases where the pension values were either missing or unclear, and they have not been tested for significance.

3.2 Key features of pension order cases: the court file survey and the views of practitioners and District Judges

3.2.1 The number of pension order cases

Pension orders were made in 51 of the court cases which we surveyed. This equated to 17% of the 293 cases in which either or both parties had any pensions other than basic state pension, and just under 14% of cases overall.[114]

The Judicial and Court Statistics for 2010[115] show that pension orders represented 12% of all financial remedy disposals, approximately 1.5% less than our sample. The difference may be partly accounted for by the fact that the Judicial Statistics include interim and maintenance pending suit orders in the figures for financial remedy disposals, whereas our sample was restricted to cases with final orders only.[116]

The response of the practitioners to the relatively low number of pension orders ranged from no surprise at all to astonishment.

> *So 9 out of 10 times, I think you will get people, if they can avoid a pension share, they will.*
>
> *I found that figure quite astonishing, mainly because it doesn't reflect my caseload and my experience.*

One of the Northern judges, who specialised in financial remedy work, also expressed surprise at the low number: it was his experience that about one in four final orders contained pension orders.

3.2.2 The type of pension order

All of the pension orders made in the court file sample, other than those simply dismissing pension claims, were for pension sharing. We found no orders for pension attachment of any kind (or indeed, any evidence that attachment orders had been proposed or applied for).

Practitioners' views on pension attachment orders reflected the results of the court file survey: pension sharing was by far and away the preferred option and there was widespread agreement amongst practitioners that pension attachment was rarely if ever appropriate. Pension attachment was described as 'unfashionable' and/or 'unpopular' with practitioners, judiciary and clients alike. Only one practitioner had acted in a case including a pension

[114] Unless we indicate otherwise, all differences reported were statistically significant.

[115] Judicial and Court Statistics 2010 Chapter 2 Family Matters Table 2.6, p. 54. (see footnote 28, p 6.) This does not allow an exact comparison because the Judicial Statistics give numbers of 'disposals' and there may be more than one disposal for every financial remedy (financial remedy) order. Later statistics are available but we give the ones for the period which is closest to that of our sample.

[116] See also later in this chapter, ***Cases with more than one pension order page, p 33*** **-** our percentages are very similar to those for the Judicial and Court Statistics for approximately the same period.

attachment order within the last year, and although a few others might have considered it, most could not remember doing any, if at all, for many years.

> *I avoid attachment like the plague if I can.*
>
> *No, not done an attachment, earmarking for a long time. The courts just… I think the courts have almost forgotten that they exist.*
>
> *It's just not something which I've ever been trained to consider really I suppose.*

Some of the reasons given for why attachment was so unpopular compared to sharing included the uncertainty of what would happen if the pension member died or the beneficiary of the pension order remarried, the beneficiary's lack of control, the sense that it would be unfair for the spouse to benefit from increases in the pension member's pension after the divorce, and above all the lack of security or finality for both.

> *I think the hard part about the attachments is that you're still linked, and by and large people want to be able to walk away and say 'done it, don't want to see you again' [laughs].*
>
> *I haven't done a pension earmarking order for the last I can't remember how many years because it doesn't get us where we need to get usually in terms of finality and certainty for the clients, either party.*

The rare circumstances in which attachment orders were considered potentially appropriate included attaching death in service benefits to protect spousal or child maintenance, and income attachment for an older spouse who had poor life expectancy, who was unlikely to remarry and/or where a pension sharing order might lead to loss of benefits. But of those few who said they had considered, or might consider a pension attachment order in such circumstances, all expressed reservations about the attachment arrangements. They described them as being '*not ideal*', '*unwieldy*', '*complicated*', less 'clean' than a pension sharing order or worse.

On the whole the judges took a similar view. Two recalled making a pension attachment order before pension sharing had been introduced but most had not come across any pension attachments for years and none within the last 12 months.

> *SDJ2: I'm not tending to come across them as a Judge and I'm not sure that practitioners are necessarily thinking of them, to be honest...That's the trouble with attachment. Attachment was seen as a half baked attempt to do something about pensions which was then improved upon with sharing, so I think it was seen as, well we've dumped that in the bin now really, and the one area where you perhaps need attachment is in relation to death benefits. I think it just got overlooked but I think any tinkering anybody does with it is just as likely to make it worse as make it better.*

Given that the court file survey revealed no pension attachment orders at all, and that the practitioners when talking about pension orders almost always meant pension *sharing*

orders, all further references to pension orders in this chapter will mean pension *sharing* orders unless we specify otherwise.

3.2.3 Who was sharing the pension with whom?

In all but two of the 51 cases in which pension orders were made, it was the husband who was sharing one or more of his pensions, with the wife being the recipient.

Two cases involved the wife sharing a single pension with the husband. In the first of these, the marriage had lasted 12 years; the wife was in her early 40s and the husband in his early 50s; her annual income was double that of the husband; and the wife had a public sector occupational pension with a CEV of approximately £180,000, whereas the husband disclosed none. However, the order, which was by consent, gave the husband only a 15% share of the wife's pension and it was not possible to identify from the court file the basis on which that percentage had been arrived at. In this case there were no children. The only other matrimonial asset appeared to have been the former matrimonial home, which had been sold and the net proceeds divided equally, therefore offsetting appears unlikely to have been involved. We might speculate, in view of the parties' ages, that the wife had acquired a proportion of her pension pre-marriage, and may have argued that that should be excluded from the calculations**.**

The second case, also by consent, involved a long marriage; both parties were in their late 50s, and they had similar occupations and incomes. Each had similar types of pensions, with CEVs in excess of £0.5m each, but the wife's CEV was greater. A 10% share of the wife's pension meant that she would be left with 51% of the combined pension 'pot' and the husband with 49%. In this case, there were also no children. The capital assets excluding pensions were also substantial and the order appeared to have had the effect that the wife was left with approximately 55% and husband with approximately 45%.

3.2.4 Cases with more than one pension order

Of the 51 pension order cases, 39 (77%) involved a single pension being shared. Six cases involved two pension shares and six cases involved three or more, including one case which involved six and one case which involved seven. A total of 80 pension orders were made across the whole sample.[117] The 12 cases involving more than one pension share all involved the husband sharing pensions with the wife.

Practitioners and judges on the whole tended to favour sharing just one pension where several pensions existed in any one case, principally to keep it simple and to minimise the

[117] This represents 21.7% of the total sample, which is the equivalent of the Judicial Statistics for the closest period (2010) See Table 2.9 https://www.justice.gov.uk/downloads/statistics/courts-and-sentencing/csq-q4-2012/csq-q4-2012-tables.xls

implementation fees charged by the pension administrators. Here are the views of two of the judges:

> *NDJS: You may find that they're able to say, 'right, okay, we'll have that one transferred, and that one keeps [this one]', rather than sharing, because you don't do bits of sharing.*
>
> *SDJ1: And you would certainly try to limit the number of pensions, insofar as you possibly could, the number of pensions across which you would do a pension sharing order. So if someone's got four pensions, you would try to make sure that you can do it with one pension, and if you can't do it with one, if you can transfer one completely, that's a lot more clean than trying to give you 25% of all of them.*

However, if the pensions were of different types, for example defined benefit and defined contribution, and of sufficient value, only a minority of practitioners suggested they would just add up all the CEVs and share the biggest one in a way that gave each party an equal capital share; the general consensus was to consult an expert for advice on which one(s) should be shared. One practitioner suggested it might be appropriate to share them all:

> *Well there is a school of thought that you should share them all, because then you share the good assets and the bad assets. Usually cost is a factor, because if it's quite a small pension the cost of splitting it can be a few thousand, which is not cost effective. So we'll look at all of the assets. If there are a considerable number of pensions and a lot of money in them we'd look to get an actuarial report, and ask them what would be the best outcome for the client.*

We could not tell for sure whether an expert had been instructed in any of the cases involving more than one pension sharing order except for one case where an expert clearly had been involved.

3.2.5 The pension share percentages

In those cases involving a single pension share, the percentage share was most often 50% (in seven cases), followed by 100% (in four cases). Other than this, there was a wide variety of percentages involved, ranging from 10% to 81%. In five cases the percentage was very precise, to two or three decimal places (for example 31.76 and 55.637). We think it likely that a pension expert was instructed in these cases and that the percentage was designed at least in part to achieve equality of income.[118] It should be noted here that a 50% share of the CEV rarely produces equality of income because of the different life expectancies for men and women, thus a wife with a 50% share would be likely to receive a lower pension income than a husband.

[118] See also Chapters 5, p 68 on the Role of the Pension Expert and Chapter 6, p 81 for a discussion of the objectives of pension orders and equality of pension capital or pension income.

Overall, of the 39 cases which comprised only one pension share, excluding those 11 cases where the percentage share was either 50% or 100%, 15 involved orders for between 10% and 49%, and 11 cases between 51% and 81%.[119]

3.2.6 The value of the pension assets

It was possible to calculate the combined capital value of the parties' pension assets, based on disclosure being clear in relation to CEVs for both parties, in 33 of the 51 pension order cases. The range of values here was very wide: from approximately £4,000 to a little more than £1.2m. However, these values were outliers, particularly the lowest one. The combined values were below £50,000 in only two other cases. Similarly, there were only two other cases in which the combined values were more than £750,000. The median combined value of the parties' CEVs for these 33 cases was £290,000.

The total value of the pension assets held by individuals whose pensions were being shared was clear in 41 cases. Here, the range was again very wide, from approximately £4,000 to just over £800,000. Again the lower figure in particular was an outlier; the party relinquishing a share of their pension(s) had total CEVs of below £50,000 in only three other cases. The larger value was less of an outlier; there were eight cases in which the party relinquishing a share had total CEVs in excess of £500,000. The median was approximately £235,000.

Later in this chapter we show how the pension values in cases with pension orders compared to those with pensions but no pension orders.

3.2.7 Disparities in pension values

In almost all of the 33 pension order cases in which CEVs were available for both parties, there was a substantial disparity between the values of their respective pensions. In 13 cases, the party receiving the pension share had no pension of their own. In a further nine cases, the receiving party had 10% or less of the combined value prior to the order being made, and there was only one case in which the receiving party had more than approximately one third of the combined value.[120]

3.2.8 The value of pension assets relative to non-pension assets and the total pot

As discussed elsewhere in this report,[121] it is not possible to equate pension asset values with non-pension asset values. Nevertheless, it seemed that where pension orders were made, the value of the parties' combined CEVs tended to be substantial when compared to the value of the non-pension assets or when viewed in the context of the parties' overall joint wealth. In 17 of the 33 cases in which CEVs were available for both parties, the value of the

[119] These figures exclude one case in which the pension share was to be determined by a formula, and one case in which the percentage share was unclear because the pension annex was missing.
[120] This was one of two cases in which it was the wife whose pension was being shared, discussed earlier in this chapter.
[121] See for example Chapter 1 The current law, *Pensions on divorce*, p 2

combined CEVs was at least as great as the total net value of the non-pension assets, and in a further nine cases it was equal to at least 50%.[122]

The value of the pension assets, their value relative to the non-pension assets and the disparity in value between husband and wife, were seen as the key issues by one DJ:

> *NDJM: Well, I mean, the starting point is going to be the disclosure in the Form Es, is going to be the size of the pension, and pension disparity... So, you've got (a) the size of the pension, and (b) the size of the pension compared with the other assets.*

What value the pension pot needed to be in order to justify a pension order was a factor which elicited a great deal of variation amongst practitioners. Some declined to comment at all and others found the question difficult to answer. Where practitioners gave a figure, it tended to relate to what they would regard as significant enough to take the pension into consideration and not necessarily what would lead to a pension order. The figures given ranged from £15,000 to £300,000, the lower figure being given by a practitioner who had a mixed, including publicly funded, caseload, and the higher figure by two practitioners who were working principally with high net worth clients.

> *Any pension really that has a cash equivalent transfer value over about £15-£20,000 is worth looking at.*
>
> *I mean, to be quite honest, in some of the big cases we deal with, a pension fund of £200-£300,000 can be insignificant in the scale of a £10M/£20M asset pot, and it just gets lost in the wash.*

However, the figure which came up most often as a possible threshold for significance was £50,000.

> *… it's hard to say what the cut-off would be, but if there's a pension of £50,000 then I'd be paying attention, just to make sure that we're dealing with the issues as we should be doing.*
>
> *What do I consider as significant ... That is always terribly, terribly difficult. You know, the significance I suppose starts at about say £50,000 upwards...*

The judicial perspective on the factors which might determine whether or not a pension was going to be significant in any one case was similar to the practitioners' and all mentioned the value of the pension as important. Only one District Judge would admit to any threshold (£50,000) below which he might treat a pension as insignificant, save for the purposes of death benefits and possibly pension lump sums.

> *SDJ2: That is a sort of difficult one. I suppose the other thing, with regard to pension orders, is to what extent you've got parties with differing pensions. If you've got two parties, both with CETV's of about £200,000, then generally you would tend to think it wasn't much of a pension case because of the balancing factor and, again, if you are*

[122] See Chapter 2, p 18 and earlier in this chapter, p 30 for a summary of the total net capital and how this was calculated.

talking about the lower value ones, then if both have got pensions, then that sort of shifts it. I find that people will bother with pensions over the transfer value of £20,000. I think you've got to take notice of them when it's £50,000 it seems to me. Below £50,000, particularly if they're not all in one hand, then you're more likely to be saying, well we're not looking, but then the forgotten death benefit, which is not the subject of a sharing order, but could be subject to attachment, can still be quite important.

3.3 A comparison between cases with pension orders and cases with relevant pensions but no pension orders: the court file survey, and the views of practitioners and District Judges

At the beginning of this chapter we identified from the court file sample some of the factors which were associated with whether a party had any pension rights at all and whether they were members of a pension scheme other than the basic state pension. We turn now to look at these and other factors which appeared to be associated with the making of pension orders and at some of the comments of the practitioners and judges in relation to each factor.

3.3.1 Ages of the parties

The court file survey showed that both the wives and the husbands tended to be older in cases in which pension orders were made. The wife's and husband's median ages at the date of the final financial remedy order were both 51 in cases where pension orders were made, compared to 42 and 45 respectively in cases in cases with pensions but no pension order.[123]

Table 3.5 shows the rate of pension orders based on the parties' ages being grouped into three bands,[124] with the highest percentage of orders in the highest age band and the lowest percentage in the lowest age band.

[123] Mann-Whitney U Test: for wife, U = 2984, z = -5.518, p < .001; for husband, U = 4096.5, z = -3.475, p = .001.
[124] Chi-square test: p < .001 for wife, and p = .029 for husband.

Table 3.5 Age at date of final financial remedy order/whether pension order made (Base: cases in which relevant pensions disclosed)[125]

		Under 35		35 to 54		55 and over	
		N	%	N	%	N	%
Wife	Pension order	1	2.3	35	16.8	14	38.9
	No pension order	42	97.7	173	83.2	22	61.1
	Total	43	100.0	208	100.0	36	100.0
Husband	Pension order	1	3.2	33	17.7	17	25.4
	No pension order	30	96.8	153	82.3	50	74.6
	Total	31	100.0	186	100.0	67	100.0

There was one pension order case in which both the wife and husband were under 35. This was an atypical case, in that both parties were aged 30. There were only three other cases in which pension orders were made and in which either party was younger than 40: one in which the wife was aged 39, and two cases in which the husband was 39. The oldest wife benefiting from a pension order was 68, and the oldest husband sharing his pension (in the same case) was 69.

The data supported the practitioners' view that age was a significant factor when considering pensions on divorce. Where practitioners gave more detail, it was fairly common ground that couples aged 40 to 50 and upwards would be the ones for whom pensions would be most significant.

The District Judges tended to take a similar view:

> *WDJ2: The age of course is crucial... if you've got someone coming in, 22/23, in today's world they're going to be working until they're 70 probably realistically, so it's not going to play the same degree of importance as if someone comes in at the age of 45/50 and they've been married for a long period of time, because they could have acquired significant pension contributions.*

[125] Totals in this table sum to less than 293 cases due to the wife's or husband's age being unclear or missing in 6 and 9 cases respectively in which relevant pensions were disclosed. One of the cases in which the wife's age was unclear or missing was a pension order case.

3.3.2 Length of marriage

The court file sample confirmed that cases in which pension orders were made tended to involve much longer marriages than those without pension orders. The median length of the marriage (measured to the date of the final financial remedy order) was 25 years in pension order cases, compared to 11 years in the other cases in which relevant pensions were disclosed.[126]

Table 3.6 shows whether or not a pension order was made according to the length of the marriage, which was collapsed into three bands approximating to 'short', 'medium' and 'long'. No pension orders were made in cases in which the marriage was 'short'. In contrast, pension orders were made in a third of the cases involving 'long' marriages.[127]

Table 3.6 Length of marriage at date of final financial remedy order/whether pension order made (Base: cases in which relevant pensions disclosed)[128]

	Short (under 5 years)		Medium (5 to 14 years)		Long (15 years and over)	
	N	%	N	%	N	%
Pension order	_	_	6	5.4	45	33.1
No pension order	44	100.0	106	94.6	91	66.9
Total	44	100.0	112	100.0	136	100.0

Although there were no cases involving 'short' marriages in which pension orders were made, there was one pension order case in which the marriage had lasted for slightly less than six years (classified as 'medium').[129] The next shortest marriage where a pension order was made was 11 years. Long' marriages were a feature of 88% of the cases involving pension orders, compared to 36% of the cases in which no pension order was made.

Practitioners and District Judges were less specific about the length of the marriage than they were about age; the general view was simply that the longer the marriage the more significant the pension became. One suggested that the pension would be taken into full account for a marriage of anything over four or five years.

There was, of course, a strong correlation between the parties' ages and the length of the marriage.

[126] Mann-Whitney U Test: U = 2328.5, z = -6.972, p < .001.
[127] Chi-square test: p < .001.
[128] This table excludes one case in which the length of marriage was unclear.
[129] This was the same atypical case, referred to in the previous section, in which both parties were aged 30. Both had pensions, of unequal CEVs, and it appeared likely that the rationale for the order was to achieve an equal capital split of both the pension and non-pension assets.

3.3.3 Capital wealth

Whether or not a pension order was made varied significantly according to the parties' overall joint wealth. The average (median) net value of the non-pension assets was £329,000 in pension order cases, compared to £125,178 in cases in which there were no pension orders.[130]

Cases were also significantly more likely to include pension orders if the parties' net capital was in the highest quartile (over £259,810); 39% of such cases included pension orders. This was in contrast to between 7% and 15% of cases in the first to third quartiles, as shown in Table 3.7. [131]

Table 3.7 Net capital/whether pension order made (Base: cases in which relevant pensions disclosed) [132]

Net capital	Pension order		No pension order		Total	
	N	%	N	%	N	%
Up to £39,750	4	7.7	48	92.3	52	100.0
£39,751 to £113,515	4	6.5	58	93.5	62	100.0
£113,516 to £259,810	12	15.2	67	84.8	79	100.0
Over £259,810	31	38.8	49	61.3	80	100.1
Total	51	18.7	222	81.3	273	100.0

3.3.4 Income Wealth

Whether or not a pension order was made in favour of the wife varied according to the parties' incomes (based on available data on net annual income). The wife's income tended to be lower, and the husband's tended to be higher, in pension order cases.[133]

Net median income for the wife in cases in which pension orders were made in her favour was £12,720, compared to £16,164 in cases with pensions but no pension order.[134]

[130] Mann-Whitney U Test: U = 3187.5, z = -4.865, p < .001.
[131] Chi-square test: p < .001.
[132] The table excludes 20 cases in which it was not possible to calculate the net capital.
[133] Analysis here is based on whether a pension order was made in favour of the wife, rather than whether a pension order was made at all, because there were two cases in which orders were made in favour of the husband and it appeared possible that those would be qualitatively different in terms of any potential relationship with the parties' respective incomes.
[134] Mann-Whitney U Test: U = 3728.5, z = -3.108, p = .002.

Pension orders were also made in favour of the wife most often in cases in which her income was in the lowest quartile and least often where it was in the highest quartile (25% compared to 8%).[135]

The position with regard to the husband's income was similar, but in reverse. Median net income for the husband in cases in which pension orders were made in favour of the wife was £31,026[136], compared to £22,500 in cases with pensions but no pension order.[137] Pension orders were made most often in cases in which the husband's income was in the highest quartile and least often where it was in the lowest quartile (28% compared to 6%).[138]

The difference between husbands' and wives' median incomes was statistically significant in cases in which they had relevant pensions, but not where they had no pensions.[139] Disparity between wives and husbands is a point which recurs in cases with pension orders.

3.3.5 Socio-economic classification by occupation

Analysis based on the three class version of the NS-SEC, excluding cases in which the parties could not be allocated to a class (see Appendix 1) indicated that pension orders were made in more cases in which the husband was classed as managerial or professional, than in cases in which he was assigned to the intermediate and routine and manual classes respectively.[140]

As shown in Table 3.8, the position regarding wives was different. Pension orders were made slightly less often in cases in which the wife was classed as managerial or professional. Although this difference was not statistically significant, it is of interest and might be explained by a wife in a higher socio-economic group being likely to have a better pension of her own than wives in the other two classes and therefore be possibly less likely to seek, or need, a pension sharing order.

[135] When cases in which the wife's income was in the highest quartile were compared to cases in which it was in the first to third quartiles, the difference was statistically significant. Chi-square test (with Yates Continuity Correction): p = .025.

[136] It is not possible to accurately calculate the gross equivalent but it is between £42,000 and £45,000 per annum. Average male earnings in that period were £28,000 gross per annum. ONS, 2011 Annual Survey of Hours and Earnings (Soc 2000) 23 November 2011, p 5

[137] Mann-Whitney U Test: U = 2692, z = -3.962, p < .001. This compares to an annual net income of £15,678 for husbands with no pension provision.

[138] When cases in which the husband's income was in the lowest quartile were compared to cases in which it was in the second to fourth quartiles the difference was almost statistically significant;[138] when cases in the highest quartile were compared with those in the first to third quartiles, the difference was statistically significant.Chi-square test (with Yates Continuity Correction): p = .002.

[139] Mann-Whitney U Test: p = .000 and p = .075.

[140] Chi-square test: p = .024.

Table 3.8 Socio-economic classification/whether pension order made (Base: cases in which relevant pensions disclosed)

		Managerial and professional		Intermediate		Routine and manual		Total	
		N	%	N	%	N	%	N	%
Wife	Pension order	12	10.2	16	20.3	9	19.1	37	15.2
	No pension order	106	89.8	63	79.7	38	80.9	207	84.8
	Total	118	100.0	79	100.0	47	100.0	244	100.0
Husband	Pension order	36	22.9	6	10.7	3	7.7	45	17.9
	No pension order	121	77.1	50	89.3	36	92.3	207	82.1
	Total	157	100.0	56	100.0	39	100.0	252	100.0

There were 49 cases in which relevant pensions were disclosed, in which the wife could not be allocated to one of the three occupational classes. In 19 of these, the reason was that her occupation was given as 'housewife', 'homemaker' or 'full-time mother'.[141] As that might have indicated that the wife had not had the opportunity to build up her own pension contributions, we wanted to see how the frequency with which pension orders were made compared in such cases. We therefore grouped the wife's occupation in these cases together as 'homemaker', to create a fourth occupational class. Pension orders were made in seven out of these 19 cases. This was equivalent to 37%, which as Table 3.8 above indicates, was much higher than for the three main occupational classes. However, the number of cases involved was too small to calculate whether this difference was statistically significant.[142]

3.3.6 The value of the pensions

The total median value of the wife's pensions across the whole sample, as referred to above, was £36,316 and for the husband it was £72,889, making for a combined median total value of £109,205. This compared to about £290,000 for the combined median total value for the 33 pension order cases where the CEVs were clear for both parties. The total value of the husband's pensions was clear in 39 of the cases in which a pension order was made in favour of the wife and the median total value was £234,898, compared to £54,995 in the

[141] The ONS approach to such cases would be to classify 'homemakers' and others according to their last known occupation where possible, however we did not have information which would allow this.

[142] [Chi-square test: p = .018 but assumption of the test violated in that expected count for one cell = less than 5.]

cases where no pension order was made. Although these figures have to be treated with caution, because of the quality of the disclosure on pension values, it is clear from Table 3.9 below that the total pension pot was much bigger in cases where pension orders were made compared to those where no pension orders were made.

Table 3.9 Total value of husband's pensions by whether pension order made to wife

Whether pension order made in favour of wife	N	Mean(£)	Median(£)
Yes	39	293973	234898
No	106	104378	54995
Total	146	155372	72889

3.3.7 Pension types[143]

It was not possible to identify any particular patterns to the frequency with which different types of pensions were or were not made the subject of pension orders.[144] Of the 80 pensions which were involved in the 51 pension order cases, approaching half (35) were personal pensions. Almost as many (30) were defined benefit occupational pensions, of which 11 were public sector and 18 private sector.[145] The type of pension involved in the other 15 orders was unclear.[146]

The fact that there was little difference between the number of pension orders made in respect of defined contribution and defined benefit pensions was somewhat surprising, given, first, that the type of pension which was mentioned most frequently by practitioners as potentially significant and impliedly most likely to lead to a pension order was, in general terms, the final salary or defined benefits pension. Public sector pensions came up time and time again as pensions of interest, particularly schemes relating to the Police, NHS, Armed Forces, Civil Service and Local Authority. Practitioners saw such schemes as more valuable, but also requiring more investigation.

> *So I suppose it's mainly value, and linked with that of course it's the type of pension, if it's a final salary or a defined benefit. Defined benefits pensions are more… your ears prick up more, because they are more valuable, certainly to the current pension holder anyway.*

> *You only tend to deal with pension claims if they're significant. Sometimes the spouse is a Police Officer as well, sometimes they're a teacher or a nurse, so again, the NHS or Local Authority pensions are quite good...*

[143] We briefly describe the different types of pension in Chapter 1, p 5

[144] This was due to the type of pension(s) involved being identifiable in a minority of cases – mainly those in which proceedings were issued.

[145] In one case the type of pension involved was occupational but the sector involved was unclear.

[146] However, seven involved pensions which appeared to be in payment or subject to drawdown.

Secondly, the prevalence of defined benefit and public sector pensions across the UK population might lead one to expect a higher profile of such pensions on divorce. Although we do not know to what extent the divorcing population mirrors the wider population in terms of pension membership, we do know that in 2003, there were approximately 4.5 million public sector workers in a defined benefit pension scheme, and approximately three times as many contributing to a private pension scheme,[147] which is about twice as high as the percentage of pension orders against public sector pensions in our sample (11 public sector pensions out of the 65 known types which were the subject of pension orders, that is about 17%). It is possible that practitioners found private pensions easier to deal with, in that the CEVs would more often accurately reflect their true value than with final salary pensions and so be less likely to need expert input and possibly more likely to lead to a pension order than one might otherwise have expected. However, the numbers in our sample were too small, and the quality of disclosure too unreliable, to draw any firm conclusions on this.

3.3.8 Location/courts

There was some variation between the courts in the number of pension orders made: as we discuss in Chapter 7,[148] pension orders were made in a smaller proportion of cases in the North than in the South or West. We simply note once again that the percentages by location run somewhat counter to the file survey findings discussed above. The North had the biggest disparity in value between the wives' and the husbands' pensions and yet the lowest number of pension orders; the South had the lowest pension values for both wives and husbands and yet the biggest number of pension orders.

3.3.9 Whether there were children of the family

The presence of children was of interest to us, even though it was not a factor that was raised directly by the practitioners or the judges in relation to the making of pension orders. As we discuss in Chapter 8, the alternative to a pension order most commonly used when there were still dependent children was an offset of the pension against the family home. We therefore wanted to check whether amongst the court file cases there were fewer pension orders in cases with dependent children compared to those without.

There were children of both parties and/or of the family, of any age, in 204 of the cases in which relevant pensions were disclosed. In about one third of those (67), all the children were aged 18 or over at the date of the final financial remedy order, and in 137 there were children under 18.[149]

The interaction of the presence or absence of such children with the making of pension orders was quite complex. Pension orders were significantly more likely to be made in cases in which there were children *of any age*: 23%, compared to 5% of cases in which there were

[147] Public Sector Pensions Commission Report, *Reforming Public Sector Pensions,* July 2010, table 3.1 http://www.iea.org.uk/sites/default/files/publications/files/Public-Sector-Pensions-Commission-Report.pdf p.31

[148] See in particular Table 7.9, p 123

[149] 28 of the cases in which there were children under 18 also included children who were 18 or over.

no children.[150] However, whether or not a pension order was made did not appear related to the presence or absence of children under 18: pension orders were made in 16% of cases in which there were such children, compared to 19% of cases in which there were not.[151]

When analysis was confined to the 204 relevant cases in which there were any children, we saw that pension orders were significantly more likely to be made where all of the children were 18 or over (37%, compared to 16% where all or some were under 18).[152] Therefore, it was the fact of all the children having grown up that appeared to be related to the making of pension orders, rather than the presence of children at all, or of children under 18. However, further analysis suggested that the association between pension orders and children over 18 was more likely a reflection of the ages of the parties and/or the length of the marriage than an independent association.[153]

3.3.10 The basis of the divorce

There did not appear to be any strong association between the fact on which the divorce was based and the frequency of pension orders. Nearly one third of pension order cases were commenced by an adultery petition compared to about 17% of cases with pensions but no pension order (and 19% overall), so a slightly higher percentage than one might have expected. Just over half of pension order cases were commenced by a behaviour petition, compared to about three fifths of cases with pensions but no pension order (and a similar percentage overall), so a slightly lower percentage than might have been expected. Pension orders, however, were made in five of the 31 pension cases which were based on a behaviour petition including allegations of domestic violence, and it appeared therefore that at least in those cases such allegations did not have a major impact one way or the other, notwithstanding the suggestion by one or two practitioners that the existence of domestic violence might deter the party making the allegations (usually the wife) from pursuing a pension order.[154]

---

[150] Chi-square test (with Yates Continuity Correction): $p < .001$.

[151] This difference was not statistically significant; Chi-square test (with Yates Continuity Correction): $p = .641$.

[152] Chi-square test (with Yates Continuity Correction): $p = .001$.

[153] Based on cases in which there were any children, median ages for the wife and husband where all the children were 18 or over were 52 and 54 respectively, compared to 41 and 43 respectively in cases in which all or some of the children were under 18. Similarly, the median length of marriage where all the children were 18 or over was 27 years, compared to 14 years where all or some of the children were under 18. Each of these differences was statistically significant. Mann-Whitney U Test: for wife's age, $U = 921$, $z = -8.992$, $p < .001$; for husband's age, $U = 1153.5$, $z = -8.433$, $p < .001$; for length of marriage, $U = 1232$, $z = -8.451$, $p < .001$. We did a crosstabs analysis to look at whether there was a pension order and whether all the children were over 18, with length of marriage as layer. This indicates that i) there were no shorter marriages in which all the children were under 18, ii) there were no medium length marriages in which all the children were over 18 and pension orders were made – difference not statistically significant but assumptions for chi-squared violated due to low expected counts, and iii) for long marriages no significant difference between whether or not a pension order made depending on whether children over 18.

[154] See Hitchings. E., Miles, J. and Woodward, H. *Assembling the Jigsaw Puzzle: Financial Settlement on Divorce* [2013] Appendix B, in which a similar court file survey showed a higher proportion of pure consent order cases

3.3.11 Legal representation

The question of legal representation is a complex one: a party may have advice at different points during the divorce and financial process but not necessarily all the way through and sometimes not at all; a party may be privately paying or publicly funded, and, if the latter, be advised or represented under any one of a range of different levels. The key for us was whether the court file records indicated that a solicitor was acting for one or both parties at the time the final order was made. We devised a matrix to show whether i) both parties were represented at the time of the final order, ii) only the wife was represented, iii) only the husband was represented, or iv) neither was represented.[155]

Table 3.10 shows that pension orders were more likely to be made in cases in which the wife was represented at the date of the final financial remedy order than in those cases in which she was acting in person (19% compared to 5%). Similarly, pension orders were more likely to be made in cases in which the husband was represented (21% compared to 9%). The difference for wives was not quite statistically significant, but it was statistically significant for husbands.[156]

Table 3.10 Representation/whether pension order made (Base: cases in which relevant pensions disclosed)

		Represented		Not represented		Total	
		N	%	N	%	N	%
Wife	Pension order	49	19.1	2	5.4	51	17.4
	No pension order	207	80.9	35	94.6	242	82.6
	Total	256	100.0	37	100.0	293	100.0
Husband	Pension order	43	20.8	8	9.3	51	17.4
	No pension order	164	79.2	78	90.7	242	82.6
	Total	207	100.0	86	100.0	293	100.0

arising from divorces based on two years separation with consent and a smaller proportion of pure consent order cases arising from divorces based on behaviour. .

[155] The figures exclude two cases where it was unclear whether both, one or neither party was legally represented.

[156] Chi-square test (with Yates Continuity Correction): p = .068 for wives, p = .029 for husbands.

Cases in which both parties were represented were also significantly more likely to involve pension orders: 23%, compared to 8% of cases in which one or both parties were acting in person.[157]

Interesting though they are, what these statistics do not tell us is whether the representation itself made a pension order more likely, or whether the circumstances which made a pension order more likely, such as greater income, capital and pension wealth, also made representation more likely. However, it does seem likely that having a legal representative positively affected the chances of a pension order being made. It is also worth noting that several practitioners and judges highlighted the difficulties of unrepresented parties dealing with the complex issue of pensions on divorce and expressed concern about the increasing number of parties without representation. We discuss this point in more detail in Chapter 9.

3.4 Key points

- **The wife had relevant pension membership in 58% of the total sample and the husband in 70%; in 20% neither party had any relevant pensions**
- **Pension orders were made in 17% of the cases in which relevant pensions were disclosed, all were for pension sharing and all but two were in favour of the wife**
- **Pension order cases compared to cases with relevant pensions but no pension order tended to involve older parties, longer marriages, children over the age of 18, higher value pensions and greater capital and income wealth; however, there were some regional variations**
- **Pension orders were significantly more likely to be made in cases in which both parties were legally represented, and in those in which the husband was legally represented.**

[157] Chi-square test (with Yates Continuity Correction): p = .001.

Chapter 4: Pensions and Financial Disclosure

In this chapter we outline first the basic disclosure procedure in financial remedy cases and the prescribed procedure where pensions are involved. We then describe the financial disclosure which we observed on the 369 court files, looking at its nature and quality, particularly in relation to pensions, the methods of valuation, their timeliness and whether they were supported by any documentation. We summarise the opinion of our pension expert on the adequacy of disclosure in the 130 pension cases which he assessed. We then go on to discuss the disclosure which the practitioners said they generally expected, the extent to which this differed in uncontested and contested cases, their experience of how the parties responded on issues of disclosure and their practice with regard to the financial statement of information supporting draft consent orders. Finally we describe the judges' approach and experience on the issue of financial disclosure with particular reference to pensions.

4.1 A brief outline of the disclosure procedure relating to finance and pensions

4.1.1 General principles

The general requirement in any financial remedy proceedings or negotiations is for full and frank disclosure. The normal minimum requirement, where either party is a member of a pension scheme and whether the case is contested or not, is a 'cash equivalent' valuation ("CEV") not more than 12 months old.[158] A CEV should be calculable for all types of pension, including additional state pensions and pensions in payment; the only exception for which a CEV cannot be provided is the basic state pension. It is up to the pension member or their representative to request the CEV from their pension scheme. The CEV must be provided by the scheme within three months of their receipt of the request, or within six weeks if the member makes clear that the information is required for the purposes of financial remedy proceedings.[159] Each pension member is entitled to one CEV per year without charge, unless the pension is already in payment and then a charge may be made.

Where the pension is significant and/ or where it is thought likely that a pension order might be made, the parties may also ask the scheme administrators to complete part or all of Form P. Form P includes the cash equivalent valuation as well as details of the way the valuation has been calculated, a breakdown of the benefits included, whether the scheme can offer membership to the claimant spouse, the charging policy, whether any previous orders have been made or whether it is in payment or drawdown and other relevant information. The scheme may make a charge for completing the Form P.

In some circumstances, a pension expert may be instructed by the parties, usually jointly, to provide a more accurate or detailed valuation, clarification of the projected benefits, and/or

[158] Reg 4 Pensions on Divorce etc (Provision of Information) Regulations 2000 SI 2000/1048
[159] Reg 5 Pensions on Divorce etc (Provision of Information) Regulations 2000 SI 2000/1048

the division of the CEV to produce equal income for both parties. If the expert report is to be adduced as evidence in court then the prior leave of the judge is required.[160]

4.1.2 Uncontested cases

Where the parties have agreed on, and wish to formalise, the financial arrangements following their divorce, they are required to submit to the court a draft of the order which they are seeking, together with a Form A which summarises the claims being made,[161] and a form D81. The D81 is a statement of the parties' finances as at the date of the signing of the form. The version of the form which was in use when we conducted our file survey included brief details of the length of the marriage, the ages of the parties and of any children of the family, the parties' income, capital and pension assets, their plans for accommodation for themselves and the children and any present intentions to remarry or cohabit. The D81 was amended under the Family Procedure Rules 2010 and put into effect in April 2011. The new form requires rather more precise and comprehensive background and financial information and makes clear that the information should be given as it was *before* implementation of the proposed order. If a transfer of property order is being sought then the parties have to confirm that they have given notice to any mortgagees, and similarly if a pension order is being sought that they have given notice to the pension administrators, and in each case state whether any objection has been made to the proposed order(s); in the case of a proposed pension sharing order, confirmation is required that relevant information has been provided by the scheme[162] and that the court has power to make the order sought.

The section on pensions in the standard D81 which was in use at the time of our survey asked for: "the value of any benefits under a **pension arrangement** which you have, or are likely to have, including the most recent valuation (if any) provided by the scheme".

4.1.3 Contested cases

An application for a financial remedy order is commenced by the filing of a Form A[163] with the divorce court. On receipt of the application the court fixes a date for the first appointment (FDA) 12 to 16 weeks later. If the application includes a claim for a pension order, it is a requirement that a copy of the Form A or B be served on the pension scheme.

At least 35 days before the FDA each party has to file with the court and exchange with each other a copy of their Form E. The Form E is a statement of the party's financial position, a much more detailed version of the D81 described above, and should include copies of the documents received from the pension scheme such as the CEV for each pension including

[160] At the time of our field work the test for whether expert evidence should be allowed was whether it was 'reasonably required' but since 31 January 2013 the test is whether it is necessary, Family Procedure Rules 2012 Part 25. See Chapter 5, p 68 for full discussion about the role of the pension expert and the extent to which this tightening up of the test for adducing expert evidence will affect financial proceedings.

[161] Practice varies amongst the courts when a draft consent order is filed as to whether Form A is insisted upon.

[162] Regulation 4 Pensions on Divorce etc (Provision of Information) Regulations 2000 SI 2000/1048

[163] Or Form B is used when a respondent is applying to the court to consider their position on divorce

any additional state pension (ASP). The parties should also each file and exchange a concise statement of the issues, a chronology and questionnaires/ requests for further disclosure prior to the appointment.

At the FDA the district judge will define the issues based on the information before him or her and make such directions as he or she thinks necessary for the proper conduct of the case, such as the appointment of a joint pension expert or a response to a request for further information. The judge will also make directions for a financial dispute resolution appointment (FDR); occasionally and for more straightforward cases this may take place at the same time as the FDA.

By the time of the FDR the parties should have exchanged all relevant information, documentation and reports, responded to any questionnaires and made efforts to settle any outstanding issues. The parties should have filed with the court a copy of their latest offers which will then be discussed with the judge on a without prejudice basis. If matters are settled at that hearing then a draft of the agreed order will normally be presented to the judge for approval shortly afterwards. If matters are not settled then the FDR judge will give directions for the final hearing such as the filing of bundles, schedules of assets and a summary of each party's case, and the case will be listed for final hearing before a different judge.

4.2 Results of the court file survey

The court file survey recorded data from divorce files with a final financial order made between 1 April 2009 and 31 December 2010, and so it preceded the introduction of the Family Proceedings Rules 2010 and the new D81 statement of information supporting a draft consent order.[164]

4.2.1 Disclosure in general

Form E for the wife was available on the court file in 74 cases, and for the husband in 76 cases (86% and 88% respectively of cases in which proceedings were issued). In total, there were 15 cases in which proceedings had been issued but Form Es were not available (seven in which there were no Form Es, and eight in which one or other party's was not available). In all but one of the cases in which one or both Form Es were not available, the proceedings were settled by consent, and in most of these cases statements of information for consent orders were on the court file. It appeared likely that in at least some instances, the lack of Form Es was due to settlements having been reached before the deadline for filing them.[165]

[164] We give the practitioners' and judges' views on the new D81 later in this chapter, p 62

[165] Form Es should usually be filed within 7 to 11 weeks of the filing of Form A or B. It was not always possible to tell whether settlements had been reached within this timescale, but it appeared that at least one or two were. However, there were also some cases in which Form Es were not available which appeared to have settled outside the usual period for filing.

In almost all instances in which Form Es had been filed, they were filed by the parties' solicitors. Just one wife and two husbands filed Form E themselves; this appeared to reflect the high levels of representation in cases in which proceedings were issued.

Statements of information for consent orders were almost always available on the court file in consent order only cases (there were just two such cases in which the statement was missing). Some of the D81s had the appearance of having been at least partially completed by a non-professional, which we assumed must have been the parties themselves.

Overall, and based on the financial information disclosed on the court files, we were able to calculate the annual net income of wives in 90% of the cases and of husbands in 86%. We were able to calculate the family's total net capital (excluding pensions) in 92% of cases.[166]

4.2.2 The nature and quality of pension disclosure

We now turn to the disclosure which was apparent from the court files specifically in relation to pensions. The disclosure on the court files is just one part of the picture and does not always reflect the full extent of disclosure between the parties, as we discuss later in this chapter. Nevertheless, the file survey, and our pension expert, suggested that information disclosed to the court regarding pensions was often poor or incomplete, particularly regarding pension valuations.[167] Form Es and statements of information almost invariably addressed whether the parties had pensions; however, there were a small number of statements of information, amounting to approximately 5%, in which spaces for information about pensions were simply left blank, and there was no clear indication either that a party did not have any pensions, or that there were pensions but the information about them was not available.

4.2.3 Method of pension valuation

Although the Form E which was in use at the time of our survey required the parties to supply the court with the cash equivalent transfer value (CETV) for pensions (now the cash equivalent value (CEV) or cash equivalent (CE)), the method of valuation used in the court cases which we studied was varied. In only around half of relevant situations were figures supplied that could be unambiguously identified as CEVs and which covered all pensions disclosed. This was so for the wife in 48% of cases in which she disclosed relevant pensions, and for the husband in 56% of cases in which he did so.[168] Often, figures were provided which appeared to refer to capital valuations and which may have been CEVs, but it was not clear that they were; this was so for the wife in 24% of cases and for the husband in 18%. In some other cases projections were given for lump sum and pension income; sometimes the figures were for current pension income with no CEV; and in others, figures were given which referred to both capital and income but with no explanation. There were

[166] A description of the court file sample is given in Chapter 2, p 14 and more specifically in Chapter 3, p 26 in relation to pension membership and pension orders.

[167] In a small number of cases, documents appeared to have been submitted to the court but misfiled.

[168] In addition, in a small number of cases CEVs were provided for some pensions but were unclear or missing for others. This applied to the wife's disclosure in four cases and the husband's in six cases.

also a small number of cases in which one or other party's pension provision was simply referred to as being 'small', 'minimal' or 'nominal', without any figures being given. In all, the method of valuation was unclear or missing for the wife in 34% of relevant cases and for the husband in 18%.

4.2.4 How up to date the pension information was

Due to the limited amount of detail provided on statements of information for consent orders, which rarely included dates of valuations, assessment of how recent the information was regarding pensions was confined to cases in which Form Es were on the court file.

There were 51 such cases in which the wife's Form E disclosed one or more relevant pensions, and 64 cases in which the same was true for the husband. Together, these cases involved a total of 190 pensions in respect of which data regarding the date of the valuation was collected.[169]

Dates of CEVs were available for 134 of these pensions (71%).[170] The majority of these fell within the 12 months prior to the date of the final financial remedy order (64%).

Approximately a third of valuations (36%) were more than 12 months old by the date of the final order but only 15%, involving 20 pensions, were more than 15 months old.

Where CEVs were more than 15 months old, the values of several of the pensions involved were relatively low, ranging from less than £5,000 to approximately £30,000. In some of the cases in which more substantial pensions were involved, the other party had similar or greater pension provision of their own, and in others, pension orders were made and there were actuaries involved. It therefore appeared that in many of these cases, older CEVs were relied on because an order in respect of those pensions had always been thought unlikely, or possibly the member had stopped contributing and therefore the value had changed little, or more up to date valuations had been obtained by an actuary.[171]

4.2.5 Additional State Pensions (ASP)

Court files contained explicit references to additional state pensions in just 12 cases, and only six of those included CEVs.

Of the six cases in which there were CEVs, values for both parties' funds were disclosed in two cases, and values for the wife's fund only and the husband's fund only were disclosed in

[169] There were a further 23 pensions in respect of which data regarding recency was not collected, either because it was not there or because we omitted to collect it. In any event we have excluded these pensions so as not to skew the figures.

[170] Dates of CEVs for the other 29% were either missing, unclear, or marked as 'to follow'.

[171] There was one case in which the husband's CEV of approximately £230,000 was 21 months old at the date of the final order. In this case the wife disclosed no pension of her own, and there was a pension order for a 50% share, without any indication of an actuary being involved. There was no indication of offsetting (both parties had similar levels of capital, and the other main provision was that the wife would receive a greater share of the proceeds of sale of the family home).

two cases each. Figures[172] for the wives' funds were £2,700, £4,800, £9,200 and £16,300, and for the husbands' funds were £5,800, £19,300, £29,200 and £53,300.

In one of the two other cases in which there were figures for ASP, the husband disclosed an income entitlement of approximately £3,500 per annum, and in the other, the wife and husband disclosed entitlements of approximately £460 and £530 per annum respectively.

The other four cases contained only references to ASP. In two of these, there were references to the wife having an entitlement to ASP which was not quantified, and in one there was an indication that both parties had entitlements, the values of which were 'to be confirmed'. In the fourth case, the husband's statement of issues included a note that neither party had obtained a valuation of their entitlement to SERPS, but did not state why not.

Although the numbers involved were small, a notable feature was that overall, eight of the cases in which there were references to ASP (two thirds) were ones in which pension orders were made. As we discuss in more detail in Chapter 5, it was not always possible to tell for certain from the court file whether or not experts had been instructed. However, there were clear indications that actuaries had been instructed in four of the cases in which pension orders were made and in which ASP was at least referred to, including the two in which annual entitlements were disclosed. It was also clear that in the case in which annual entitlements were disclosed for both parties, the figures were identified by an actuary. It therefore seems that if ASP was specifically brought to the court's attention it was most likely to be in the context of cases in which pension sharing was contemplated; also, that where information was put before the court, it may have been due to the involvement of pension experts.

4.2.6 Independent documentation and Form P

As noted above, there were 51 cases in which the wife indicated on her Form E that she had one or more relevant pensions, and 64 in which the husband so indicated. Of these cases, supporting documentation was attached to the Form E for the wife in 47% and for the husband in 63% (24 and 40 cases respectively). We found no evidence of Form P on any court files.[173] If the form was being used it appeared that it was not being routinely filed with the court if at all.

4.3 The view of the project expert

We asked the project expert to evaluate the court file data on a number of different measures, including the adequacy of disclosure. We provided, on an anonymous basis, all the information which we had collected for each case on the background of the family, their finances and the terms of the final order and asked him to give his views on 'the apparent consistency, accuracy and comprehensiveness of the financial disclosure provided'. He

[172] Rounded up or down to the nearest £100

[173] It is conceivable that it had been filed in some cases but that we missed it at the time of data collection, particularly if the file was very large. It is also likely that a completed Form P was on the solicitors' files in many more cases, based on the information which they gave us, referred to below.

gave his opinion on 130[174] of the 293 cases which disclosed one or more pensions. His view was that 40 (31%) were adequate, 52 (40%) were inadequate and 38 (29%) were unclear. Thus, over two thirds, in his view, gave either inadequate or unclear financial disclosure.

In a large proportion of the cases which the expert deemed inadequate on disclosure the reason was either that the CEV had not been provided, or the true value of the pension appeared to have been misunderstood. One simple example was a West case in which the parties had split the non-pension assets equally but dismissed all pension claims; they had been married for 13 years, the wife was working in a management role in the NHS and the husband had a personal pension but no values were provided for either.

In about half of the cases which the expert deemed inadequate, ASP had not been disclosed when he was certain that there would have been some. Even where the value of the ASP was modest, its CEV could apparently have made a difference in those cases.

In nine cases, the CEV of a pension in payment had not been provided, for example a North case where the 60-year old husband had a pension in payment of £1,512 per annum; he put 'N/A' in the box for the CEV when in fact it could have been worth between £30,000 and £60,000. The wife's pension CEV was just over £5,000 and in that case the non-pension assets appear to have been shared approximately equally but pension claims dismissed.

In a handful of cases, the type of pension had not been disclosed when that could have made a material difference.

There were other 'unclear' cases in which the expert guessed that there would have been some pensions, based on the parties' ages and occupations, but none were disclosed.

On the whole, our expert deemed the disclosure adequate in those cases where it was clear that a joint expert had been instructed. There was just one case in which the husband had his own actuary rather than a joint one and the disclosure was deemed potentially misleading and unfair to the wife.

The fact that the project expert considered the disclosure inadequate or incomplete did not necessarily mean that he thought the settlement was economically irrational, or unfair in quantum: sometimes, for example in cases with very short marriages or young couples, or where pensions were likely to be of minimal value, the overall approach to the pensions was in his view rational and fair notwithstanding the lack of full disclosure.[175]

[174] See Appendix 1, p 194 for details of the way in which these cases were selected.

[175] We discuss the points concerning the economic rationality, fairness of quantum of the orders and more on financial disclosure in Chapter 9, p 142. in the context of the level of understanding of pensions by the public and professionals.

4.4 The practitioners' approach and experience

4.4.1 Pension information and method of valuation

All practitioners without exception referred to the Cash Equivalent Valuation of the pension (or Cash Equivalent Transfer Value ('CETV') as it was then known) as the starting point for disclosure. A handful were content to *always* settle for the CEV alone as disclosure; however a significant number said that their *normal* practice would be to seek solely a capital valuation for the pension, usually because they did not consider the pension valuable or important enough to enquire any further. A few admitted to settling for a 'nominal' or 'minimal' valuation instead of the CEV, for example if the couple were very young and/or had not been long in pensionable employment and a consent order was being applied for.

> *Just the CETV. That's it. According to the Law book, that's the only figure that you need.*
>
> *I'd certainly want a transfer value of pensions, I don't think I'll get anything else if I'm honest with you, but it would be that. I would be very wary about sending in a consent order without it, if nothing else, because you've got to give the Court the value of what it's worth in your Statement of Information forms anyway, so, unless I suppose if the client told me they didn't have pensions or they were very very small pensions and they weren't bothering, I might try and see if I can get away with writing 'negligible value' or something on the form and then not get a valuation. But I think it would have to be one that's very, very low.*

Just over half suggested that they would seek additional information and documentation, such as annual statements, pension booklets and terms, and details of the projected income and other benefits of the scheme.

A popular practice for disclosure was the voluntary exchange of Form Es; about one third suggested that this was their standard practice, whether or not they expected to issue proceedings, and a few others said they would do this in certain circumstances, for example if the spouse was acting in person. Most practitioners indicated that the process of disclosure was the same, regardless of whether they issued proceedings or not. However, one solicitor who had a largely publicly funded practice made a distinction between contested and uncontested cases on the issue of disclosure; the difficulties facing such practitioners were painfully clear.[176]

> *Yes, I think there is definitely a tendency, and I would admit to being a lot less thorough when you haven't got proceedings. I certainly feel like doing disclosure as being a bit of a nuisance to the client... unless you had reason to be suspicious about something, but generally, if they were both agreed, and very often you'd just get an exchange of letters, a very basic disclosure... And I mean, certainly there's a bit of a shying away I think from ancillary relief cases on legal aid just because I think it's the worst paid of the lot, you know, because to get a Form E done and questionnaires and all that sort of stuff, for what you get paid for it, is pretty lousy. There's a lot of*

[176] The position has radically changed since then as a result of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 and the limitations on the scope of public funding.

time... and if you get cases where it's a private firm on the other side, it's an absolute nuisance because they're just you know bombarding you with 20 letters a day and you're going to end up getting paid £300 for this. I'm sure it does affect the amount of work and the quality of work you do for it, you don't do it deliberately, it's going to happen subconsciously isn't it.

4.4.2 Form P

Having found no evidence of Form Ps on the court files, we asked all practitioners whether they ever used it, and if so, in what circumstances. Practice with regard to Form P varied considerably. A few were very enthusiastic, 'one of the best inventions ever', and used it as their standard form of pension disclosure. A similar number, however, had *never* used it or were not even sure what it was. A few who had never used it themselves said they left it to the pension expert to get that information in appropriate cases. About one quarter said they *sometimes* used it, for example where the pension was believed to be of some value, and/or if proceedings had been issued, or if the other spouse was acting in person. Another quarter said they rarely if ever used it, for example only if they had a 'rather picky' solicitor on the other side. One mentioned difficulties in getting a response to the Form P from the pension trustees. We had the impression that, whatever their practice, few practitioners filed the Form P with the court and there was no suggestion that the courts were insisting on it.

I think I'm the only person in this place that does [use Form P], just because, I mean, I think it's a great form, and I've had problems with those because pension companies don't have a clue what they are, and they've rejected them... so I've had problems with that, but yes, I tend to like using it... It's just to protect me on the basis that I know it asks the questions that need to be asked about whether the pension company will be willing to do it and those sorts of things.

I did have somebody ask me to do one and I'd never heard of it before, so we got it filled out, but it didn't seem to make a lot of difference to the case we had because we were still then going on the transfer value, and I don't think any of the other information that came out was actually used or relevant particularly. I can't remember... It was just someone who seemed to be very picky about everything and they wanted a Form P.

4.4.3 How recent the CEV and pension information would be

Just below half of the practitioners considered that 12 months would be an acceptable but maximum age for the CEV. This was determined in part by cost factors and the fact that pension administrators are entitled to charge for more than one CEV in any one year, which one solicitor described as 'outrageous'. A similar number of practitioners preferred a shorter period such as six or even two months.

We would want it straight away as soon as we ask for it, so it would be very recent, and we certainly would be asking for a new one every six months, because you know Counsel have said you cannot rely on pension CETV's any more for a period of 12 months. You just can't.

The factors which practitioners mentioned as determining their advice on the age of the CEV included the size of the fund, changes in the pension holder's status, income, or the stock market, whether proceedings had been issued and the wishes of the clients themselves. Only one practitioner suggested he might stretch the 12 months further in the interests of closing an agreement quickly for a client. Another gave an interesting case example from her own experience.

> *Normally when we start a case we call for the pension information so, by the time we get to a final hearing, if 12 months have lapsed since the pension information was given, we call for another one because they're entitled to one free CETV every 12 months; except in cases of final salary pensions, where there has been an increase in salary, a dramatic increase in salary, then it justifies paying for a second one. Because I had a Fire Officer, and he went from earning £50,000 something to £75,000, and he was trying to suppress his promotion, to post-date a final hearing, because on final salary, with 25 years' service behind him in the fire department, it made a big difference and we were acting for him... it was one where you could see it was dodgy as ever, but you know, we had a duty to the Court …*

4.4.4 Additional State Pensions

Just over one third of the practitioners said they 'always', or 'as a matter of routine', checked State pension and Additional State Pension details in their financial remedy cases, usually online at an early stage using Forms BR19 and 20. Some had learnt the importance of doing so from their training, some from the pension experts and others from experience. A small minority of those who did the checks as a matter of routine did so more to cover their backs than in any expectation that the information would make much difference to their cases.

> *Yes, on every case, fill out the BR20, usually very early on, because of course the individual has to sign it. So yes I always send off for those, and I think the most I've seen in one of those is about £150,000, so it can be quite considerable, and there's no pension sharing charges on them as well. So sometimes it's quite a good way if you've got a relatively modest case, by modest I mean somewhere between £100,000 and £300,000 in pension asset, it's an easy and cheap way to share. Yes, again, because I would, as I say, these days, it's not just me, common practice, because again, because of the litigious world we're in, we're all frightened to death that we don't ask a question and then 12 months down the line the client comes back saying 'you should have asked this, and I've lost out, and I'm suing you'*

Just over one third of the practitioners said they requested the State and Additional State Pension details not as a matter of routine but only in certain circumstances, for example if one or both of the parties was nearing retirement age, if it looked as if there might be a substantial disparity between the parties or if they were filling out a Form E. Some admitted to not requesting it as often as they thought they should.

> *If you don't do a Form E, I have to say, it does tend to be something that I think quite often gets pushed to one side... I think on a confessional basis it's probably something we ought to pay more attention to.*

The rest of the practitioners, about one quarter, rarely if ever requested details of ASP, either because they thought it was unlikely to be relevant, or because they did not really understand it or know what to do with it if they got the information.

> *I don't think I can explain to you what it is, I think it's like, it used to be SERPS is it? Yes. But I couldn't tell you what it is, any more than that, if I'm perfectly honest with you. I think very technically on a Form E people are meant to get valuations of that or certainly were, but I've not seen it, not really come across it as an issue. Whether I should do or not I don't know.*

When we mentioned to some of the practitioners that we rarely came across evidence of ASP on the court file survey, some suggested the information may have been disclosed between the parties but not recorded on the court documents. One speculated that cases with high value pensions and ASP went elsewhere, that is not to their local court (which was one of the ones we had surveyed). Others justified it by saying that ASP was becoming less valuable these days, and/or in the more run of the mill cases it was low down in the list of priorities.

> *Well that doesn't surprise me at all, it doesn't surprise me. It's one of these things that we should do, but we don't because we don't consider it to be a particularly significant asset. If you look in the case where you're trying to house children, and you're trying to make capital stretch far enough, and you've got a couple in their 30s, what's going to happen to their additional state pension 30 years hence is not very high in the list of priorities. That may be wrong but that's what we do.*

4.4.5 How clients responded to requests for pension disclosure

On the whole, practitioners did not experience any resistance or problems with their clients producing the necessary information and documentation about their pensions. The majority said that, once they had explained clearly what they needed to produce and why, clients did as asked. Several solicitors emphasised how important it was to ask clients for pension information early on, even on their first appointment, because of the inevitable delays in securing the information from pension administrators. Some would encourage their clients to sign an authority for the solicitor to get the information on their behalf. If there were issues about disclosure it was not always the client's fault. For example, at the time of our interviews there were severe delays getting public sector pension CEVs as a result of a change in the method of calculation and several practitioners mentioned that this was causing problems.

> *90% of them toe the line.*

> *... it's generally quite straightforward, because the information has to come from an external source, that they have to get a contact with their pension provider and get the information to come through... So yes I don't think disclosure has even been a problem with a pension, that's normally one of the areas that's quite straightforward, because you're not producing historic statements, you've not got to produce 12/24 months of things, two or three tax returns, it's a very discrete piece of information.*

The way clients in general produced their financial disclosure varied, and some struggled to understand the point of the exercise. More specifically in relation to pensions, a few solicitors said that they had to explain more than once what they meant by the 'cash equivalent transfer value' (as it was then known).

> *They always have to write down cash equivalent transfer value always, and I say don't worry it will be in my letter [laughs]. Well it's funny people don't write anything else down, but they will write down the CETV.*

The CEV was not the sort of information that clients had readily to hand or may ever have seen or heard of, unlike for example the value of their house, mortgage or bank balance. Most clients had no idea of the value of their pensions, particularly for example their additional state pension, and many would bring in the wrong documentation such as their annual statements. Practitioners also gave examples of clients being very vague or forgetting about pensions which they may have accrued years earlier (although the same could be true of non-pension assets such as bank accounts or insurance policies). One saw a difference between men and women in their understanding of what was needed.

> *If it's a lady who generally speaking has quite a modest pension provision, we sometimes struggle to get information about it because she's no idea where to get it. ... If it's a chap if he's quite financially savvy I get the name of his accountant or financial advisor and a telephone number, and I'm told to phone. So it tends to be a very clear gap between whether it's a male or a female client.*

A few practitioners gave examples of clients being reluctant to produce financial information in general but did not think that disclosure on pensions in particular was the problem.

> *... some clients are very coy about disclosing anything and others are quite open. Do people try and hide their pensions more? I don't think so. I'm just thinking about people who have got multiple pensions. I don't think anybody has tried to… they don't like disclosing their assets… I sometimes have to dig a bit, but probably actually I think it's more other assets, or hidden bank accounts that you sometimes see. Whereas with pensions now I would say people are pretty open about what they've got I think.*

Others had had experience of clients being reticent about pension information in particular, even seeking to hide it, one to the extent of being dis-instructed on the finances when her client refused to produce the documentation about pension funds that she (the practitioner) knew about. A few made a distinction between husbands and wives in this respect, suggesting that the husband was more reluctant to share the necessary information about his pension than the wife.

> *It differs. I've got… most clients are fully on-board and they will provide them. I've got other clients who, especially in second marriages or the shorter marriages, they are actually quite against disclosing things, I don't think that's just pensions... It depends on who they are, whose pension is it. Women, quite happy, sign the forms,*

not a problem, and a chunk of the male clients will as well, but you will get a certain type of client who will be resistant. One gentleman has stopped instructing me because he refused to write to me with disclosure, and I said, "Well I can't act for you unless you do this, because I know these things exist, so either you go elsewhere or you provide me with the disclosure." So he is instructing me to deal with the divorce but I'm not to deal with finances, and I have a disclaimer that says nothing to do with me.

Clients' knowledge of what their spouses had by way of pensions also varied. It was clearly helpful if the client had had some part in the management of domestic finances during the marriage and so could assess the quality of, and if necessary suggest questions for, disclosure. One practitioner, however, specifically mentioned husbands hiding this information from them, keeping it in a locked safe or in a briefcase which they kept out of the client's reach. In circumstances in which the spouse appeared to be dragging their feet, whether because of lack of understanding or willingness to cooperate, some solicitors wasted no time in issuing proceedings; this was seen as a means of showing the recalcitrant party that they meant business and ultimately giving them the power to compel disclosure through court directions and sanctions.

They usually say it's all locked up in a filing cabinet or a safe. They sometimes say, "He's got it", or "she's got it". Usually, you know, depending on which lawyer asked for it first. Sometimes you can write to the other side and ask for it. It's not unusual for husbands to try and hide their pensions, if they have a few. I've come across the wife saying, "Well, he's got four pensions, not two pensions. He's only disclosed two." What I tend to find though is that with older couples they do know what each other has, so the issue of disclosure, you tend to be guided by the client, particularly when going through the other party's.

Some practitioners appeared to be guided by their client's wishes on whether they issued proceedings more than others; on the one hand if the client was not bothered about the pension or its disclosure, the solicitor would not force the issue but might get some sort of disclaimer from the client instead; on the other hand the solicitor could be quite assertive about issuing proceedings even where the client was reluctant to do so. The filing of a financial remedy application to encourage disclosure appeared to be more frequent when the spouse was acting in person.

There are some solicitors who will not do anything without full disclosure, even if their client wants it. My view is clients are adult, grown up people that, as long as you give them the right advice, and they sign the right disclaimers, and they know the consequences, I don't see a problem with them dealing with things by consent.

And then if I'm representing someone and the other side haven't produced a proper supporting document to say so, there isn't a proper set of pension documents, we're going to want them, and we're going to want them quickly, otherwise we're going to issue, don't want to waste any time. So it's quite a hard approach, but it's the only safe route, otherwise I think clients are vulnerable if they think that there's a way around...

We asked practitioners to what extent their practice on financial disclosure varied according to whether the spouse was acting in person in the case. Most said their expectations and standards were the same for their own client and the other party, whether or not they were legally represented. They might describe a slightly different style of communication, for example they would explain in more detail to the other party what was required, or adopt a slightly more 'chummy' approach to try and put them at their ease. Two practitioners identified specific advantages of their client's spouse acting in person, one in that it gave him more control, the other saying that sometimes the litigant in person was even more conscientious than the solicitor in providing financial disclosure. A slightly larger minority were quite vocal about delays and difficulties in getting financial disclosure from a litigant in person.

> *... and the procedure wouldn't be any different, I would ask the opponent to get the same information. The only difficulty there is that with a litigant in person sometimes they're either unwilling to do what you're asking them to do and therefore you might require a court order permitting you to get it, or you might find that with a litigant in person they're not getting you the right information, and so then you may ask for an authority to try and get it yourself, or again you might go down the court route to get it, disclosure.*

> *I don't think difference in approach, difference in extraction, one is more like taking out a set of dentures, the other is more like an extraction under anaesthetic [laughs] if you get my drift. Yeah, so it's difficult, some people just do not understand the concept of disclosure, particularly disclosure about the pension.*

One suggested litigants in person were more common where the parties had already reached agreement between themselves. A few solicitors had little experience of litigants in person, especially when a large pension was involved.

> *It just makes life extremely difficult. But that said, it makes no difference to the professionalism with which you conduct a case, and what it really means, is that you've got to make sure that the other side understand. It just means that you've got to be very very careful to ensure that the other party understands what the issues are and what is required of him.*

4.4.6 The D81 Statement of Information

In the light of our finding from the court file survey that many of the Statements of Information supporting the draft consent order (D81) were sparsely completed, and sometimes unclear, we asked the practitioners what their normal practice was with regard to its completion, and how closely it reflected the information on their file.

The vast majority of solicitors said that they completed the Statement of Information and then sent it to the client to check and sign, occasionally asking the client to fill in some gaps such as current net income or an up to date bank balance. Most thought it more cost-

effective for the practitioner to complete the form rather than the client, as they would normally have most of the information on their file and knew what the court required, especially when it came to pension information. A handful said they would ask the client to meet with them to do it. Just two said they would normally ask their clients to complete it then the practitioner would check it, but on the whole this was felt to be a false economy.

> *Being a bit of a control freak I tend to do it. The difficulty is, and I've had this quite a bit since I've actually taken over here in November, is my predecessor would normally send out a blank statement of information and rely on the individuals to fill it out accurately... obviously these people are not lawyers, they're lay people, they don't understand the information that's required, and they sometimes do not fill it out properly and if you then send that to the court the judge will bounce your consent order so I tend to take control of that ...*

> *I would do it on the basis of what I've got, and then send it to my client saying "Are you happy with this? If you are send it back to me." I have had one at the moment actually where husband we know has got a good pension, but wife didn't want to know about it, and she went against my advice and all the rest of it, and they've sent me the statement of information and he's put a zero down as his pension, and so I've gone back to his solicitor and said, do you want to fill that in properly? [Laughs] but they've obviously just sent it out to him, and you can tell he's hand written it. But I wouldn't, I tend to fill mine in, and just get them to confirm my figures.*

Occasionally the agreement would break down on the exchange of the D81:

> *But we produce it from the information we've supplied and we send it to the clients then and ask them to confirm whether any of that has changed. We then disclose it to the other side. We wait for their information to come in. We send it to the client again and ask them to come back with any queries and it's amazing how many consent orders then fall apart.*

We asked the practitioners how closely the information on the D81 matched the disclosure which had been exchanged or was on their file. Approximately half the practitioners said that the Statement would mirror the information on the file in summary form. Some qualified this by saying there would normally be documentation on the file to verify the information on the form, and that there might have been some minor updating. Others specifically referred to their practice of asking their clients and spouses to complete a Form E even in cases where no proceedings were issued, so they would have this on the file in addition. Some also said that they attached a schedule of assets to the Statement, and/ or a covering letter to explain the reasoning behind, and effect of, the agreement reached. This was a practice heartily encouraged by most of the District Judges that we met, but again, something which we observed less from the court file survey than we might have expected from the practitioners' comments. A few, however, confirmed that for cost and other reasons they would only provide the minimum required by the D81 and no more.

> *I like to think we know more because we've looked at the benefits, and we've looked at the cost of the transfer, we've looked at the whole package of details which influence our decision making. So we would have had more information that you've got on that thing, that's only a summary.*

Relatively, I mean there's no fine art to it, and you know, with the Statement of Information, no, we're not disclosing, we're not sending to the Court the documentation to say this is actually what they earn each year, those sorts of things, so you can get away with being a bit rough round the edges...

4.4.7 How practitioners' comments fitted with the survey data

Based on practitioner responses to our questions on financial and pension disclosure, we might have expected a higher quality of disclosure on the court files than was actually the case. There could be several reasons why the quantitative and qualitative data did not entirely match up on disclosure in several respects, such as production of clear pension valuations and supporting documentation, additional state pension information, Form P and the way the D81 statement of information was completed. First, as we have already described, our sample of practitioners was neither a random nor a nationally representative one; although we went to some lengths to meet with a good cross-section of family lawyers from a range of backgrounds and experience, the ones who actually agreed to be interviewed could well have been more conscientious than those who did not agree or were not approached. Secondly, especially in uncontested cases, the practitioners tended to have on their files documents and information which were not filed with, or required by, the court. However, it also seems possible that there was a tendency for the participating practitioners to respond to such questions in terms of what they perceived as good practice rather than their own actual practice. It was not uncommon for them to compare their own apparently relatively rigorous practice on disclosure to some of their peers' slightly sloppier practices; few admitted to adopting such practices themselves.

4.4.8 Practitioners' views of the new D81

One of the difficulties which we encountered when extracting the data from the court file survey was working out if the figures on the (old) D81 represented those before or after the proposed settlement. The old D81 asks for details of the parties' finances as at the date of the form whereas the new D81 additionally and expressly requires the figures on income, capital and pensions to be given as they are *before* implementation of the proposed order. The new form D81 is longer than the old and requires more precise and more comprehensive background and financial information.

As we described above, the section on pensions in the standard (old) D81 which was in use at the time of our survey asked for: "the value of any benefits under a **pension arrangement** which you have, or are likely to have, including the most recent valuation (if any) provided by the scheme". The (new) form D81 which has been in use since April 2011 asks for: "Pensions valuation including the Additional State Pension (cash equivalent)".[177]

[177] Or, where relevant, a Pension Protection Fund compensation valuation.

We were interested to hear the practitioners' views on the new form. Opinions varied quite considerably. A small majority of practitioners preferred the new Form D81 and thought it an improvement on the old, some being particularly enthusiastic, but at least as many qualifying their enthusiasm in some way, for example bemoaning the lack of space to explain the reasons behind the draft order. Just below one quarter disliked it and thought it was worse than the previous form, mainly because it was more complicated and detailed, but also because of the requirement to total the non-pension and pension assets together. About one third had mixed views on the new form, or had no particularly clear view on it.

> *I think it's better, a lot better. It's more detailed. It gives the judge more information and it should, it should, if used properly, reduce the number of consent applications that are rejected, in my opinion.*
>
> *And they're appalling, the new ones... They're appalling... Yes. They don't address really what Courts need... Why on earth you add, in the cumulative boxes, you add pensions to capital, to come up with a figure. What on earth's that about ... appalling. What a Court needs to know is what's the percentage of split, you know, because I always think, you know, a District Judge needs three documents, that's the plan, that's the proposed arrangement, what the husband has, what the wife has, but Judges won't you know spend, most don't, can't, spend half an hour or an hour, overseeing a consent order and working out what the percentage split is on capital, what the pension, you know, that's what we need I think. Could have been done so easily, but it's put together by a Civil Servant. It's my bête noir.*

Several commented on it being a logistically tricky process, working out who is to complete the information first and making sure both parties had seen the completed form before signing.

> *The actual process of doing it really confuses people because one person has to fill out their stuff but can't sign it until they've seen the stuff of the other person. So that process of it going backwards and forwards I think confuses people…*

4.5 The District Judges' approach and experience

Whatever the practitioners said about their practice on disclosure, the reality was, at least on uncontested cases, that the financial disclosure which we observed on the court files was the disclosure which the judges themselves saw and in most cases used as the basis of their decisions. At the other extreme, in the very few fully contested cases which were amongst our sample, there would have been significantly more financial disclosure than was apparent from the court files, notably agreed bundles of documents which may well have included pension valuations and reports.

The District Judges took a similar view to the practitioners, in referring to the CEV as the minimum that they would expect for pension disclosure, one suggested not more than three months old. However, most recommended supplementing the CEV with an expert report if

the pension value was complex or worth over £100,000.

> *WDJ2: It's the value of the pension. We were always told CETV values etc. but, no, that doesn't always give you to accurate value of the pension, and we're being told now... anything over £100,000, you should be able to get a valuation of that pension, because that will give you a true market value.*
>
> *NDJM: You either have the CETV, or you have a report. You don't tend to have anything in between...*

The pension schemes which were most often mentioned as ones requiring more investigation were the public sector ones, and then the point was that the CEV could not be safely relied on without an expert valuation. The particular schemes mentioned included the NHS, Armed Forces, Civil Service, Police, University, Fire Service, Teachers and that for Judges. One described them as the 'magic' schemes.

> *SDJ1: Obviously, if you could do something that would produce, in all of those, what we might refer to as the magic pensions, the Police, the University, and a few others, where you know full well that the regulation CETV figure doesn't actually produce the … the Armed Forces is another one isn't it … they don't produce a realistic valuation of the pension, because there are other factors involved in it. There's security involved in it. And if there were some way of being able to produce that in a way that was comparable, that would help…*

Another Judge mentioned SIPPs as being potentially more troublesome:

> *NDJM: And I've had arguments about whether the actual underlying asset valuation is accurate or not, and should the court order a re-valuation of the assets held by the pension fund and things like that. That gives rise to all measure of complications.*

One referred to issues over personal pension values being unstable because of market forces, and being *'a bit like Russian roulette'*. Another mentioned draw-down annuities. But as a general rule, as previously described and partly for reasons of proportionality, the Judges relied on a combination of their gut instinct and the information before them:

> *WDJ1: I'm pretty clued up on pensions and financial things, but sometimes they go into it in such a degree, that it is too detailed, if you like. It is an asset there and I think the danger is, the more you go into it, and the more you go down to the last penny or the last £100, you're going against the balancing...*
>
> *WDJ2: And it's being proportionate because we don't want to go wasting people's limited assets.*

One judge suggested that forecasts were sometimes helpful, including details of the benefits and dates that the parties could draw them.

Two Northern judges made the point that CEVs were often not available at the time the parties completed the Form E or even by the first appointment, but emphasised how essential they were if any guidance was to be given at the FDR.

NDJR: And then you might have an adjourn for first appointment... and it's only really, I would say, when you get to the FDR appointment, when you've got people's open proposals, that you can actually sit down and say, "Right, what are the issues here?" Because, until you've got full disclosure, you cannot make a proper decision or judgement on whether this is going to be an important issue or not...

NDJM: And often pensions is one of the things that isn't yet provided.

In so far as disclosure and draft consent orders were concerned, the judges frequently described themselves as reliant upon the practitioners to draw any significant pension issues to their attention, and their gut instinct. If pensions were described as 'minimal' or 'nominal' on the D81, or only projections were available in modest cases, half of them were quite clear that they would not go behind that or make further enquiries, but they would trust the practitioners' judgment.

WDJ2: I mean we only have to consider if it's fair, you know, we don't have to go into it in great detail and let's have the evidence and things... If it's 'nominal' or 'minimal' I'd probably leave it alone, because, admittedly that is a value judgement as to what is nominal and minimal, but you're only looking at, because you're painting, as I say, with a fairly broad bush, what's actually going to affect the outcome. If they just said 'we're leaving pensions alone', I'd want to know what they were.

SDJ1: ...it always helps to have somebody telling you what the effect is of what you're going to do. But the bulk of what you're doing, when they don't have actuary reports, is back to gut instinct; it's back to, 'does this feel about right'. And if you're honest about it, you probably don't really know what the effect is in detail in relation to a pension.

Most of them expressed a strong wish for a brief summary of the rationale behind the order, and/or a balance sheet showing the effect of the proposed order. It was a matter of regret to them that this had been included as a requirement on the new form D81.

WDJ2: ... a simple letter saying 'we've agreed a split here, wife is remaining in the home, she's looking after the kids most of the time, she's getting 55%, he's getting 45%, he's keeping his pension pot, she's keeping this' etc., and telling us that, in three to four lines... When we [see] the ancillary relief order that comes into us, we want to know the size of the financial cake that's going to be divided up, and that's why I kept saying, we want to know what all the assets are, and the pension is now becoming more important and more noticeable because they can be very sizable sums, especially with the NHS, with the military etc., civil service pensions as well.

One said it would be helpful if practitioners gave a breakdown of the value of the pensions if there was to be a sharing order and there was more than one pension involved.

SDJ2: The thing is, with a Statement of Information form, the most helpful thing, if it's more than one pension, is to break down the value of each pension, but you will get consent orders, where you're told the global figure and then you're presented with 40% of this one and 15% of that one and you think, well, in terms of that value I was

given. It's a question of whether solicitors are filling the form in thinking this is to give the Judge information, or whether they're filling it in to think this is a form I've got to fill in.

Another suggested that if a pension report had been commissioned it should be attached to the D81: *'Why the blazes wouldn't you put it in?!'* The general view was that practitioners rarely addressed the question of the Basic or Additional State Pension; sometimes it was simply forgotten unless an actuary was involved; in other cases it simply might not have been considered important enough.

SDJ1: I mean occasionally, again, if you get the actuary's report, it's generally in there, but no, lawyers don't tend to bother with it.

The DJs varied as to how important they thought it was to disclose ASP:

WDJ1: It's usually not an awful amount, an awfully large amount... I mean, really, at that level, if that's their only income, which is the State pension and any extra, there's not much there is there... And they're not going to be before us spending hundreds or a thousand pounds to argue over that.

SDJ2: Well if somebody's got it then it ought to be brought into the equation.... I would suspect that there's not that many substantial additional state pensions out there.

WDJ2: They can get that very easily can't they? You should know what each of them are getting under the State.

As in other situations, and especially if the proposed order was by consent, the DJs would rely on the practitioner to alert them if they thought the ASP was significant; in the absence of information on ASP none suggested they would enquire any further on a consent order case, or make a direction for disclosure in a contested case.

SDJ1: If you're doing a job perfectly, there are all sorts of issues that you might raise. But I think, if you're honest about it, the majority, you take what you're given, unless something occurs to you. I mean, there are so many things that might occur to you, and sometimes what you're looking for really is not that little detail, what you're really looking for is what's going to be the magic little bit that might untangle this...And a state pension's hardly likely to be that. It's by comparison generally a small part of a pot.

One judge felt strongly that it should be produced more often, based on her previous experience as a practising solicitor when she discovered how valuable it could be and how much difference it could make to a case.

NDJR: I mean, the additional state pension, I've nearly dropped off my chair a few times when I've had reports, and I think that is probably - it's more my experience in practice that makes me cautious on the bench, because I know that, having gone some way in my negotiations, I've then got a report and thought, giddy heck, you

know, we were wrong here, and that's really affected my view on the bench... And one of the big things that I do think is, if you've not factored in the state retirement, it does actually, on the small ones, it does actually, it can flip it - it can flip things quite significantly.

There were a few complaints about the quality of disclosure on the D81, particularly when a litigant in person was involved.

WDJ2:... and it may be that we look at it and we send back a fair number of consent orders because we can't quite understand why they've arrived at the figures they have had, because it's not very well set out... But you're trying to unscramble this from the figures that are before you, and some of them, on the information, are completed prettily scruffily, especially when you've got litigants in person...

The new form was not seen as especially helpful in this respect, and practitioners as well as litigants in person were said not to always follow the instructions and provide details of the finances as pre- rather than post-settlement.

NDJM: I still see errors where they are putting in the post-settlement figures ... Yes, I think there's still problems there.

As with the practitioners, there were some complaints about the requirement to total the pension and non-pension assets on the Form.

NDJR: Well, personally, it's just…really a rubbish form, because you're not comparing like with like, and that is the problem...

4.6 Key points

- **Of the 293 cases in the court file survey which disclosed one or more relevant pensions, only approximately half supplied figures which were unambiguous CEVs for all pensions**
- **Additional State Pension was expressly mentioned in a total of 12 out of the 369 cases surveyed, and the CEV was provided for only six of those.**
- **Disclosure on pensions was viewed as either inadequate or unclear in over two thirds of the 130 pension cases assessed by the project expert**
- **Practitioners found clients to be largely cooperative on pension disclosure but a few, mainly men, resistant; the concept of a CEV was unfamiliar to most clients**
- **Disclosure on pensions from litigants in person was often but not invariably problematic; some practitioners issued proceedings at the first sign of reluctance to disclose**
- **The District Judges relied very much on the practitioners to alert them if there**

were significant pension issues but all made a strong entreaty for a balance sheet, statement of rationale and/or summary of the effect of draft consent orders with the D81

Chapter 5: The Role of the Pension Expert

In this chapter we look at the role of the pension expert in the financial remedy proceedings, considering what evidence there was of this in the court file survey, and what the practitioners' views were on the role of the experts. We look at what type of expert tended to be instructed and when, what advice was sought and how much they cost. We discuss the judges' approach to the question of pension experts and their experience in practice. It should be borne in mind that the Civil Procedure Rules apply to family proceedings with regard to expert evidence and that until 31 January 2013 expert evidence had to be reasonably required and justified in the light of the overriding objective before it could be adduced.[178] Since then expert evidence has to be shown to be 'necessary' for the courts to grant permission.[179]

5.1 The court file survey and expert reports

Although it is likely that experts were instructed more often than was apparent from the survey, we saw only ten court files which contained clear indications that pensions experts' reports had been obtained, and the expert's report was on file in just two of these.[180]

These cases shared certain characteristics, for example, they all involved longer marriages (ranging from 16 to 37 years), and the parties' ages in all of them ranged from mid-40s to early 60s. In nine of the ten cases the husband's pension assets were substantial, with CEVs ranging from approximately £247,000 to approximately £860,000. In four of these cases, the wife's pension assets were relatively low, with CEVs ranging from approximately £11,000 to approximately £38,000, and in one case the wife had no pension. The values of the wife's pensions in two cases were much higher (approximately £121,000 and £198,000), but were still much less substantial than the husband's (amounting to approximately 13% and 34% of the combined pension assets respectively). These cases therefore tended to involve substantial disparities in the parties' pension provision.[181]

Pension orders were made in favour of the wife in all ten of the cases in which expert reports were clearly obtained, and in five of these cases, there were two or more pension shares.

In seven of the cases involving experts, the expert was an actuary; in two cases, the type of expert was unclear but in one of these the nature of the questions asked indicated an

[178] CPR r35.1

[179] CPR r 35.4, FPR 2010 Part 25 as amended and PD25D

[180] This was based on checking through court files to see whether they contained an expert report, or whether one was referred to in the documentation accompanying final orders, such as correspondence submitted with draft consent orders. There was one other case in which a proposed direction for an actuarial report was noted, but the direction did not appear to have been made. However, we did not routinely check to see whether, in cases in which proceedings had been issued, there had been any directions regarding experts (with hindsight, we should have). Also, interviews with practitioners suggested that they would not always explicitly refer to experts' reports when submitting draft consent orders.

[181] In two cases, the total CEV for the wife's pensions was unclear, and in one case, CEVs for both parties were unclear.

actuary.[182] In the tenth case, the expert mentioned was an independent financial advisor (IFA).

The matters on which experts were asked to advise in these cases varied (and were unclear in two cases), but they included a valuation and advice on the pension share(s) required to provide equality of pension income in seven cases. Advice was also requested on: equalising capital values; a proposal to ring-fence one pension; and equalising capital values and pension income based on fund values accumulated during the parties' relationship.

5.2 The practitioner approach

Experts were mentioned during interviews frequently and in a number of different contexts, both spontaneously and in response to our specific questions. Most of the interviewees were keenly aware of the limits of their own knowledge on pensions and spoke of the need in appropriate cases to seek expert assistance. Some referred to the risk of exposing themselves to negligence actions if they failed to instruct an expert and one expressly referred to the passing of legal liability to the expert as a good reason to instruct one.

> *I think where there's any decision to be made about a pension fund, be it, which one, if there's three or four funds, which one do you keep, how you value it, whether you're looking to do it on value or income. I mean, to me it's an area where I leave myself wide open if I start dabbling, for a negligence claim. It's just not on my radar to do.*

5.2.1 Type of expert and the purpose of instruction

The most common type of expert referred to by the practitioners, and engaged to assist on pension questions, was an actuary, and in such cases the usual practice was for the appointment to be a joint one. The purposes of the instruction of an actuary included:

- To advise on the true value of the pension, especially if it was a public sector pension
- To advise on what share would be needed to equalise incomes or benefits
- To calculate an appropriate offset figure
- To value pre-acquired or post-separation pensions
- To advise on hidden benefits, charges, risks and prospective scheme changes
- To advise on which of several shareable pensions might be the best one(s) to share
- To obtain full disclosure
- To advise on the respective advantages of pension sharing or attachment.

[182] The expert was to be asked to advise on the pension share required to achieve equality of income in retirement, based on true CEVs for the parties' pensions.

5.2.2 Circumstances in which experts would be recommended

The practitioner would be most likely to recommend an actuarial report to their client in circumstances where:

- the value of the pension was substantial
- the CEV might not reflect the true value of the pension, such as Police or Armed Forces schemes and other public sector schemes
- the pension in question was a final salary scheme
- the parties were older and/or married longer (although there was no cut-off point for either)
- SIPPs or SSASs were involved, or other complex schemes
- there was more than one pension to share
- the client suspected non-disclosure
- a pension was in payment or the member near to retirement and/ or there was an age gap between the parties
- there were special factors to consider such as health or the risk of bankruptcy
- the case was likely to be the subject of proceedings

> *If you've got someone who is extremely suspicious it's good to have an extensive report for them to chew over.*
>
> *...we tend to use them in only the bigger cases, and I think by that there's going to be a black hole appearing here between what I call the small cases and the bigger money cases where I use actuaries.*

This prediction of a 'black hole' echoes to some extent the broader findings of this research which we come back to in our conclusions, that there is a major difference between the higher net worth cases and the more run of the mill or smaller money cases in the treatment of pensions on divorce.

We asked practitioners how often approximately in the past 12 months they had instructed an expert on a pension issue.[183] Only three had not instructed one at all and nearly half had instructed an actuary between one and five times. Two solicitors said they had instructed an actuary in approximately five to ten % of their cases involving pensions. One said she had done so in about 20 cases and another, a solicitor specialising in high net worth clients, said she had consulted an expert in approximately three quarters of her cases but that included

[183] This was, of course, at best an estimate of the number of referrals. We did not ask for this information in advance, partly because it would have involved time and effort for the practitioners which most could not afford to give us, and it may not have improved the reliability of the figures enough to justify it.

informal consultations as well. In almost all cases of formal instruction the expert was an actuary.

Some practitioners would as a matter of course recommend an actuary if there was to be a pension share. Sometimes it depended on who they were acting for, for example a solicitor acting for a wife seeking to equalise incomes on a pension share was more likely to recommend an actuarial report, in contrast to the husband's solicitor who might prefer to settle for the simple equalisation of CEVs which would not require a report. Similarly, solicitors acting for the spouses of police officers were much more likely to argue for an actuarial valuation than those acting for the police officers themselves.

> *And it's a long time since I've been on the wife's side of a Police pension, but I mean I think if I was now, it would be one of the cases where I'd say let's go to an actuary because the only cases of that type that I've ever seen, where you've had actuarial reports, the figure that they come up with, for what you'd need in a private pension to achieve the sort of same level as a Police pension, is astonishing.*

The main factors which militated against a practitioner recommending a pension report, other than the reverse of the above list (e.g. young clients, small or money purchase pension) were the potential costs and delay in securing it. These ostensibly rational reasons for not getting a report would apply to both parties. Sometimes there were less rational reasons for not getting a report, for example the practitioner's lack of experience, or more partisan reasons, that is, it was not in their clients' interest to have a report. And of course, the clients did not always follow their solicitors' recommendations to get a report, however sound they might have been, as we describe later in this chapter.

> *And then we try and avoid actuaries' reports as well, because they over-play it in our opinion...I've had one or two in the past year, but again, I think the good reason to avoid them, not just because it sometimes isn't great for our position, again, it's more delay, it can take a few months for an actuary's report to come through, and they're about £1,000 plus.* [Solicitor acting for police officers]

> *I think from experts generally there is a reluctance to use them unless necessary. I suppose maybe a little part of me thinks, will I understand the report when it comes through anyway, you know, is it going to get us any further on?*

5.2.3 The costs of an actuarial report

The costs of an actuarial report varied according to the complexity of the case and also according to the actuary but were said by some to have come down in recent years. The range of fees quoted was between £400 and £3,500 plus VAT. One solicitor also mentioned an on-line 'express CEV checker' costing about £50 and another mentioned a similar service for a 'not quite back of an envelope but quick guide' for £150. The figure mentioned most often for a standard report was £1,000 plus VAT, but several referred to securing reports for as little as between £400 and £850, and rather fewer mentioned fees of between £1,600 and £2,500. In most cases, of course, the parties shared these fees equally but in addition they would be incurring their solicitors' costs for work in connection with the report, plus possibly

the scheme charges for implementing a pension order. The difficulty here was that the person most needing the report could often not afford it.

> *I think the people who'd benefit being the other side with the lesser income and the lesser pension are the people who haven't got the money to actually be getting excited about getting an actuarial report, which is why you tend to fall back on transfer values, unless you think, gosh, there's so much here, it would be worth getting them to borrow the money or whatever to get some more information on it.*
>
> *... husband is never happy with the report when it comes in. So you're then asking lots of questions of the actuary, so it definitely increases the cost of the proceedings.*

The timescale for securing an actuarial report was mentioned less often as a factor, but four to eight weeks was mentioned more than once. It was rare for a practitioner to suggest that a report slowed the proceedings down although one solicitor mentioned having to ask for an adjournment of the financial dispute resolution hearing[184] because the actuary was so busy. A few mentioned delays in securing CEVs for public sector schemes caused by recent changes in the valuation rules, and this had in some cases delayed or complicated the expert report. One solicitor mentioned a delay of six months in securing the report, as well as hugely inflated actuarial fees at the top end of the range, in a case where the pension trustees had been particularly uncooperative, but that delay appeared to be exceptional.

5.2.4 Independent Financial Advisors

Independent Financial Advisors were also mentioned frequently by the practitioners as being engaged instead of, or as well as, actuaries, but more commonly to advise just one party rather than both. Reasons given for the involvement of an IFA included advice on:

- whether an actuarial report was needed
- to advise one party on a joint actuarial report
- the respective merits of pension sharing and offsetting in the broader financial context
- the pros and cons of an internal or external transfer[185]
- the best pension provider for an external transfer
- when the pension benefits might be drawn
- which of several shareable pensions would be the best one(s) to share
- the mechanics and practicalities of sharing arrangements with SIPPs and SSASs

[184] See Chapter 4, p 47 for a summary of the procedure in financial remedy cases.

[185] An internal transfer is one where the spouse's pension share remains within the member's scheme but as a separate pot; an external transfer is one where the pension share is moved to another scheme of choice. Schemes vary as to whether they offer an internal or external transfer or both.

- post-separation arrangements and lifestyle planning, especially on prospective income and expenditure
- tax efficient ways of sharing pensions

A few practitioners also mentioned having formed professional relationships with IFAs from whom they sought informal advice, for example on whether an actuarial report was necessary, on what questions to ask of the actuary or to clarify technical points. IFAs were sometimes seen as a cost-effective alternative to actuaries but also as having rather more flexible fee structures, some of which might be arranged through commission from the pension providers or directly with the client rather than through the solicitor.

> *We use independent financial advisors... because it doesn't cost us anything to do it because you know we have an arrangement whereby they appreciate if they get the business they get the commission, they get the work. But it is very helpful to the client... So just about everything that's got a pension on, run it past them, and ... they'll give preliminary advice on how it should be approached, or they'll sometimes say, "Well, actually, there's a little bit more to this one than meets the eye, it needs to go to an actuary".*
>
> *... We'll try and get an IFA in, well as soon as possible, for all clients, but particularly for the more cautious, nervous ones, so somebody can talk them through it all.*

5.2.5 Counsel

The instructing of Counsel to advise a client specifically on pension issues appeared to be much rarer. Counsel was often seen as, first, having no more expertise than the solicitor, secondly as expensive and thirdly as a competitor. If Counsel was involved, it tended to be in the bigger asset cases where pensions were just one of several issues, or where the parties were particularly argumentative or bitter towards one another and the matter was likely to end up in court. Counsel's main role in that situation was to present the case to the court, but he or she might also be brought in at the FDR stage to advise, often with the benefit of an actuarial report. Instructing Counsel to advise in publicly funded cases was not seen as an option because of the financial constraints of the scheme, but for privately paying cases where funds might be in short supply, an actuary (or IFA) was usually seen as taking priority over Counsel. One or two solicitors who were less experienced or who had a less specialised family practice were slightly more inclined to instruct Counsel as part of the 'team' to advise on the broad approach.

> *I wouldn't particularly rush to counsel, because I'd rush to the actuary, I'm rushing to the actuary rather than to the counsel if you see what I mean.*
>
> *I mean certainly if I had a case where pensions looked like being a big issue, I think if I'm honest with you, I'd probably go to Counsel then to do the actual hearing, because I would be a bit nervous on my own of you know if the main asset is some dirty great big pension fund, we're looking at how much the wife should get of it, I think I would personally be a little bit wary of certainly settling it on that basis, you know, I think I would probably rope in Counsel at that point.*

5.2.6 How clients responded to recommendations for pension reports

We asked practitioners how their clients responded to their advice to obtain an expert's report and if they met any resistance to such advice. Many practitioners confirmed that they did meet some client resistance and the cost was the main reason given. However, other client factors mentioned included a general fear of pensions and lack of understanding of the benefits of a report, a questioning as to why they should pay for a report to tell them how much of their pension they had to give away, a suspicion that the recommendation was about 'jobs for the boys', a concern that the report might not give any more certainty to the outcome, a reluctance when the parties had already agreed everything in mediation or between themselves, and general 'ostrich syndrome'. One solicitor also referred to some resistance to the appointment of a 'shadow' expert to advise on the joint actuarial report, again mainly for costs reasons.

> *So they're never going to be too happy about 'well how much is it costing me to tell her how much of my stuff she's going to get?'*
>
> *But the actuary will tell you that over the next 15 years anything could happen with those two pension pots to completely undermine any assumptions made at the very beginning. They [clients] will say "Well what's the point of having an actuary if you're telling me they can't give any degree of certainty?"*

On the whole, however, practitioners reported that, once the clients had had full advice on the potential costs and benefits of a report, even if they were not so keen on the idea, they normally went ahead with the instruction. Once the solicitor had satisfied him or herself that the costs would be proportionate and that it was an appropriate case for a report, they would encourage the client by making clear that they were not qualified to advise them on the pension issue, explain that a report would very likely lead to a settlement of the pension issue and that a judge might order one in any event. One or two practitioners expressly warned their clients in advance that the report conclusions might not be wholly in their favour, but that it was still better to settle the issue rather than argue over it. One described how she would advise the client that the cost of arguing over whether there should be a report at all was at least as high as the cost of the report itself. Some clients, for example police officers, might put up more resistance to a joint report.

> *I would say probably 85% of our cases have a pension that is worth taking into account in some shape or other...Probably only about 5% of them will agree to instruct an actuary.*[Solicitor acting for police]

Some solicitors appeared to be less insistent on the merits of a report and more prepared to give in to a client's reticence than others. They tended to be the ones who were either less convinced themselves of the value of a report, and/ or were less experienced with pensions or regularly acted for clients at the lower end of the wealth scale where costs were more of an issue.

A few mentioned the difficulties which can occur if the other party does not agree to an expert report. One, not ideal, solution was for the client to commission and pay for their own report; another was to swiftly issue proceedings so that the judge could decide.

> *So I think I get most of the obstruction to it is when you're proposing it to the other side, whether they're a litigant in person or a solicitor, that ... a pension actuary report is needed, and the response can sometimes be 'we don't think a pension share is appropriate in this case and we're not going to pay half of it'. So that can be sometimes an issue.*

5.2.7 Practitioners' experience of the judicial approach towards experts

The judiciary on the whole were described by the practitioners as willing to approve, if not welcome, the appointment of a joint pension expert providing they were persuaded that the cost was proportionate to the benefit and especially if both parties and solicitors had agreed to it at the first appointment. Many solicitors had had no experience of a judge refusing an expert appointment or of any argument between the parties over the appointment of an expert. There was a suggestion that judges were more willing these days to approve the appointment of an expert than in the earlier days of pension sharing, and that they were more likely to approve the obtaining of a pension valuation than a business or property valuation. There was also a view that judges, like lawyers, recognised the complexity of pension issues and the limits of their own expertise and thus accepted the need for, or positively encouraged, expert input.

> *I think Judges recognise where pensions are concerned that it is a complex field and I've never had any pushback from any Judges, particularly where both parties say we need an expert actuarial report to deal with this. We get pushback where it's a valuation of businesses but where it comes to something like pension issues, I've never had any pushback from a Judge, not accepting and recognising it's such a particular field of expertise, you've got to have an expert to assist you.*

> *I think they're quite happy to have it, again assuming that the cost is not disproportionate to what is being argued about. They welcome ultimately you know a professional view that they can fix upon to you know decide between two conflicting points of view really.*

There was some questioning about how much of the reports the judges actually understood. A few practitioners gave examples of judges going straight to the CEV, just taking the average figure or similar and not fully appreciating the subtler points.

> *I would have thought Judges wouldn't like the reports or dealing with pensions, because they just are so complicated... Or if you've got an actuary's report, you get that many figures thrown at you, that you just, you know, like some Judges I think, just pick the average, because you can't go wrong with the average...Then they can't be accused of, you know, they can't be appealed or anything.* (N solicitor acting mainly for police)

> *...the problem is the regulations only allow you to use the CETV, so if a Judge wants*

to get a bit fussy, he can say well that's all fine and dandy, but that's the figure I'm using because that's the one I'm told to use...They're allowed to say it or further information but they don't. Sometimes they hide behind that, and go, 'I can't be assed with it, it's CETV'.

A small minority of solicitors suggested that there might be some judicial reticence about reports. There were also a few examples from their practice of judges refusing the commissioning of a report in circumstances which the practitioners thought fully justified one, for example on a substantial police pension or an NHS pension with a CEV of over £400,000. In one case the practitioner had to bring in counsel for the FDR to argue for the report '*and the first words the judge spoke in fairness to him were, "I was wrong"".* In another case the district judge in question was not one of the usual District Judges. He initially refused the request for a report, and then subsequently, on the joint application of both parties for the appointment of a joint actuary, made a direction requiring the pension trustees to provide the report. He appeared to be more of an exception; as a general rule the practitioners appeared happy with the way the judges dealt with requests for a pension expert appointment.

5.2.8 The practice of not filing reports with the court

Practitioners tended to confirm our finding from the court file survey that expert reports were rarely filed with the court unless the issue of pensions was the subject of a contested hearing or FDR. If the issue was settled at the FDR then the report did not always remain on the court file and might be returned to the representatives. Practitioners also confirmed that where a draft consent order was filed and there had been a pension expert report, they might refer to it in the covering letter, particularly if the reasoning behind the draft order was not clear, or, less commonly, file the report with the draft order.

...what they would do is, if you send in a consent order, they send it back with a note saying will you please explain to me why the husband's, the wife is only getting 10% pension share, because in this case this looks to be unfair, can you explain? And that would be your opportunity to put forward the evidence to justify it, which might include an actuary report, or it might not.

Our file survey suggested that judges did make pension orders without actuarial evidence and this was confirmed by some of the solicitors, even where the pension was substantial.

5.2.9 The quality and impact of expert reports

Many practitioners complained about the comprehensibility of reports, both for themselves and for their clients, although some actuaries were seen as producing more comprehensible reports than others.

You get actuaries who produce reports that are so detailed and technical that you don't understand a word of them, and if we don't understand a word the client hasn't got a hope in hell, or on the other end of the spectrum simplistic, and perhaps don't pick up on some of the nuances. And it's trying to find experts who can sit very happily between the two.

However, on the whole practitioners gave the impression that expert reports had a very beneficial effect on the prospects of settlement, at least on the issue of pensions. Many described how they had led to early settlement rather than the reverse: *'Usually you can get an agreement on pension quite easily once you've got that report'*. One said that they could not remember a time when a pensions report was prepared and it was not followed.

> *But again I don't think I've ever seen a judge not follow a pension report and impose their own view on it, and usually pensions are the easy bit as it were, because once you've got that report it's laid out for you, the division and the calculation, as long as you've got your letter of instruction right of course.*

Some practitioners expressed shock at the report contents and recommendations but in a way that seemed to act as an incentive to get more reports in future cases rather than to discourage them from getting reports at all. One gave an example of the expert valuation being £100,000 more than the CEV, and another where the additional state pension was made the subject of a sharing order for the first time in his experience. Another gave an example from their collaborative practice:

> *I often quote the case of a collaborative case I did back in early 2008 where my client had a lovely big fat defined benefit pension thank you very much, very happy to share it, very happy to share the income stream 50/50, and so we, wisely as it turned out for the wife, had a report, and it used various different bases, various different calculations, anyway the pension sharing order came out at 70%. Now that's frightening, frightening for the husband, but more frightening for lawyers, because it makes me realise how many other cases have I done a deal whereby the receiver had probably lost out, because he had gone for equality of pension fund value.*

Many had developed good working relationships with trusted experts; they had got used to instructing them, knew what to expect from them in return (even if they did not understand it all), and regarded their fees as reasonable in the circumstances. These professional relationships appeared to have been a key factor in the solicitors' experience and confidence on the issue of pensions on divorce.

Solicitor and client experiences of IFA involvement also appeared to be on the whole positive with one or two exceptions. One solicitor reported how her client brought her IFA to every appointment and he made a valuable input in helping her understand the financial implications. Another described how much easier it was for her client to assess any offers made by her spouse's solicitor.

> *There is a firm that we use... who do lifestyle planning, and what they do is they take into account the expenditure schedule, actuarial tables, work out mortgage repayments, and they do basically a life chart of what your expenditures are, you look at the RPI, and they basically say this is what you need to live, and if you were to take this you would run out of money at age 70, so it's good for them. Again, they charge around about £1,000 so it's not ideal, you can't be throwing money, they're*

already spending a lot of money on lawyers' fees, but we've got one case at the moment, we're in Court in March, and she says it's been a God-send...

Occasionally, cases were described where expert advice had prolonged the case, but the examples we were given were of relatively complex cases and the practitioner's opinion was still that the involvement of experts generally aided settlement.

... sometimes some pension issues are tricky, because there are no absolute answers. The case I had last year where the pensions were the number one area for debate for a whole host of reasons, but we ended up with three different experts reports, none of whom could quite agree. There were some very difficult issues about how the pension should be shared, and because the pension funds were quite significant in value, I think they were worth about £1½ million to £2 million, and some of the complicating factors there was a big difference in the party's ages. On the face of it, it should have been easy to resolve, but because each pension expert gave a slightly different view it actually complicated, and that was one of the principle issues that prolonged the proceedings... but as I say if I was to have to come out with any generalisation, just reading your quote on the way down, Mark Twain saying all generalisations are wrong including this one, is that they probably do aid settlement and speed the process up, but if particular technical issues arise then it's very easy to get bogged down.

In Chapter 10 we describe the practitioners' views on whether a pension expert should have been instructed in a vignette, adding a further dimension to practitioners' general approach towards expert involvement in pension cases.

5.3 The District Judges' Views

5.3.1 Circumstances in which a pension expert should be instructed

There was considerable overlap between the judges and the practitioners on the question of whether an expert report was appropriate. The circumstances mentioned by the District Judges as those where they expected an expert to be involved were when actuarial/ expert advice was needed on:

- a proposed pension sharing order
- how to equalise pension (income) at different ages
- the effects of proposed orders
- a valuation of pensions with a CEV of over £100,000
- complex pensions
- which of several pensions to share and what percentage(s)
- non-protected and non-transferable rights, ASP
- health issues
- offsetting/ discounting

However, they were clear that experts should be involved only when the costs were proportionate to the benefit, and not, for example, when a pension fund was less than

£50,000. The judges would not force the parties to obtain and pay for a report but they would encourage it in the situations listed above. One warned of the risk of negligence actions against practitioners who did not get reports in appropriate circumstances. If a pension issue was likely to be adjudicated then the judges were clear that they needed and expected an expert report. However, none had had any actual experience of a pension issue being fully adjudicated.

> *WDJ2: It has been suggested on the JSB courses recently that any pension pot over £100,000 really should be getting some actuarial value on it.*
>
> *NDJR: It's the old adage: if you don't know what you're doing, you go and find somebody who does! You know, you can get a barrister who knows what to do, or you go and get an expert who knows what to do... If you're actually going to do pension sharing – absolutely [I would encourage a report], because I would not be confident in making a percentage order with any degree of accuracy.*

5.3.2 The quality and impact of expert reports

Overall the judges' view of the quality and usefulness of the reports was very positive. They were generally found to be helpful, and essential in some cases. Once a report had been obtained the judges' experience, like the practitioners', was that the pension issue usually settled and was '*worth the weight in gold*'.

The fact that the cost of reports had come down over recent years meant that they were much more likely to pass the proportionality test. However, the DJs without exception acknowledged that they either did not read, or they did not understand, all the detail of the report. They did not have the time or need to do so. They all tended to go straight to the conclusions.

> *SDJ1: The majority of pension reports, again, I think most people if they're being honest, most of them, you don't read them. What you want is those odd pages, the analysis is somebody else's problem...It's the conclusion that I'm interested in...Because balancing ancillary relief, balancing people's assets on divorce is complicated enough.*
>
> *NDJM: Just picking up on the point about having the summary at the end, when we - we have FDR days, so we will have seven FDRs, sorry, no, four FDRs in a morning, and then an afternoon of FDAs. But if you're doing four in a morning, you haven't got time to read all the documents on the file in the same way as you would with a final contested hearing, so you need an easy summary and a way in.*

Counsel was usually only involved in the bigger contested cases and the judges relied on them to tell them the law.

5.4 Key points

- **All ten cases from the file survey in which it was clear that an expert had been instructed involved relatively long marriages, older parties, larger pensions and pension orders**
- **Practitioners were generally in favour of jointly instructing pension experts where significant pensions existed but the cost and time involved in securing a report were major disincentives in the more run of the mill cases**
- **The more experienced the practitioners were the more they tended to rely on pension experts, both actuaries and IFAs; good working relationships between practitioners and pension experts appeared to be key to the practitioner's level of confidence in their management of pension issues**
- **Most practitioners and judges found actuarial reports hard to understand but were generally very positive about their impact on the prospects of settlement**
- **The District Judges usually supported the involvement of an expert in a contested case as long as it was proportionate, but most did not read more than the conclusions to the report.**

Chapter 6: The Rationales and Objectives behind Pension Orders, the Drive towards a Clean Break and Arguments about Pensions as Matrimonial and Non-Matrimonial Property

In this chapter we describe what the practitioners and judges saw as the main rationales behind orders relating to pensions, the extent to which they framed the rationales in terms of needs, compensation, sharing or in some other way, and whether the rationales for pension settlements were any different to those behind other issues in the cases. We then go on to consider a related topic, namely whether the pension settlements were based on capital or income values, and how the practitioners and judges viewed the objectives there. Finally, we consider the arguments that were put forward about how to deal with pensions which were acquired before the marriage or after the separation, and the extent to they were treated as 'matrimonial' or 'non-matrimonial' property. Most of our material in this chapter derives from our discussions with the practitioners and District Judges, but we end each section by briefly examining the court file survey data and the project expert's view on it.

6.1 Rationales

In Chapter 1, we briefly outlined the cases of *Miller v Miller; McFarlane v McFarlane*[186], in which their Lordships[187] considered the general principles applicable to achieving fairness on the division of property following divorce, beyond the welfare of the children of the marriage. They concluded that fairness would be achieved by reference to: (1) consideration for the present and foreseeable financial needs of the parties; (2) compensation aimed at redressing any significant prospective economic disparity between the parties arising from the way they conducted their marriage; and (3) the principle of sharing.

6.1.1 The practitioner perspective

We asked the practitioners what tended to be the rationale behind pension orders and behind their approach towards their pension cases – was it needs, sharing, compensation, or something else? Was it any different to the rationale on other issues? Some practitioners did not appear comfortable with the terms 'needs', 'sharing' and 'compensation' at all; they preferred to talk about 'fairness', 'entitlement' or 'equality'. One solicitor in particular was quite critical of the way these concepts had entered into case law.

> *The Court of Appeal have said stop inventing these words that don't appear in Section 25. I only wish they'd have said that 15/20 years ago. We'd have been in a lot better place.*

[186] [2006] UKHL 24 [2006] 2 AC 618

[187] Lord Nicholls of Birkenhead, Lord Hoffmann, Lord Hope of Craighead, Baroness Hale of Richmond and Lord Mance (24 May 2006)

...we don't tend to see compensation that much actually works in practice... But you don't tend to vocalise it as needs and sharing...You're doing it, if that makes sense? You're looking at entitlement I guess generally, entitlement and fairness.

Most practitioners made it clear that as far as they were concerned the question of compensation was rarely relevant to their financial cases and only really applied to the bigger money cases which were not within their experience. In relation to pension issues, one (experienced but) non-specialist solicitor said that compensation might be relevant to the extent that the wife (usually) had given up a career/ full time work to look after the children and so should be compensated for the loss of her ability to build up a pension by a sharing order against her husband's pension. A few others made similar comments, but most saw that factor as coming within the ambit of sharing rather than compensation, and one emphatically excluded it as a possible rationale for pension sharing. Only one person could think of a case they had had where the concept of compensation was expressly raised.

I mean the compensation argument, or ground, call it what you will, is virtually disappeared now because the Courts have told us you just embrace it in the whole sharing principle.

But with pension sharing I don't think compensation would ever come… I couldn't envisage a situation where compensation would come into pension sharing.

For many practitioners dealing with mid- to low-value cases the nature of their caseloads meant that the issues, including pension issues, were primarily about meeting needs; they did not have the luxury of considering sharing, let alone compensation. For a practitioner with a higher net worth clientele, the sharing rationale was most significant:

Sharing is usually the predominant reason, so for example we tend to deal with larger money cases, so there will be an issue of a wife for example taking her fair share of the assets, if the pensions are significant then sharing will drive that. Needs tends to be more of a factor in smaller cases, or shorter marriages, so that will tend to drive it in those factors on those bases.

Some as a matter of law would look at needs first in any event and sharing would only come into the equation if there was enough in the pot:

No, not really, we'd look at need, starting off as our kicking off point, and work outwards from there, and if we get to the stage where both parties can have a pension and a house and everything, fantastic.

For others sharing was the starting point with needs entering into the equation in relatively few cases:

It can be a mixture, well sharing obviously, but needs, we've done one or two cases where we've looked, especially where the wife has had very limited employment history, and very little employment prospects, we have looked based on the needs going into retirement.

However, one or two described their *clients* as having a conceptual difficulty in associating needs with pensions, tending to go for simple sharing despite any efforts by the solicitor to persuade them otherwise. It may be that, having provided a CEV, clients found it easier to conceptualise the pension as a shareable capital asset rather than trying to work out what income it might produce for them in retirement and what their income needs might be.

Indeed, some solicitors suggested that a needs rationale was more appropriate for those nearing retirement, and sharing for those further away from retirement. They seemed to have been identifying 'needs' here with *income* needs, and 'sharing' with a split of the *capital* value of the pensions.

> *Yes there is, I think needs based is much more linked in the cases where the parties are much closer to retirement, and you can be much more certain about what income stream the pension's going to give. If you're looking at a case where you're much further from retirement, then it's much harder to predict income, so there you're looking not so much at needs but at sharing, fair sharing.*
>
> *You don't just go for a convenient percentage and say that will do, you don't just say "50%, give us 50%" because what you are doing is trying to make sure that the outcome is fair for both people. So you're actually looking at the needs usually, needs. And specific income needs.*

This was not to say that there would have been more pension sharing orders for those further away from retirement; indeed the court file survey showed quite the reverse – that pension sharing orders were much more likely to be made in cases with older parties and much less likely with younger ones.[188] By 'sharing' the practitioners were not referring here to pension sharing orders but more to the general principle of fair sharing of both pension- and non-pension assets by reference to their capital value. Such an approach may well have included offsetting the pension against the non-pension assets.[189]

Most said that the rationale behind pension orders was no different from the rationale behind other issues. A few of the more specialist solicitors did make a distinction between pension assets and non-pension assets. They were more likely to look at pensions from the perspective of a sharing rationale, 'looking towards the future, reflecting back the extent to which the asset has accrued during the marriage' and generally *equal* sharing. If there was to be any adjustment away from an equal division to allow for needs in the financial settlement, it was likely to be done through the non-pension assets.

> *Purely sharing on the pension. Depends on the age of the parties but normally that's just to do with the sharing principle, you know, unless you're very close to retirement,*

[188] See Chapter 3, p 33. Only 2% of wives and 3% of husbands under the age of 35 had pension orders compared to 39% of wives and 25% of husbands aged 55 and over in cases which disclosed one or more pensions.

[189] We discuss offsetting in detail in Chapter 8, p 131

you're not going to meet a needs argument using the pension fund. It's got to be the non-pension fund assets.

The main driving factor that I'm finding locally is equalisation, so that people are coming out with as close to a 50/50 split on pensions as they can. Both in terms of negotiating with other solicitors, but also what the Courts are indicating, when you are in contested proceedings, they are very keen on looking at pensions in an equal way, rather than an unequal way, and if there's any inequality they tend to do that through the capital of a property, whereas the pensions seems to me, I may be wrong, but my impression of the sort of local market, is that we aim to look for equalisation.

One less experienced but specialist solicitor from a different area bemoaned the lack of consistency and judicial guidance on rationales towards pension assets.

I'm not criticising any local District Judge and everything else, but they need to be a jack of all trades, so their specialism if you like within family law, not everybody can be a [named pensions specialist], so I think it's just another reason to confuse matters, convolute matters, and it increases the litigation risk, which means that we can't do our job as effectively, because we just don't know what the District Judge will do in that matter, whereas with capital or with, I don't know, former matrimonial home or anything that's liquid if you like, or debt even, or anything like that, there seems to be certain defined rules, whereas with pension, you literally have no idea.

In Chapter 10 we describe the practitioners' responses to questions about rationales based on the vignette. The vignette was a fictional but not untypical type of case in which the wife was aged 49 and the husband 50, they had been married for 20 years and previously cohabited for five, with two children aged 20 and 14, the younger one living in the family home with the wife. The assets comprised the family home valued at £245,000 with a mortgage of £40,000, and an ISA in the husband's name worth £10,000. The husband had a final salary pension with a CEV of £160,000 and the wife a personal pension worth £10,000. He worked as a senior engineer in a private company earning £3,000 per month net and the wife was an admin assistant with an income of £1,200 net including tax credits and child benefit.

Most practitioners saw this purely as a needs case, and primarily about housing needs for the wife and child but also about the husband's housing needs and wife's income needs. Most predicted that the wife would come away with a slightly larger share of the equity to meet the family's primary needs. Approximately two thirds of the practitioners considered that there should be a pension sharing order in favour of the wife; because of the parties' ages and the length of the marriage most thought that the pensions would be shared in a way that gave them equal income in their retirement. This suggested that a needs rationale was predominant in relation to the non-pension assets but that both sharing and needs were at play in relation to the pensions.

6.1.2 The District Judge perspective

The judges confirmed that their divorce finance work on the whole revolved around needs cases, and they took the same view as practitioners on the compensation rationale – that it was more relevant in big money cases, which they saw much more rarely. The sharing rationale featured quite strongly for the judges in their discussions about pensions, but as with the solicitors, they chose to express it rather differently. None of them suggested there was any major difference between the rationale on pension issues and the rationale on non-pension issues, although one said that you might want to look at a pension in a different way '*because it's not just capital, it's not just income, it's both'*; one was adamant that the approach was exactly the same.

The following quote illustrates the complexity of trying to distinguish needs and sharing, different ways of expressing these concepts and looking at each case on its own merits and facts:

> *SDJ2: I suppose the cases I'm dealing with are virtually all needs cases... The thing about needs I wouldn't be very sympathetic to the argument that, well, yes, I accept that she's entitled to it, but she doesn't need the pension because she's getting an inheritance from her parents or something. So it's more of an entitlement to matrimonial property probably approach.*

6.1.3 The court file survey and the project expert's perspective

It was difficult to assess with any certainty from the court file survey what the rationales were behind the orders in pension cases. However, the project expert assessed 119 of the court file cases which had disclosed pensions and concluded that the rationale was compensation in one case only, needs in seven cases (6%) and sharing in 35 (29%). In the remaining 76 cases (64%), the rationale was unclear, or it was a combination of two or more rationales, or it was something other than needs, sharing or compensation.

Of the 23 pension sharing order cases which the expert assessed, his view was that the rationale behind the pension order was sharing in 13, and in the remaining cases it was unclear. No pension orders were based on a needs or compensation rationale in his view. He commented on a needs rationale in relation to the non-pension assets but not in relation to the pensions.

A case identified by the project expert as demonstrating a sharing rationale

One example of a pension order case which the project expert considered demonstrated a sharing rationale was a South case involving a husband aged 57 and a wife aged 50, divorcing after a 26-year marriage. They had two children over 18 who had completed their tertiary education but were still based in the family home with their mother. Both parties were represented and a pension expert had been instructed. The case settled after the issue of proceedings. It was not possible to work out the exact value of the total net assets excluding the pensions but they appeared to be in excess of £800,000. The combined annual income was in excess of £110,000, mostly from the husband's earnings, and the combined pension

CEVs totalled in excess of £436,000, again, almost all from the husband's one occupational pension. It was not possible to work out the precise net effect of the non-pension asset division based on the final order but it appeared that the husband received a slightly larger share. There was a periodical payments order in favour of the wife for a fixed term until the husband's retirement in the sum of £7,000 per annum, and a pension sharing order in her favour for 54.1%. The pensions appeared to have been dealt with entirely separately from the other assets and according to notes from the court file the pension sharing order was intended to provide the parties with equal income. The expert considered the approach to the pensions in this case to be economically rational, the pension disclosure adequate and the quantum fair.

In this case, of course, the non-pension assets were more significant in value than the pension assets and there were sufficient of both pension and non-pension assets to meet both parties' basic needs. Their basic needs were being met through a sharing of resources and thus it could be argued that both needs and sharing rationales were relevant, in effect blending into each other.

6.2 Settlement objectives

6.2.1 The practitioner perspective

Relatively few practitioners gave an unqualified response to our question as to whether the settlements in relation to pension issues tended to be based on an income or capital objective. The normal starting point was to obtain a capital valuation in the form of a CEV as required by the rules. And, aside from arguments about needs, and entitlement to pre- or post-acquired pension assets (which we discuss in more detail below), there was no real argument that *equality* was the presumed objective for fairness; the question was, whether it was to be based on equality of the pension income or equality of the CEV. The distinction is relevant, first because the same value fund will normally produce a smaller income for a wife than for a husband as a result of women's longer life expectancy, but secondly because the CEVs for final salary schemes (and especially some of the public sector schemes) rarely fully reflect the cost of the benefits to be achieved on retirement.

Only two practitioners gave an unqualified response that it was solely about equalising the CEV, one of whom said:

> *...but we're just doing, add the CETV's together, divide by two, separate hers out, that's the balancing figure and then express it as a percentage... you know, we have to look at the CETV, that's what the rules say...And if we're looking at equality then that's all we do. It seems to be that's what the Judges do, in the cases, so there's no point in arguing, but I think it's a push too far for case law and the legislation to say we should have equality of output, so I'm always resistant to that...*

One practitioner doing a large amount of publicly funded work suggested he would always look at the capital value unless the pension was the only asset:

> *I think I tend to go down the capital route, looking at the transfer value of the pension,*

because that's the easiest way to put it into the pot. The only way in which I would switch it the other way is where the pension is the only thing there, and then I would purely look at the case from an income perspective, and say right we need to divide this pension a certain way to provide each party with a certain income that's fair.

Rather more practitioners tended towards the equalising income objective:

I think you've got to look at the end result rather than the cash equivalent transfer value... so what you're after, at the end of the day, is equality of income.

But it is, I don't think I've done a split of CETV, I would say for five years, everybody is looking at equality of income and benefits, because of course some of the private sector, NHS, police pensions are astronomical in terms of the benefits that they get, and that would cost significantly more to buy on the open market, those types of benefits.

However, pension sharing on an equal income basis was not without its problems, and the issue presented particularly acutely in a case involving a pension in payment:

I'm acting for the 70 year old... He still loses half the pension... but one of the problems we're going to have is the wife is trying to establish equality of output of pension rather than simply a share of pension because actuarially she's entitled to a smaller pension per pound than he is because of the life expectancy at the moment... So we've got two arguments, about whether she should have it at all, because it's going to make a huge economic impact on the family as a whole, and secondly, why should she have say 60% of the pot in order to produce 50% of the income.

Also, as with the rationales behind the orders, the clients themselves did not always approach the issue in the way which the solicitor advised:

The recipient as far as I am concerned, and it obviously is mainly women who are recipients, I'm always asking them to think about their position in retirement, particularly older people from 40 onwards. It's very difficult to get them to do that, so I would say for my point of view it's about income in retirement, from their point of view I would say it's more about equality and it's there, let's just chop it up and do it.

Another pointed out that offsetting might affect the way they approached it:[190]

If you do an offset it tends to be the value of the fund that you look at, the capital fund, rather than the income from the fund.

However, the majority said, on whether the objective was equality of pension capital or pension income, "It depends" and they mentioned three main factors on which it depended, the most frequently mentioned of which was the age of the parties and how close they were to retirement.

I mean having been involved in some cases where people are arguing equality of

[190] See Chapter 8, p 131 for a discussion of the use of offsetting as an alternative to a pension order.

income as opposed to equality of CETV, I think there is some sympathy from the judiciary for equality of income if you're near retirement, but I think the further away from retirement you are and you're projecting forward, I think you tend to get less sympathy for trying to argue equality of income.

The second factor mentioned most often was the size and type of the pension fund.

Depends really. If you've got a husband and wife that have both got money purchase schemes, so they're traditional private pensions, then you would look at equalising the cash equivalent transfer value even though there is a lot of question about the validity of that... The difficulty lies where you've got one with a money purchase scheme and one that's in a final salary scheme... So I think we're becoming more clinical about those types of cases, whereas a few years ago, you'd have probably been a bit more relaxed about dividing up the cash equivalent transfer value.

The third, rather different, factor was who the practitioners were acting for.

I mean if you're obviously acting for the lady you're looking for equality of benefit, subject to age difference... For the husband, again, you'd consider the age difference, but you'd be trying to go for just straight fund.

You've got to be aware of it. I mean, if I'm acting for a wife, I'll say I want it divided by equality of income. If I'm acting for a husband I'll try it on with the other side and say I want equality of fund value, if I think it's going to work for my client.

There was some suggestion that the practice might have changed somewhat over the years and swung more in favour of the equality of income objective, but the issue clearly still generated some arguments between solicitors and occasionally led to litigation. Several practitioners made the point that an actuary would normally be required if the objective was equality of income and that gave rise to the issue of proportionality.

Depends whose side I'm acting for. We have these arguments about, is it 50% of value or is it 50% of income which would be generated. Everybody got excited, got excited a few years ago, about the latter because wives were losing out because of their longevity against us poor fellows. But actually my experience in the last 12 or 18 months, where clients have spent silly amounts of money going to actuaries saying we'd like you to work out what the equality of income would be, and therefore, what the percentage split of the fund would be, it's usually come out at two or three % either side of where you would have gone just on the fund value. There's not been many where there's been a huge change in where you would have just gone 50/50. It comes back at 48/52 and things like this. Whether it's money well spent I don't know.

So, rather like the arguments above about instructing an expert,[191] and below about pre- and post-acquired pensions,[192] the solicitors might argue one thing one day and the opposite the next, depending on whether they were acting for the pension member (usually the husband)

[191] See Chapter 5, p 68

[192] Discussed later in this chapter under ***Arguments about pensions as matrimonial and non-matrimonial property,*** p 92

or the non-member (usually the wife). For some this was just part of the game whilst others appeared to be slightly uncomfortable about it, but in the absence of clear guidance from statute, case law or their local judges they all felt duty bound to follow the line which suited their client-at-the-time's best interest.

> *I try to take tactics out of it as much as possible and just sort of get these people through, so I wouldn't say that my tactics particularly … obviously, if you're acting for a husband and the parties are very old, I'd go for a capital, and I'd request a valuation on the basis of capital. My opponent on the other side, if they know what they're doing, would be basing it on income, so you would do that because obviously looking after your client's best interests.*

6.2.2 The District Judge perspective

The question of whether the settlement objective in pension cases was based on income or capital values was one that was recognised as a potentially tricky issue but not one which any of the judges had actually adjudicated on. Generally, throughout all the discussions they appeared to incline more towards assessing the income in retirement, especially with the bigger pensions, even though they had to take capital values into account.

> *SDJ2: ...that's another issue that can come up for adjudication, even if we've agreed that it's a matrimonial asset, do we say that they both get half the pot, or do we equalise the amount they're to receive, and of course, all of this depends on age and sex... I've not had to adjudicate on that, but it's a bit of a tricky one.*

None of them felt able to commit to one preference or the other, and two of them took the view that it was up to the practitioners to persuade them in each case rather than they as judges deciding the matter on principle.

> *SDJ1: People approach it differently; depends on their ages. And to a certain extent, it depends on the arguments that are put to you rather than the ones that you're necessarily trying to invent for them. It's not my function, most of the time, to present to myself, as it were, the arguments that they should have put... And you come up with, and different Judges may look at it in different ways, and they may look at it on a purely capital basis, just to take the CETV figure and just divide it and a certain percentage, and see how that fits in with everything else you're doing. But it's such an inexact science, if science is the right word to apply to it at all, because it's so designed to give Judges discretion to do what feels fair, that it's very difficult to get fixed about anything much.*

6.2.3 The court file survey and the project expert's perspective

The expert assessed 119 of the court file cases which had disclosed pensions and concluded that in 72 cases (61%) the focus in reaching the pension settlement was the capital value of the pension, in 7 (6%) the focus was on pension income and in the remaining 34 (30%) the settlement objective was unclear. Of the 23 cases which included a pension sharing order, 17 in his view relied on the capital value of the pension to determine

the outcome and only one (the case described above in the section on rationales) focused on the income value. The objectives in the remainder were unclear.

A case identified by the project expert as focusing on the pension capital value

One example of a a non-pension order case which, in the expert's view, focused on the capital value of the pension to reach settlement was a North case in which the parties had been married for 35 years and had two children over 18. The wife was aged 55 and the husband 61. She had an income of £450 net per month and he £3,000 per month. She had what was described as a 'nominal' pension and the husband's CEV was given as £200,000. Both were represented and had reached agreement on the finances without the issue of proceedings. The order provided that the family home be sold and the proceeds divided so that the wife received the first £470,000 and the husband the balance. All other claims, including pension and periodical payment claims, were dismissed upon completion of the sale of the home.

It was not entirely clear from the statement of information whether the figures which were given for their net capital were as they would be post the settlement or before it, but on the basis that they were post, the wife ended up with total net capital of £880,000 and the husband £580,000, plus his pension of £200,000 and the lion's share of the income. Neither party had any declared intention to cohabit or remarry and both were proposing to rent, at least in the short term. By adding the pension and the non-pension assets together it seemed that the wife was receiving an additional £100,000 in lieu of her pension and/or maintenance claims. We have to say that the numbers for both capital and pensions looked suspiciously round to us, and the project expert did question the quality of the pension disclosure, but the order was approved as drafted without any queries. The expert also suggested that the approach towards the pensions was probably economically rational and the quantum fair but that if the husband's pension was anything other than a money purchase scheme it would have required more investigation.

Looking at this case from the perspective of the rationale, it appeared that a combination of sharing and needs were at play. In terms of the capital values of the pension and non-pension assets it appeared that some sort of sharing rationale was behind the order, and that the capital needs of the parties had been met in that way, albeit slightly differently for each. There was, however, a substantial disparity in income provision and one can only guess that the wife intended to meet her income needs by downsizing and investing part of the capital.

6.2.4 General observations on settlement objectives

Our questions about rationales and settlement objectives were not ones which lent themselves well to analysis of the court file survey; they were too complex, or beyond the scope of this project, and in some cases the financial disclosure was not clear enough to draw any firm conclusions. Practitioners also found it difficult to clearly categorise their cases

in these ways. However, as we mentioned in Chapter 3,[193] of the 39 single pension share cases, seven shared the pension CEV equally between the parties, and we might assume from this that the objective was based on capital rather than income values. It was also clear that in a further seven cases the percentage share under the pension order gave both spouses equal CEVs when added to other pensions which were not being shared. Thus, just over one third of the single pension share cases were clearly based on capital rather than income values, and in the other cases we could not say with any certainty what the objective or focus was.

In general it could be said that the income aspects of the pension appear to have taken rather a lower profile than the capital aspects in the majority of the court file cases. Whilst this might be understandable where couples are young and a long way off retirement, when it is almost impossible to predict what their retirement income might be, it is less easily justified when they are getting to their mid-forties, which was the average age of the parties with pensions in our full court file sample. It is the capital value, the CEV, which is the main requirement for pension disclosure on divorce and that might account in part for the fact that the majority of settlements used the capital value as the main basis of the settlement. However, if the 'ultimate objective' of any financial order on divorce is 'to give each party an equal start on the road to independent living',[194] a requirement to provide at least a basic estimate of their future/ pension income might give the parties and their representatives a better sense of whether they are achieving this objective. This might also help the parties to see where the pension fits in with the rest of their lives and what it might mean to them in more realistic terms.

6.3 The drive towards a clean break

The vast majority (87.5%) of the court file cases were resolved on the basis of an immediate clean break with a dismissal of all income claims between the parties. Of the remaining 46 cases, the clean break was deferred in 32 cases, for example until the implementation of a pension sharing order, sale of the home or when the children had reached 18, with no possibility of extending the term beyond that trigger event.[195] The majority of spousal maintenance orders were for nominal amounts; there were just six substantive joint lives maintenance orders, for amounts ranging between £3,000 and £24,000 per annum.[196] Thus a clean break culture, at least in so far as spousal maintenance was concerned, appeared to be well established.[197]

It was also clear from our discussions with the practitioners and District Judges that a clean

[193] ***Pension share percentages***, p 34

[194] Baroness Hale in *Miller/McFarlane* [2006] UKHL 24, [144]

[195] In six cases we did not collect the data on the term of the order (probably as a result of researcher omission in earlier cases).

[196] See Chapter 2, p 21 for further details of the orders made.

[197] The court just has to *consider* 'whether it would be appropriate so to exercise those powers that the financial obligations of each party towards the other will be terminated as soon after the grant of the decree as the court considers just and reasonable' and 'without undue hardship' S25A(1) and (2) Matrimonial Causes Act 1973

break was very much a priority for most parties on divorce.[198] A few suggested that a pension order somehow prevented a complete clean break. Certainly this was one of the reasons that pension attachment orders were so unpopular, but even with a pension sharing order, the effect could be to tie the parties together through ownership of the family home in a way that did not achieve what the parties' saw as a completely clean break. For example, if the couple were not offsetting the pension against the family home, it was more likely that they would be dividing the equity and the pension in closer to equal shares, and that may well have meant that a sale of the family home had to be deferred until certain trigger events, principally the children reaching 18, or the wife re-marrying or cohabiting for a certain period of time. In those circumstances the delay for the husband in realising his share of the family home and the limitations for the wife with regard to future relationships could be seen as unwelcome restrictions on their post-divorce lives.

6.4 Arguments about pensions as matrimonial and non-matrimonial property

6.4.1 The practitioners

We asked the practitioners what their approach was when issues arose about when the pensions were acquired; did they ever argue, for example, that pensions acquired before the marriage or after the separation should be excluded from the pot for division? All practitioners without exception said they would consider running the argument, in negotiations or court, that pre-marriage pension contributions should be excluded, and some saw it as accepted practice.

> *I mean I think if you've accrued a large proportion of it before the marriage, there's not necessarily a rationale for saying the other person should benefit from the pension as a whole, if you paid into a lot of it when you didn't exist as a couple.*

> *Not argued in court. There have been negotiations where, you know, as part of the figures I've said I'm discounting, you know, pre-marriage credit, so yes it has been used as part of negotiations but that was as an overall package. So you can't say exactly how much of an impact that argument had on the value of the assets but generally I think it's agreed that pre-acquired pension shouldn't be included.*

However, well over one third qualified this by saying that the argument was more appropriate in shorter or second marriage cases and that they would be less likely to run it in a long marriage case.

> *Yes, you can also consider it, but in a long marriage the reality is it's not much of an argument. But if it was short marriage most certainly I would, because that is again*

[198] Lord Scarman said in *Minton v Minton* [1979] AC 593, 608: 'An object of the modern law is to encourage [the parties] to put the past behind them and to begin a new life which is not overshadowed by the relationship which has broken down.' This very much appeared to accord with the wishes of the parties themselves.

that word fair.

Oh absolutely, yeah, definitely, yes. We were talking earlier about shorter marriages, and shorter marriages later in life, somebody will have probably built up quite a lot of their pension before the marriage. Even as much as a 15 year marriage, if you've got 20 years of pension worth that you've built up before that - no, people feel very strongly that they shouldn't share that really. As I say, I would by and large probably argue that that's right...[199]

Just below one third suggested that the argument would be less appropriate in 'needs' cases, that in such cases needs would trump all, so that all assets and not just pensions would be included in the pot for division regardless of when or by whom they were acquired.

I think that there is an element for ring fencing, in the recent case law about inheritance and things, as long as it hasn't been mixed or pulled, it can be considered but the one thing that trumps all of those cards is need.

If again it's built up in somebody's younger life, but both parties are then getting towards retirement, even if it's a very short marriage and there's no other assets, then the person without the pension will have a need for something. So the courts will look at that quite significantly.

Sometimes, agreeing to exclude pre-marital contributions on a pension claim was seen as a way of sweetening a rather bitter pill:

...mirroring this thing about mostly men that I don't want my pension touched, although I had the case with the lady, is 'I don't want to touch his pension', it's a very strong thing 'I don't want to touch his pension', it's like 'I'm not going to really go for the jugular' sort of thing. ***So is it the case that if you agree to exclude the pre-marriage bits then…*** *Then that makes it feel fair, yes, that tends to make it feel fair.*

The question of whether cohabitation should be included in the pre-marriage calculation was commented on by about half our practitioners. The majority felt that pre-marriage cohabitation should be treated as part of the marriage.

But the ones where I really do disagree are the ones who have been married for 15 years and you get the other solicitor saying 'well they lived together you know for five years beforehand so we're trying to chunk off five % or whatever it might be of the pension'. I say 'no you're not, because there's a seamless relationship throughout, it's all in the pot'.

[199] See *Miller/ McFarlane* [2006] UKHL 24 [2006] 2 AC 618 [151] per Baroness Hale: 'Ownership and contributions still feature in divorcing couples' own perceptions of a fair result, some drawing a distinction between the home and joint savings accounts, on the one hand, and pensions, individual savings and debts, on the other...'

Three however did not agree with adding the years of cohabitation to the marriage, and two felt particularly strongly, one being especially critical of a decision on this issue in one of her recent cases in court.

> *I've also thought that it's worthwhile as well saying that pre-marriage cohabitation should be ignored for the purposes of pensions, because it seems unfair to me, that if you're living together, that suddenly the pension that was acquired during the years that they were living together is also brought into the equation. I understand that the District Judges take into account the cohabitation extended relation of the marriage, but I think particularly with regard to pensions, which parties never would have considered sharing before marriage, are suddenly taken into the equation as well... I had a case last week where the Judge included the cohabitation on a one year marriage. And that wasn't even full cohabitation in the sense of the gentleman was working abroad for three weeks, back three weeks, away three weeks, and he took a period of cohabitation into account where the husband had taken, not pity isn't the right word, he had felt sorry for his future girlfriend and had given her a roof over her head whilst he wasn't in this country and gradually became cohabitation, and the Judge took the whole of that period into account rather than when it actually became a relationship... I feel that's unfair.*

The support for the argument that post-separation pension contributions should be excluded was not so clear cut as for pre-marriage contributions. About two thirds said they would consider arguing the point, but the comment was made by several that the gap between the end of the marriage and the financial settlement was rarely long enough to justify such an argument – it might be relevant in five year separation cases but rarely in others.

> *I've got one at the moment actually where they separated in the 1990s, so yes again… but it is harder because even if you've separated, if you've stayed married there's the person who hasn't got the pension will still say, "Well we've been married all this time," even though they haven't actually contributed anything in terms of family life or anything like that. So I'd say post separation contributions are harder to argue out of, but you would still go for it, you would still make your case.*

Some felt that the argument about post-separation pension contributions would be harder to run if the parties had remained financially dependent on each other.

Almost all of the examples given by the practitioners of cases where arguments had arisen about pre-marriage or post-separation contributions involved final salary pensions, and all except one of those were public sector pensions.

> *I have run the argument about it not being… that we shouldn't take pre-marriage pensions into account, I've had that on a few NHS final salary schemes, so actually working out the 19 years in the NHS, 14 years of those have been during the marriage and doing a calculation like that.*

Where these matters were going to be in issue, many solicitors indicated that they would get a pension actuary on board to make the relevant calculations. A simple mathematical calculation was felt by many to be inappropriate, not just when they were dealing with final salary pensions. The arguments went both ways on this; some argued that simple pro-rata-

ing was inappropriate because early contributions were likely to be smaller than later ones reflecting lower early career salaries, others that the earlier years' contributions had had the benefit of having been invested longer.

> *Depending who I am representing, if they've been together, were a couple for a long time before they got married, usually I would ask for four calculations, calculation from the date of cohabitation to the date of separation, then from the date of cohabitation to the date of decree absolute, then the date of marriage to the date of separation, and from the date of marriage to the decree absolute, and work backwards from there... using an actuary.*

It has to be said that not all shared the view that an actuarial report was needed. A few simply looked at the number of years of marriage against the number of years the pension had been in force, applied that fraction to the CEV in question and then divided by two. One gave a specific example from their recent practice:

> *... the one I had recently was a very interesting one, where it was an astonishingly short marriage. Well he'd been paying into his pension for something like 32 years. They cohabited for about four years and then were married for one. So in that scenario he was very happy to exclude the pre-co-habitation contributions, and in fact, then pro-rata-ed that, so yes, that was done as a pro-rata, rather than really looking at how the pension might have grown over the five year period; but yes, well it makes for a more logical and mathematical and dependable and appealable approach. If you pro-rata that tends to be the way they like to deal with those.*

Another practitioner was very critical of such an approach:

> *I will be disparaging here, there are a lot of lawyers out there who seem to think there's a hard and fast rule about pre date of marriage accrual being ring-fenced or excluded, or the word that's used now in the cases is non-matrimonial property. And I think that is, like a lot of these attempts to standardise or formulise things, is wrong, because it's not what the guidelines say, the guidelines refer to resources without any limit on where those resources come from, and if you brought a resource into the marriage you have brought it to the party, and the law says you brought it to the party and it falls to be considered.*

About half the practitioners had had experience of running arguments at court about ring-fencing pre-marriage or post-separation pension contributions, or of being on the other side of such arguments, at different stages in the proceedings. Two said they had had experience of these arguments in negotiations but not in court proceedings. Views about how judges responded to such arguments were quite varied. If draft orders were by consent, especially if there was an explanation with them, the view was that judges would normally approve apportionment based on pre-acquired years. Where matters were contested, about half those who had had experience of testing the arguments in court felt that the judge had been receptive to the principle of excluding pre- or post-marriage contributions; the other half had had a much more mixed response. It did seem to be accepted, however, that, in cases where a direction for the appointment of a pension actuary had been approved, one of the

questions would be to ask for valuations both with and without the pre- or post-marriage contributions.

> *I haven't had a case I don't think where the Judge has been asked to determine the extent, that issue, pensionable service as against length of marriage. I think, well, most cases that we've been dealing with, have generally gone along with that sort of theme, without us having to test it really.*

> *I had one where all his pension was accrued pre-marriage. They were both in their 60's... he would have had roughly about £22,000 a year; and she would have had her State Pension, plus a small private pension of roughly about £7,000 a year. So a very big discrepancy, a 20 year marriage, and she had given up all claims of maintenance, and she had made no claim in ancillary relief against her previous husband, on the basis you know of marrying this chap... Anyway, they ended up that we went to a doors of the Court on a final hearing and the Judge said "Well I haven't heard anything you've both got to say, but just looking at the figures, this is a needs case, so you go and sort it out or I'm going to be you know I'll listen to your arguments, spend the rest of the day but, you know, unless you've got something magnificent that you're going to blind me with, there's going to be a pension sharing order, so off you go".*

A few were keen for us to raise the issue of pre-marriage and post-separation pensions with the District Judges in our meetings with them; it was one of the points which came up most often as a potential source of dispute over pensions and they felt that in the absence of a deciding case more guidance from the judges would be helpful.

> *... it's a common argument that people have been running for five/ten years. But it's never held water, and there's no high court reported decision or court of appeal decision to that effect.*

> *I mean, in the current climate, where our Court of Appeal, Law Lords, bless them, have basically made a mess of family law and are looking to claw back the mess they've made, so we're now spending numerous hours and days arguing over what's a non-matrimonial asset and looking at pre-acquired wealth.*

It was once again striking how much it depended on who the practitioners were acting for as to which argument they would run; they could argue strongly for excluding pre-marital contributions one day when acting for a husband/ pension holder, and argue the reverse when acting for a wife the next. This oft-repeated point was not simply to do with the facts of each particular case.

> *Yeah, it's common, it's one that I will bring out if I'm acting for the person with the pension, and it's one that is used against me if I'm acting for the other person, yes common argument at the moment it seems to be, yeah.*

The argument about when the assets were acquired was perceived by some to be essentially part of a wider Section 25 contributions argument and they sometimes distinguished their approach on pensions from their approach to other assets. The argument most frequently arose in relation to inherited assets; however it was felt to be easier to

separate out pension contributions than inherited asset contributions as the latter had usually been absorbed into the marriage finances and 'lost in the mists of time'. Pension contributions, on the other hand, were clearly identifiable and could be quantified in an actuarial report.

> *Well this is a contribution point, and the standard answer you will get from any lawyer is that the longer the marriage the less impact it's going to have. If it's a needs based solution then the length of the contributions are going to have less impact...*
>
> *I think the bigger arguments in relation to pensions, I find, are about whether you ring fence premarital contributions, and that's not really a pension argument, that's a Section 25 argument... but in relation to the pensions themselves and the values and what you can do with them, I think that's very factual. That's, you know, an accountancy/ actuary issue.*
>
> *The judicial approach seems to be very much that they're only interested in the assets acquired during the course of the marriage or the relationship. They seem to have got the same approach very much with inheritances as well, in a case where inheritance came in several years after separation, a judge wasn't interested. I thought it was a bit surprising.*

6.4.2 The District Judges

We asked the judges how they approached arguments about pre-marriage and post-separation acquired pensions, whether they approached the arguments on a case by case basis or whether it was possible to establish any principles and say anything about them with more certainty. All the judges were familiar with arguments about apportioning pensions according to the years that they had been accumulated in relation to the years of the marriage, mainly in relation to larger final salary pensions. All were equally clear that such issues could only be decided on a discretionary case by case basis, in accordance with section 25 and in the context of the rest of the finances, and not as an arithmetical exercise. Two raised the need for an expert report if being asked to make any such adjudication.

> *SDJ2: A favourite one seems to be that 'I've worked out that only three quarters or half of this pension is attributable to the period of the marriage, so we've worked out that if you're making a pension sharing order, you should only make it for about 25% because you slice off half of it, and you're only looking at the other half'. It usually turns up in cases where somebody's in a final salary scheme...The trouble with them, the whole system is discretionary, and using your discretion... I think it really needs to be case by case.*
>
> *WDJ1: You can't say, 'right, you've had this pension for 20 years, you've worked for eight, it was eight before you came in, and it's 12', I'm not taking 12/20ths. I don't do that. That's a guide but I don't do that.*
>
> *NDJM: It is an argument that I find raised fairly often, and as with anything else, you*

look at it in the context of everything else. So, if it's a needs-driven case, then the fact that it's pre-acquired is going to be of little, if any, relevance, in the same way as pre-acquired other capital assets will need to be called upon, and then you're looking at the length of the marriage as well. So, again, we can't give you a clear-cut answer.

A key factor for all was the length of the marriage, and so an argument that any part of the pension pot should be ring fenced out for a marriage of, say, twenty years or more would be decidedly less attractive than the same argument for a short marriage later on in the husband's career. However, as always, the question of proportionality was to be considered; there was a suggestion that the time and cost expended on such arguments could be inappropriate and sometimes tested the judges' patience.

WDJ2: You're trying to achieve a fairness, having regard to the duration of the marriage, and you know, if it's only a two/three year marriage, why should that partner claim half the pension rights which are there...

SDJ1: I mean strictly speaking, the idea is that it's the amount of pension that has been accrued during the marriage. And it depends upon the particular situation, as to whether that is an argument that is worth running or not, and that depends upon the length of the marriage compared with their ages and when they started the pensions. That's obvious stuff really isn't it. But if you've got the marriage that has substantially been the time that the pension's been running, what's the point in arguing about sort of knocking off 10% of it...There are very few pensions that we deal with in the County Court that are so significant that that sort of percentage makes that much difference... Again, the real problem with all of these questions, I'm sure you appreciate this, is you're balancing them with the other issues.

The views on post-separation accruals were slightly more mixed.

NDJM: Yes, but if you're talking about post-separation, there's a stronger case for saying you draw the line at separation, isn't there?

NDJR: Although it's not - for me, it's not a hard and fast rule, I have to say… So it's partly whether they're still dependent or not...

6.4.3 The court file survey

It was not possible to tell from the court file survey whether and how arguments about when the pensions had accrued had entered into the reasoning behind the final settlement, unless for example there were covering letters or other documents which expressly said so. The variables involved were too many and too complex to establish this with any degree of reliability and we therefore did not attempt the exercise.

6.5 Key points

- **Practitioners and judges saw the rationales behind pension case orders in terms of fairness, entitlement and equality as much as in terms of needs and sharing. Compensation was very rarely seen as relevant except in big money**

cases. Most described their cases as having a needs rationale regardless of whether pensions existed or not, but some of those acting for higher net worth clients distinguished pension from non-pension assets, approaching the non-pension assets such as the family home in terms of needs and the pension assets more in terms of sharing, unless the parties were in or nearing retirement when income needs would come to the fore. In practice, needs and sharing rationales blurred into each other and in trying to achieve fairness solicitors drew on more than one rationale

- **Practitioners described an increasing tendency to treat the objective of pension orders as equalising pension income rather than pension capital. However, this depended to some extent on 1) the age of the parties and how near they were to retirement, 2) the size and type of the pension and 3) whether the practitioner was acting for the husband or the wife. The District Judges appeared to have a slight preference for a pension income objective but would only decide on the particular facts of the case. The file survey showed that in at least one third of pension order cases it was the capital values of the pensions which were used to determine the outcome. The project expert's view was that pension capital values were more significant than income values in the majority of the pension order settlements.**

- **It was clear both from the file survey and from the practitioners and judges that a clean break culture was well established and actively sought after by the parties, in relation to both income and capital, sometimes affecting the approach to pension orders as well.**

- **Departure from equality on the basis that the pension had accrued outside of the marriage was a common source of argument, the more so in cases involving shorter or second marriages and final salary pension schemes. District judges were clear that they would only decide such arguments on a case by case basis and that any such arguments should be supported by actuarial valuations.[200] Practitioners switched their arguments depending on whether they were acting for the husband or the wife.**

[200] See *B v B* [2012] EWHC [2012] EWHC 314 (Fam) 23

Chapter 7: Pension Issues, their Contentiousness and the Process of Settlement

In this chapter we discuss how contentious an issue pensions were on divorce, how often proceedings were issued and how much pension issues added to the length and cost of the cases. We then go on to consider the relationship between pension issues and legal representation as evidenced by the court file survey data, the project expert's assessments, and the interviews with the practitioners and the judges. We also look at the circumstances in which the judges intervened on pension issues in uncontested cases. Finally we take a brief look at the three courts where we carried out the file survey to see if there were any significant differences between them.

7.1 Contested, initially contested and uncontested cases[201]

7.1.1 The court file survey

7.1.1.1 Whether proceedings were issued

In total, of the 369 divorce court file cases which we surveyed, financial remedy proceedings were issued in 86 cases (23%).[202] The wife was the applicant in 72% of those cases and the husband in 28%.[203]

In common with the national picture, the vast majority of cases in our sample settled.[204] As shown in Table 7.1, approximately three quarters were uncontested or 'consent order only' cases. A further 21% were initially contested, but settled after the issue of proceedings. A very small minority were fully contested.[205]

[201] We are using the terms here as adopted by the Judicial and Court Statistics: by 'contested' we are referring to cases which were fully adjudicated; by 'initially contested' to cases where proceedings had been issued but were later settled; and by 'uncontested' to cases in which no proceedings were issued other than to lodge a draft consent order with a supporting statement of information, D81; we sometimes refer to uncontested cases as 'consent order only' cases.

[202] There were 16 cases which were uncontested, but in which Form A appeared to have been issued as a formality only, with an application for a consent order. These cases were treated as uncontested.

[203] These figures are excluding seven cases in which data on who was the applicant was unclear or missing, and some where it appeared that both parties may have lodged applications.

[204] The Judicial and Court Statistics provide figures for the disposal of applications, rather than cases, and as a case may include more than one application, are not directly comparable with our sample. However, in 2010, 73% of applications were uncontested, 22% were initially contested and subsequently settled, and 5% were contested: Judicial and Court Statistics 2010.

[205] These figures are excluding two cases which appeared to have settled after proceedings were issued, but it was not entirely clear that they did so as the final orders were not expressed to be by consent and we found no other obvious indicators on the file.

Table 7.1 How cases were concluded by issue of proceedings

How concluded	N	%
Uncontested	283	77.1
Initially contested	78	21.3
Contested	6	1.6
Total	367	100.0

Proceedings were issued more often in cases where there were relevant pensions. Proceedings were issued in 27% of cases in which the *wife* had relevant pensions, and also 27% of those in which the *husband* did, compared to 19% of cases in which the wife did not have any relevant pension and 15% of cases in which the husband did not. The difference for wives was not statistically significant, but the difference for husbands was.[206] The difference between wives and husbands here may be related to the fact that the husband's pension was usually larger than the wife's and possibly more likely to trigger the issue of proceedings. [207]

Proceedings were also statistically more likely to have been issued in cases in which pension orders were made than in pension cases where they were not (39% compared to 23%).[208] However, this does not in itself indicate that the fact that a pension order was being sought necessarily influenced whether proceedings were issued: 61% of cases involving pension orders were still uncontested, consent order only, cases.[209] We return to this point later in this chapter.

Most final orders (82%) were made by District Judges rather than deputy District Judges (who made 18%).[210] It appeared that District Judges dealt with most of the more contentious cases; all of the six adjudicated cases were heard by District Judges, and District Judges also made the final order in nine out of ten of the cases which settled after the issue of proceedings (92%). In contrast, nine out of ten of the cases in which deputies made the final order were consent order only cases (91%).

[206] Chi-square test (with Yates Continuity Correction): p = .083 for wives, p = .023 for husbands.
[207] Proceedings were issued in 26% of cases in which either or both parties had relevant pensions, compared to 15% of cases in which neither did. This difference was not quite statistically significant: Chi-square test (with Yates Continuity Correction): p = .065.
[208] This difference was statistically significant: Chi-square test (with Yates Continuity Correction): p = .023
[209] The Judicial and Court Statistics indicate that in 2010, the proportion of pension orders that were *uncontested* (77%) was slightly higher other types of disposal, such as periodical payments (74%), lump sums (75%), and property adjustments (71%).
[210] In two cases, the level of judge was unclear, but these percentages remained the same whether or not those cases were excluded.

7.1.1.2 The length of proceedings

It was possible to calculate the length of proceedings in 55 cases which were initially contested but settled after issue of proceedings, and four of those which were fully contested.[211] Of the 55 which settled, 29% concluded within four months of issue, 53% within six months, and 86% within nine months. The remaining cases took between ten and 15 months to conclude. The four contested cases took 9, 12, 14 and 19 months to conclude.

Cases with pension orders took longer than the other cases to settle: 69% of the cases with pension orders had settled within nine months of the issue of proceedings compared to 92% of those with pensions but no pension orders. Thus 31% of pension order cases took ten months or longer to settle compared to only 8% of those without pension orders.[212]

Table 7.2 Length of proceedings excluding adjudicated cases by Broad case category

		No relevant pensions		Relevant pensions no pension order		Pension order		Total	
		N	%	N	%	N	%	N	%
Length proceedings	**Up to 4 months**	2	40	11	29.7	3	23.1	16	30.9
	5 to 6 months	1	20	10	27.2	2	15.4	29	51.8
	7 to 9 months	1	20	13	35.1	4	30.8	47	80.4
	10 months or more	1	20	3	8.1	4	30.8	8	19.6
	Total	5	9.1	37	67.3	13	23.6	55	100

We had hoped to collect some data on the cost of proceedings but too few cases contained any data at all on costs to make this a worthwhile or meaningful exercise.

7.1.2 The practitioner perspective

7.1.2.1 The complexity and contentiousness of pension issues

The vast majority of the practitioners said that, even where pensions were in issue, they did not significantly affect the prospects of settlement one way or the other. Pensions were widely acknowledged to be a complex issue, and difficult to understand without professional help, but they were not necessarily seen as particularly contentious. Very few solicitors had had experience of cases where pensions were the only or main issue in the case; if pensions

[211] This is based on the number of completed months between the date of Form A and the date of the final financial order. This could not be calculated for two of the adjudicated cases and 25 of the other cases in which proceedings were issued, as the date of Form A was unclear or missing.
[212] The numbers are small so should be treated with caution.

were in issue, although they might raise the temperature, they tended to be just one of several issues in a generally contentious case.

> *There's often discussion or disagreement about the precise percentages but not the principle [of pension sharing]. And we tend to find that, well, I haven't had a case which has gone fully contested where the Judge has been asked to determine the share. Where there have been disagreements, we've either resolved them before we got to, for example, the FDR appointment, or we've asked the Judge, at the FDR appointment, what his or her view might be, given their experience of these sorts of cases, but I've never had a case where we've asked the Judge at a final hearing to determine the percentage. That is the one thing often that by the time we get to a contested hearing is not an issue any more.*

> *I think it's more of the if you get into an argument you'll be arguing about everything, and it may be that what fuelled it is the realisation on the payer's part that they've got to share their pension, that might be what lit the fire of the animosity of the argument you're going to have. But I don't think I can think of a case where we've just been arguing about pension, no I don't think I can. But the general feeling of, 'ah she's going to have my pension and she's taking me to the cleaners', I think that might be the general fuel to the fire if you've got a difficult one.*

Where pensions were an emotive issue for the parties, they could work either way in helping or hindering settlement.

> *Do they make it better or worse? It's sometimes useful to know that you've got that, particularly the case I mentioned earlier where there was nothing else, at least there was that to talk about, as something we've got, there is something in sight, you've got nothing at the moment but something to look forward to. On the other hand it can make it harder, people are quite protective of their pensions, they don't really like the idea of giving up something that they feel they've saved for personally...*

A husband who felt particularly protective of his pension might be willing to give up more non-pension assets in return for keeping his pension intact and where the non-pension assets existed this might suit the wife very well, meeting her and the children's immediate housing needs, and thus helping settlement.[213]

> *I think there's a general feeling that men are very possessive of pensions, and therefore very often there's a case that you can do quite well in terms of offsetting. And so that can, if you like, can help cases settle because you'll very often get the feeling that the guy will say, "well you can have the house, as long as you don't touch my pension", I appreciate it doesn't happen in every situation, but there's certainly a fair few that it does happen in, or certainly that's the wife's perception.*

On the other hand, a husband who was keen on keeping a valuable pension, particularly if he was acting in person, might be less cooperative over providing full disclosure, instructing an expert or negotiating a pension share even where this was the only really viable option. This might delay settlement and prompt the solicitor acting for the other party to issue proceedings.

[213] Offsetting is discussed in detail in Chapter 8, p 131

...we recently went to court because he was in the forces and wouldn't give us his pension details. We went to court, he was forced to give them to us, it took about 18 months, just for pensions, everything else was settled, the house had sold, money split, but she 'didn't deserve them', so that took 18 months just for pensions, and she walked away with her share.

In general, however, the practitioners' experience was that the divorcing public were increasingly aware and accepting of advice about taking pensions into account on divorce, and that it was a minority who would fight to the bitter end over them.

I've only really ever had one or two clients who have been hell bent to protect their pensions...

It used to be a bug bear because husbands by and large were the ones who had the bigger pensions, but I think there's gradually, over the last 10 years, become an acceptance that it can't be avoided... I think there's been a definite shift. It's much more accepted by the pension owning spouse now that they're going to have to give.

If it is correct that the principle of taking pensions into account is more widely accepted now than in the past, one might expect that acceptance to be reflected in the Judicial and Court Statistics. But as we have already observed in Chapter 1, these statistics show only a very small increase in the number of pension orders over the years and consistently low numbers overall. It appears that, if pensions are being taken into account on divorce more readily these days, they are being dealt with in ways other than by pension orders. We discuss the alternatives to pension orders that are being adopted in the next chapter.

One solicitor who agreed that pension issues were not on the whole particularly contentions compared to other issues nevertheless said she could not remember a case involving pension sharing that did not involve the issue of proceedings. As we discuss above, it was indeed one of the findings of the court file survey that proceedings were more likely to have been issued in cases in which a pension order was made.

I'm just thinking, I'm not sure I have ever done a case without proceedings at all that has had a pension share, which seems insane, but I can't think of one at the moment. And that doesn't mean they're more contentious though … it's not like the pensions make it a contentious case and therefore you go to court.

Several practitioners echoed her view that other issues were more contentious than pensions.

I would suspect, in a huge percentage of the cases, the majority, even when they fight in the Court room, they're not fighting over the pension issue, that's parked, we've sorted that bit, you can leave that bit alone, because it's not difficult to sort.

No, I wouldn't say that the pension is the problem, the rest of it is the problem I would say more, particularly at the moment it's trying to get a quart out of a pint pot, it's the level of debt, it's everything else...

A handful of practitioners thought that the existence of significant pensions positively enhanced the prospects of settlement: so long as the principle of sharing was accepted, then it was also generally accepted that there should be equal shares, and then the fact that one aspect of the financial settlement had been agreed might encourage settlement of the rest.

> *I think it makes it easier actually, because certainly the solicitors that I work with on a regular basis, and the Courts, we tend to know our local District Judges, that if you're going to argue on pensions, they're going to look to put the parties in a similar position on retirement, so in actual fact, it can aid settlement because you can deal with that as an asset in isolation, and agree that, which makes everybody feel better because they've at least agreed on one issue.*

A few practitioners had had the reverse experience, namely that the existence of significant pensions made the cases more difficult, and/or less likely to settle. Usually this was perceived to be because of one party's resistance, but a few solicitors blamed other solicitors' inexperience.

> *It can [affect ease of settlement], yeah. You have different levels of experience of pension sharing in the legal profession. Pensions are very scary, they are very technical, they're difficult, people don't understand them. Judges don't understand them often. And so we do find some lawyers shy away from the whole pension issue and still argue with us about whether you need an actuarial report and they take the approach that you can just add figures of different pension types together and use it as if it was cash.*

Party resistance was also thought to stem from the general difficulty of understanding pensions, as well as an instinctive possessiveness on the part of the pension member:

> *I mean the ones where I've had to carve up pensions have always been the grizzlier cases. I just think people just don't like to touch them. Personally I find clients find it very difficult to give up a pot that they think was for their own benefit. I think the person does struggle with that, to deal with that.*

It could be particularly difficult to counter resistance on the part of the pension holder if equalising pension income meant the spouse taking a greater share of the CEV: '*trying to unravel that and explain that to a client is quite…can be quite a tough thing to do*'.

Although the prevailing view was that pensions were not generally the most contentious of issues, there were a few points which came up repeatedly as being a potential source of argument. Some of these are covered in more detail elsewhere in this report but we briefly mention below the ones most commonly raised. A pension expert could help to resolve some but not all of these arguments.

i) Pre- and post-marriage acquired pensions.[214] These could be seen as a sensitive issue and one where the solicitor would invoke different arguments depending on whether they were acting for the pension member or the potential beneficiary.

[214] See Chapter 6, p 92

ii) Whether the objective was to be equality of pension income or capital.[215] The majority view was that, especially for those nearing retirement, there should be equality of pension income, but this could sometimes be very unpalatable for the pension member and, once again, the solicitors might invoke different arguments depending on which party they were acting for.

iii) How to compare the values of pension assets with non-pension assets, of final salary with personal pension funds, and how to predict future benefits with accuracy.

iv) A particularly thorny issue, known as 'income gap syndrome'; this refers to the difference in timing between when the pension member and the spouse could draw the pension benefits, especially if the pension was already in payment and there was an age gap between the parties. A sharing order for a pension in payment could have the effect of immediately reducing the pension holder's income by half or more whilst giving no benefit to the spouse for many years. Practitioners suggested a few different solutions to this problem, including an attachment order or periodical payments order and deferred pension sharing order, but none was without its risks, and the legitimacy of a deferred pension sharing order was questioned by some. This situation was especially acute for clients who did not have the resources to pay their solicitors privately but who would not be entitled to public funding after April 2013, as the following full quote demonstrated.

I've seen cases where the Judges have been very reluctant to make those sort of orders because of that situation that no-one benefits, certainly in the short-term from that. I've got a case like that, I've pretty much I've said to the lady, "look, there's not much point", because the husband's caring for the children in this case, and the wife is clearly entitled to a pension sharing order because it was a Forces pension, it's worth a lot, and she's on income support, so she's clearly got a claim there for a pension, but if she pursued it now, and the Judge ordered it, then his income would immediately be slashed, you know, she wouldn't see anything for a long, long time. And she's only in her 40's or something, anyway, so basically the advice from the Barrister was basically well come back in 10 years time when the children are older and we'll actually do a case... They are divorced but she's never had an ancillary relief settlement. And why, because she's on income support and she's in Local Authority housing, she doesn't need any kind of settlement at the moment, but the pension share claim is definitely there... but one sort of issue I've got with this lady is that you know I've got to be thinking about doing it for her any time soon because, in a year's time, she may well not get public funding for that sort of case because legal aid's going for that. And she's not the shiniest spoon in the drawer and I think, if left without public funding, she just wouldn't be able to do it, she just wouldn't know where to start.

[215] See Chapter 6, p 86

A few other issues described as potentially tricky ones specifically in relation to pensions included moving target syndrome,[216] the uncertainty of future changes in pensions legislation and regulations especially in relation to the state pension, and occupational pension schemes becoming insolvent (although only one practitioner had had any experience of a scheme becoming insolvent).

7.1.2.2 The length and cost of pension cases

The experience of the majority of solicitors, including those who thought that pensions were rarely a stumbling block to settlement, was that pension issues did add to either the length or cost of the cases, or both. A range of reasons was given for this. In those cases where pension issues added to the length of the case, the main reasons cited were:

i) The disclosure, and the length of time it took to secure a CEV, particularly for final salary pensions, often exacerbated if a litigant in person was involved. When we were interviewing in early 2012, there had been a moratorium on public sector CEVs because of the change in the valuation rules and this had seriously added to delays in concluding cases, but even without that fairly unusual circumstance, disclosure relating to pensions, particularly final salary pensions, was seen as time-consuming;

ii) Actuarial reports, which were needed in certain cases; even though they were often produced within a few weeks they inevitably added to the length of the case and sometimes delayed the proceedings. Once produced it might take the solicitors several readings to understand and explain them to their clients, and/ or there might be further questions to ask of the actuaries by way of clarification, especially for the party who did not like the recommendations.

And because he's so busy we have had a case which has been adjourned for the report to be produced. We had an FDR adjourned, which obviously increased the cost, we then had questions in relation to the report which he eventually produced, it was a very good report, but extremely difficult to read, and we had to go back with layman's questions because even Counsel couldn't understand some of the … which is you know we're all experts in certain areas, so there are questions always...

However, as discussed in Chapter 5, reports were generally seen as making a positive contribution to the prospects of settlement, thus the net effect overall was to reduce the risk of a protracted argument.

iii) Implementation, which was described by many as adding months to the closure of the case, occasionally by as much as 12 months. Some secured the help of an IFA to manage this process, but they still usually saw it as their

[216] Moving target syndrome refers to the difference in valuation between the date of the CEV produced for the purposes of negotiations or court proceedings and the valuation on the valuation day chosen by the scheme to implement the pension sharing order, which can be many months later. See Salter, D. 'Moving target syndrome: A New Twist', [2010] *Family Law* 296

responsibility to ensure successful completion, and for the clients of course this must have meant yet more of a wait before everything could be seen as truly finalised.

You could find that a case that didn't involve pensions would finish six months earlier than a case involving pensions because the pensions administrator takes so long to implement the pension sharing order and it costs so much as well, that it is a bit off-putting to tell you the truth, off-putting to the client and off-putting for us as practitioners.

iv) General ignorance of pensions and lack of understanding of the procedure on the part of both clients and practitioners. Solicitors often spent much time explaining to clients what disclosure was required and why, the need for an expert report and then its contents, the detailed options available, the mechanics of implementation and so on. Where extra time was required, the solicitors' fees would usually go up accordingly.

If you get someone on the other side, I'm not going to say that they are the high street firms, or they are non-specialist family lawyers, but the naivety on the other side to even embrace or understand how to effectively do a pension share can take a lot longer and, because of the cost rules, you can never get that money back and effectively your client is having to pay extra for a solicitor who knows what they're doing, informing a solicitor who doesn't know what they're doing, what the scope is.

Certain types of pension were said to require more time or care than others, almost always the final salary pensions in both the private and the public sector. Those most commonly mentioned were the Police and Armed Forces pensions, where benefits could be complex or hidden, and where the CEVs rarely reflected the true value. Sometimes practitioners found that the pension administrators were unhelpful, and added to the time and costs of the case.

I think probably all of them are fraught with particular dangers. The public sector ones particularly, the fire service and the army ones, I think generally speaking if you ask round the armed services pension trustees are deemed to be very unhelpful.

You've got the quirky ones that you do have to be careful with, Policemen, Armed Forces, footballers, because they have particular rules applicable to their funds, so we have to be on the guard for those.

Other types of pension mentioned by solicitors as potentially more difficult to deal with, and thus more time-consuming and expensive, were self-invested pension schemes (SIPPs), '*the bane of a lawyer's life*', and small self-administered schemes (SSASs), especially when pension funds were invested in premises used by the family business. Such pensions, where subject to a pension sharing claim, not only gave rise to liquidity and logistical problems, but could also involve the time and expense of other types of valuers and experts. Some of the practitioners who had had experience of negotiating over such pensions gave vivid examples of the difficulties which could arise.

Well I've got one at the moment actually which is a complete nightmare, I'm acting for wife. Husband and his brother have a SASS in which there are properties which they own jointly, which are in the SASS but produce a rental income which generates obviously you know, growth as well as the capital value of the properties. And we've finally come to an agreement that she should have a pension share of half of the husband's interest, which would be 25%... There'll be that many clauses in the recitals to pin it all down, purely to protect her interest, so yes, that's a bit of a nightmare.

The difficult ones are the ones where they buy commercial property and maybe the husband's running the business from the commercial property and that's his SIPP, and they then typically have to sell it back to the insurance company and take their annuity when they're 70, whatever the age is. And so they're not particularly easy to make pension sharing orders against, in fact I'm not sure how you can make a pension sharing order against a fund that has a commercial property as its main asset, presumably you just get a share of the rent that's being paid. These SIPPs are complicated, and I have to say I'm not particularly knowledgeable about them. I do know, because I've just been reading this morning about this very big one I've got at the moment, and it looks as if the big problem we face is the sheer cost and charges and the fees to be incurred in moving a percentage of the fund from his name into her name, whether internally or externally. And those costs are going to dwarf the NHS implementation charges that I've been moaning about.

There were some additional costs and disbursements specifically associated with pensions:

i) The charge for the CEV. One CEV per annum was normally supplied without charge, but in some cases, where the CEV might have changed significantly or the case was in court, it was necessary to seek a fresh one, and that almost always had to be paid for. There was also usually a charge for the CEV of a pension in payment. These charges varied considerably but could amount to several hundred pounds.

ii) Actuarial reports, although said by most to have become much more reasonable over the past few years, nevertheless cost between £500 and £1,000 plus VAT, more if there were technical complications. This fee would normally be shared between the parties, and in the high net worth cases could be 'a drop in the ocean', but for the more run of the mill cases, still a potentially significant cost to the parties.

iii) Fees for implementing pension sharing orders also varied hugely but were said to have increased quite dramatically for some pension schemes and could be as high as £3,500. These fees were cited by many practitioners and judges as one of the main factors to be considered in advising on the pros and cons of a pension sharing order, and in the case of smaller pensions could mean that the costs simply outweighed the benefits.

7.1.3 The District Judge perspective

The judges' broad view was that, if anything, unless there were disclosure issues, the existence of significant pensions tended to increase the prospects of settlement rather than reduce them. First, the changes in the law that introduced pension sharing meant that people had more to trade off, for example, the house against the pension. Secondly, the cases with bigger pensions tended to be the ones with more money to go round, which were generally easier to settle than those with just a family home and very limited equity.

> *SDJ2: Well they can make it easier, particularly if people have got different objectives, because if you've got "only" a matrimonial home to argue over, and no way of compensating a party for the other one's interests, then that might sort of push people towards a hearing, whereas if you've got a range of assets, and people want different things out of it, it does make it perhaps more likely that they'll settle.*

The judges took a similar view to the practitioners, that lack of understanding of the nature of pensions on the part of clients and sometimes practitioners ('*who aren't necessarily top notch lawyers*') could make cases more difficult. However, their experience was also that it was rare that pensions would be in issue on a final hearing; most would either settle without proceedings at all, or at the FDA or FDR. By the time the case got to a final hearing, which was a very small minority, the parties would usually have settled such issues, often with the help of counsel. In the smaller cases it was usually the home that was in issue; in the bigger cases it was more often the company that caused the problem rather than pensions.

> *WDJ1: ... I mean I've got a couple at the moment where it's the state of the business, that's the issue to be determined, they agree the pensions should be split... You don't have many issues about the pension itself... I think it's rare that you get an issue just on pensions. It's very rare.*

> *NDJM: A lot of the big money cases will settle, with quite complex settlements, and with pensions, quite complex pension shares. The much smaller cases, it's what happens to the house that is really important, and that's got to be adjudicated on. In those sort of cases, there are either no pensions or the pensions are very small.*

The issues relating to pensions that were most often aired at the FDR, and the types of pension that most commonly were in issue, included all those touched on by the practitioners:

- Pre-marriage and post-separation acquired pensions
- Public sector valuations, especially for Armed Forces and Police pension schemes
- Other occupational final salary schemes
- The volatility of personal pension values
- SIPPs and SSASs

- Internal or external transfers
- The income gap syndrome (there's *'not an easy way out of it'*)
- Pensions in payment
- Health issues or disabilities
- Nominating or attaching death in service benefits.

> *NDJM: ...SIPPs, where they've used them to purchase the business from which …the premises from which the business trades... And I've had arguments about whether the actual underlying asset valuation is accurate or not, and should the court order, a re-valuation of the assets held by the pension fund and things like that. That gives rise to all measure of complications.*
>
> *NDJR: And people will fight a lot harder against a pension sharing order in payment than something that is prospective. Because, in the case that I had, of course, half his income was going to disappear overnight!*

The following are some examples of guidance that the judges might (or might not) have given at an FDR on pensions:

> *NDJR: Well, all I can say personally is, if I'm asked to give guidance on what would be an appropriate pension share, absent any information, the answer is no...*
>
> *NDJS: All I would say is one should be achieving equality. It's a bit of a cop-out I know, but that's all you can say!*
>
> *NDJM: Or, sometimes the guidance is "Is this a case where you are likely to make a pension sharing order at all?" and certainly I've been asked for that.*

None of the judges seemed to think that pensions prolonged the proceedings once the CEV had been obtained, although they were aware of the recent specific problems in getting public sector CEVs. Obtaining an actuarial report in cases where this could be justified tended to increase the prospect of settlement in their view. An actuarial report added to the costs but a bigger deterrent was the charge for implementing a pension sharing order, which in some cases had risen dramatically, one judge specifically mentioning £3,000 for schemes such as the NHS.

> *SDJ1: Not necessarily, not more lengthy, there's no reason why it should be more lengthy. I mean the only thing additional they've got to do is obtain that magic figure. And most pension trustees are fairly efficient about it, because they're having to do it all the time.*
>
> *SDJ2: Well, suddenly one starts seeing these figures for pension sharing, which run into four figures...And some organisation is providing guidance. I think the pension providers set up an organisation, then gave themselves guidance, which is well a bit like sort of banker putting a hand in your pocket, I mean, they've just given very generous guidance to themselves.*

The judges' view was that the economic climate had affected the amount of financial remedy work generally (they speculated that was because fewer people were divorcing and/or more cases settling) but had not particularly affected pension issues; falling property values and the difficulty of selling had affected settlements more adversely.

> *NDJM: I think the biggest impact [of the recession] is on the difficulty of selling houses and falling house values, and, again, I think a lot of people are very sceptical as to what pensions are actually going to be worth in 20, 30 years' time, so they are much less concerned about the future and much more concerned with here and now and what happens to the actual concrete assets that they've got in their pocket today.*

7.1.4 The issue of proceedings and the length and cost of cases: concluding thoughts

We suggest that, in the light of the findings from the court file survey described in Chapter 3 that cases with pension orders were associated with higher income, capital and pension wealth, and the broad view of the practitioners and judges that pension issues were complex but not especially contentious, the fact that more proceedings were issued where pensions and pension orders were involved was only indirectly related to the pension issues themselves and was more directly related to the broader nature of the case, namely the higher net worth case. However, it does appear that at least some of the additional length, and almost certainly cost, of the proceedings were directly attributable to the pension issues themselves.

7.2 Pension issues and legal representation

7.2.1 The court file survey and legal representation in general

We collected data on whether the parties were legally represented in respect of the final financial order within the complete sample of 369 cases, which includes all couples both with and without pensions.[217] Representation was the norm for wives, less so for husbands. As shown in Table 7.3, although overall 77 % of all parties had legal representation, husbands were more likely to be unrepresented than wives.

[217] The main criterion for categorising a party as legally represented or not was based on whether they had a legal representative acting for them at the time of the final financial order; that decision was based on evidence such as whether there was a Notice of Acting, public funding certificate, solicitor and party signing the Notice of Application, or a covering letter on the court file confirming that a solicitor was acting in the financial proceedings or that a party was acting in person. Some of those who were not formally represented at the time of the making of the final order may have been advised during the course of the proceedings but we were not able to say what proportion had had such advice or at what stage(s).

Table 7.3 Legal representation at time of final order for wives and husbands

	Wife		Husband[218]		All parties	
	N	%	N	%	N	%
Represented	320	86.7	245	66.8	565	76.8
Not represented	49	13.3	122	33.2	171	23.2
Total	369	100.0	367	100.0	736	100.0

There appeared to be no relationship between the wife's income and whether she was represented. However, median net income for the husbands was significantly higher when they were represented, compared to when they were unrepresented: £23,790 compared to £18,018.[219]

The husband was also significantly more likely to be acting in person if his income was in the first or second quartiles, i.e. up to £18,036 (44%) than if it was in the third or fourth quartiles, i.e. over £18,036 (26%).[220] It seems possible that the difference between wives and husbands in terms of the relationship between income and representation was due to the wife being more able to obtain public funding if she was on a lower income, but we can do no more than speculate about that, and, in any event, since April 2013 the scope and availability of public funding has been drastically reduced.[221]

Overall, as shown in Table 7.4,, both parties were represented in respect of the final order in more than half of cases (57%). One party was unrepresented in 40% (in three out of four of these cases it was husband), and both parties were unrepresented in 3%.

[218] Figures for husbands exclude two cases in which it was unclear whether they were represented. The difference between husbands and wives was statistically significant.
[219] Mann-Whitney U Test: U = 8,504, z = -3.302, p = .001.
[220] Chi-square test (with Yates Continuity Correction): p = .002.
[221] Legal Aid, Sentencing and Punishment of Offenders Act 2012

Table 7.4 Representation at time of final order for both parties, neither, just wife or just husband

	N	%
Both parties represented	209	56.9
Wife represented, husband unrepresented	110	30.0
Wife unrepresented, husband represented	36	9.8
Both parties unrepresented	12	3.3
Total	367	100.0

As indicated in Table 7.5, both wives and husbands were unrepresented more often in uncontested cases, than in cases where proceedings had been issued. The wife was unrepresented in 16% of the former, compared to 5% of the latter. The husband was unrepresented in 40% of uncontested cases, compared to 12% involving proceedings. Both these differences were statistically significant, indicating a relationship between whether proceedings were issued, and whether parties had representation at the time when final financial remedy orders came to be made.[222]

Table 7.5 Representation for wife and husband according to whether proceedings were uncontested or contested

		Consent order only		**Proceedings issued**	
Party	**Whether represented**	**N**	**%**	**N**	**%**
Wife	Represented	238	84.1	82	95.3
	Self-represented	45	15.9	4	4.7
	Total	283	100.0	86	100.0
Husband	Represented	169	60.1	76	88.4
	Self-represented	112	39.9	10	11.6
	Total	281	100.0	86	100.0

[222] Chi-square test (with Yates Continuity Correction): p = .012 for wives, and p = .000 for husbands.

7.2.2 The court file survey and legal representation in pension order cases

As shown in Table 7.6, pension orders were more likely to have been made in cases in which the wife was represented at the date of the final financial order (19%) than in which she was unrepresented (5%). Similarly, pension orders were more likely to have been made in cases in which the husband was represented (21% compared to 9%). The difference for wives was not quite statistically significant, but it was statistically significant for husbands.[223]

Table 7.6 Representation/whether pension order made (Base: cases in which relevant pensions disclosed)

		Represented		Unrepresented		Total	
		N	%	N	%	N	%
Wife	Pension order	49	19.1	2	5.4	51	17.4
	No pension order	207	80.9	35	94.6	242	82.6
	Total	256	100.0	37	100.0	293	100.0
Husband	Pension order	43	20.8	8	9.3	51	17.4
	No pension order	164	79.2	78	90.7	242	82.6
	Total	207	100.0	86	100.0	293	100.0

Cases in which both parties were represented were also significantly more likely to involve pension orders: 23%, compared to 8% of cases in which one or both parties were unrepresented.[224]

7.2.3 Legal Representation: concluding thoughts

There could be several factors making for the association between the fact of legal representation in general and cases where proceedings had been issued: cases which were dealt with purely by consent order may have been the simpler cases needing less legal input; parties may have felt less able to represent themselves in cases which were contested or initially contested; cases involving a need for the issue of proceedings may have involved more money meaning that the parties could better afford legal representation; or the involvement of lawyers may have made the issue of proceedings more likely. These factors were all too closely related for us to identify a single causal relationship or to establish which variable was most significant.

[223] Chi-square test (with Yates Continuity Correction): p = .068 for wives, p = .029 for husbands.
[224] Chi-square test (with Yates Continuity Correction): p = .001.

A similar question arises as to whether the circumstances which gave rise to the likelihood of pension orders, such as age, wealth, socio-economic classification and higher value pensions, made representation more likely, or whether it was the fact of representation itself which made pension orders more likely. We have seen that there were also associations between the existence of relevant pensions, the making of pension orders and the issue of proceedings, and these factors were all in turn associated with cases with legal representation. There were clearly elements of all at work, and we discuss below what light the practitioners and judges could throw on the question of legal representation in general and pensions in particular. Their observations indicated that the involvement of practitioners was key to whether the outcomes included a pension order, whether by consent or otherwise. Although pension orders are still relatively rare even with lawyer involvement, the complexity of pensions and pension orders is such that they would be even less likely to happen unless a lawyer was involved.[225]

7.2.4 The project expert's assessments

The project expert looked at the data from a total of 130 pension cases. He assessed the cases according to various measures, including how the pensions had been dealt with, the economic rationality of the approach towards the pensions, the fairness of the quantum of the settlement and the adequacy of disclosure.[226] We discuss his views in more detail in Chapter 9, but briefly mention here patterns with regard to legal representation which appeared to emerge from his assessments. In some cases he expressly mentioned the lack of representation as having had a likely impact on the outcome and approach in relation to pensions, but it was most often in the cases in which the husband was represented and the wife was unrepresented that he perceived problems in relation to the economic rationality of the approach or the fairness of the quantum of settlement. Rather surprisingly, his view of the quality of disclosure was not clearly associated with the question of the legal representation of either or both of the parties. However, some of the numbers were small and should therefore be treated with caution.

7.2.5 The practitioner perspective

Approximately half of interviewees commented on the frequency with which they encountered litigants in person. Of these, a majority said that they did not do so very often. Some suggested that if they did encounter litigants in person, it tended to be in cases in which the parties were dealing with matters amicably, and wanted a lawyer's involvement primarily to help them to draw up agreements reached between themselves. Others (particularly those who tended to act for high net worth or legal aid clients) said it would be unusual for them to have a case involving litigants in person, particularly in cases in which there were substantial pensions.

> *I must say, I have no particular experience of dealing with an individual who has a large pension who doesn't have a lawyer representing him, in fact, I'd be amazed if*

[225] See also Chapter 9 Understanding Pensions and Pensions on Divorce, p 142

[226] See Appendix 1 for details of the methodology in relation to the expert's assessments, p 194

you ever came across a situation like that, but you will, you'll come across someone like a silk or something doing his own divorce.

Several interviewees however indicated that generally they were dealing with increasing numbers of litigants in person, and cited economic factors as being at play, and the availability of legal aid, a few expressing concern about the impact of increasing litigants in person on the issue of pensions on divorce in particular.

> *Because I think the way Legal Aid has been squeezed, we've got a lot of people who are private paying, don't qualify for public funding, but they're not earning enough that they can fund litigation over an eight, nine, ten month period which could end up costing them £15,000. ... I think as perhaps solicitors' rates have gone up, and the court fees and everything else, and wages haven't kept pace and the Legal Aid has been squeezed, I think there's a lot more people trying to do things on a budget and do it themselves, and I think if you didn't know a pension sharing order existed, you're not necessarily going to make the connection.*

We discussed in Chapter 4 some of the points that practitioners raised about working with litigants in person when it came to pension disclosure. The majority of those who commented said that dealing with disclosure generally tended to be more difficult and take longer if the other party was unrepresented, but particularly so in respect of pensions, partly because they did not understand what a CEV was and/or they were resistant to disclosing it. Some said it depended on the individuals involved, and one (the exception) said that dealing with an unrepresented party could be easier in some respects *'because they're more terrified of a Form E and swearing it than their solicitor would be'*.

> *I think they just affect disclosure an awful lot, particularly I have a lot of cases where I act for a lady, the husband is unrepresented, he just does not want even to disclose his pension. So you end up in court because you can't even get the disclosure, won't even talk about it. So that's a particular problem I think. I think lack of legal advice is a real problem with pensions, because very often you have a scenario where the person is just saying well no I'm not dealing with that, and then when they do get legal advice the penny drops, they're going to have to do it. So I would think it slows things up rather than prevents it.*

The practitioners went to some lengths to describe how they related to litigants in person, mostly portraying integrity and professionalism when it came to disclosure, and a variety of ways to secure what they needed. For example, some spelt out a 'shopping list' of what they wanted the litigant in person to ask for from their pension provider, or they offered to write for it with the litigant's authority. However, any such courtesy could not extend to the more substantive decisions about, for example, whether a pension sharing order was appropriate, or economically rational, what percentage might be fair, or indeed what questions to ask of an expert.

Approximately a third of interviewees commented on the courts' approach when dealing with litigants in person. All of those who did so said that in their experience, the courts were likely to query applications for consent orders and/or to list them for a short hearing if one party was unrepresented. This was so particularly if it was not clear if the unrepresented party had

received legal advice at all, and/or if the basis upon which the draft order had been arrived at was not obvious.

Several of those interviewed said that they would try to avoid the parties being called in for a hearing when one party was unrepresented, by including a covering letter explaining the background to the proposed order. Alternatively, one interviewee said that they would advise an unrepresented party to see a solicitor specifically in order to avoid being called in for a hearing. There were few indications that the courts' approach here was any more or less likely to involve querying a draft consent order if pensions were involved:

> *…I think the judges are more careful when there's a litigant in person, and I think that would apply to pensions as much as to any other part of the case.*

However, one interviewee said that she had had a case in which a draft order which had included a pension share had not been approved due to insufficient detail from an unrepresented party on the statement of information. Another reported a recent case where the unrepresented wife on the other side had chosen to accept a share of her client's commuted pension rather than going for a pension sharing order and waiting for a pension share. The solicitor, who was acting for the husband, had briefly explained the options to the wife without going into detail and it was the wife who chose the commutation route. However, the judge did not accept the draft order and persuaded the wife to seek advice on the option of a pension share. The case was still ongoing when we did the interview – the wife had got a solicitor and was arguing for a pension share.

7.2.6 The District Judge perspective

All the District Judges expressed concern about the increasing number of parties from all walks of life who were unrepresented in financial remedy proceedings and about the impact on the court system when further major changes in public funding availability were to take effect in April 2013. Views were expressed with varying amounts of force, and future prospects were anticipated with what ranged from concern to dread. There was an acknowledgement that some unrepresented parties knew and understood what they were doing but the more common view was that the increase in their numbers was likely to be problematic.

> *SDJ2: Well, you've got general nightmares. With litigants in person one has problems anyway, in getting a valid Form E with the right attachments to it, and they will often produce a letter they'd had about their pension from last year, which doesn't include the transfer value, and which includes all sorts of information which is more or less useful. I would pick on the problems of litigants in person rather than pensions...*

Most thought that this problem was especially acute in relation to pension issues which were seen as needing professional input at various stages, including financial disclosure, decisions about pension sharing or offsetting particularly with public sector schemes, and the drafting of final orders. Judges expressed different views on the extent to which they as

judges might help unrepresented parties, and one gave an illustration from his recent experience.

> *WDJ2: ... and they [litigants in person] come in and you're trying to work out what the assets are, and they're transcending all social boundaries. I had someone before me about six/nine months ago, and there was a lot of assets there, probably I would think in excess of million, a million and a half, and they were keeping various properties, and one of them was working in the public sector, earning in excess of £110,000 a year, and they refused to go to solicitors, and they just sat there, they were probably 55/60, and trying to get them to understand what I was trying to do and trying to get a fair settlement, and the wife looked as if she was under enormous pressure and eventually they reached some type of agreement, but it was very hard work... Neither of them [was represented]... But having eventually agreed terms, I said they had to prepare a proper consent order because there was a pension share there and I said, "I'm not going to complete it, you're going to go to lawyers with the specific mandate, that is what they're going to do", and that's what they did, and they eventually lodged a final consent order in an approved format, which I could understand.*

7.3 Judicial interventions

7.3.1 The court file survey

When consent orders in financial remedy cases are submitted to the court, they may either be approved at the first time of asking, or judges may raise queries before they grant or refuse an order. On the uncontested cases, we collected data on judges' treatment of draft orders submitted for approval. As shown in Table 7.7, in over three quarters of these cases the draft order was approved on paper as originally drawn and queries were raised in nearly one quarter.

Table 7.7 Judicial interventions in uncontested cases

	N	%
Approved on paper as originally drafted	216	76.9
Approved on paper after enquiry	49	17.4
Approved following attendance at court	16	5.7
Total	281	100.0

Data on why judges raised queries about draft consent orders was available for 64 of the 65 uncontested cases in which they did so. Queries were categorised according to whether they related to technical aspects of the drafting, to a lack of information, to the apparent fairness of the proposed order, and/or to the fact that one and/or other party was unrepresented if that was expressly mentioned by the judge. Table 7.8 shows the frequency with which these types of query were raised. The figures total more than 64 due to there being 27 cases in which multiple queries were raised.

Table 7.8 Reasons for Judicial Interventions in Uncontested Cases

Reason	N	% (of 64 cases)
Drafting	19	29.7
Information lacking	35	54.7
Fairness	27	42.1
Self-represented party involved	14	21.9

Overall, about half (32) of the uncontested cases in which the judge raised queries involved one or both parties being unrepresented. The judges expressly referred to the lack of representation in 14 of the cases in which they did not approve orders at the first time of asking, the equivalent of 44% of the cases in which one or both parties were unrepresented.

In 21 of the cases on which queries were raised (which represented about one third of the uncontested cases on which queries were raised and about 7% of all the uncontested cases) judicial comments clearly indicated that they had issues concerning pensions in mind (amongst other things). In two of these cases, the queries regarding pensions related to drafting issues (completion of a pension sharing annex and the wording of a consent order). The other cases involved queries about a lack of information and/or apparent fairness, with apparent fairness queried in almost two thirds (13) of the 21 cases.

In those cases where lack of information was an issue, several proposed orders were sent back with requests to clarify whether one and/or both of the parties had any pensions, or to request CEVs where they had not been provided. In one case, the judge's comments in this regard were particularly robust: *'How can the court consider the draft order when a vital piece of information is not provided – namely the value of [the husband's] pension?'* (The judge in this case also asked that the rationale behind the proposed order be explained).

7.3.2 The practitioner perspective

Experience of judicial interventions in consent order cases varied somewhat from one practitioner to another but overall the indication was that interventions were made in a

minority of cases and few related to proposed pension orders. This overall indication did not entirely reflect the findings of the court file survey. However, the following include two examples of judicial interventions, and two suggested explanations for why pension orders were rarely queried, the first because the forms relating to pension orders are relatively straightforward and the second because of the involvement of actuaries.

> *I've not had anything pulled up on a pension issue... because the forms are, again, relatively straightforward. You've got a pension sharing annex. I think the only thing that some practitioners forget to do is write to the pension provider, with a copy of the order, saying, you know, you've got 21 days to object, and ticking the box on the statement of information.*
>
> *Well the only pension order I ever had a query on from a judge was one where they were trying to backdate it so they wanted the CETV of the date of separation used, and both parties had agreed that and the judge said, "Will the pension provider agree to this?" Because of course the legislation says 21 days. So that was the only time we had a query from the judge.*
>
> *...when there's significant pensions we've usually been to an actuary and I find that the Judges don't tend to meddle with pension orders where there's been actuaries.*

Practitioners' experience was that interventions were more likely to relate to the fairness of the wider agreement rather than to pension provisions in particular, to technical drafting issues, or general lack of information or where one or both parties were acting in person. The majority of the practitioners took the view that judges were not just rubber stamping draft orders although pressures of time and workload meant that they had to put a fair amount of trust in the practitioners themselves. Most practitioners accepted that the judges would not enter into any detailed enquiries as to how the proposals had been arrived at so long as they appeared to be fair on the face of them and within the wide discretion of the court.

> *I do think the judges are very cognisant about they want people to settle … the important thing to them is that people have had correct advice, or reliable advice, and they do know the local practitioners.*
>
> *The Judges do ask. They are there and they do read everything and if they are not sure about anything they write, you know, and they do enquire, so they are guardians of the order at the end of the day, and they do take their role very seriously, particularly when they are young, and recently appointed. Some can be so zealous that everything comes back, you know.*

One practitioner, however, expressed a slightly more sceptical view of the judicial approach:

> *So there seems to be this sort of culture of rubber stamping. The negligence claim will fall against the solicitors and not the judiciary so they don't care is the general sort of rule, it's your look out not ours.*

Several extolled the virtues of providing a schedule of means as a matter of course with the

Statement of Information (D81) and/or a letter explaining the reasoning behind the order. Another admitted that they did not do this enough. Many solicitors took pride in telling us that their draft orders were rarely queried by the judiciary and one commented on how much solicitors disliked being pulled up in this way.

> *I think solicitors hate being criticised when they think they've got something wrong, and it's like the Headmaster saying, you know, 'no, I'm not happy with your homework, come in and see me', but actually solicitors don't react well to that, they think, 'well, how dare you criticise', but at the end of the day, as I keep saying, we're there to help. That sort of hearing is all about clarifying something which quite rightly the Judge has decided 'I'm not completely sure how this has come about'.*

Where interventions did occur, they were said to be usually first by means of a letter detailing the judge's enquiry or comment and requiring an amendment to the draft order, or more information or clarification of the reasoning behind the proposals. This method of intervention was seen as preferable to the old way of doing things by which the judge requested attendance at an approval hearing. In practice, attendance was usually only sought if the written responses were seen by the judge as inadequate and/or he/she wanted to satisfy him or herself that a litigant in person fully understood what they were agreeing to. One solicitor gave an example of a case from which it appeared that it was enough for the judge to see the person concerned and where the judge did not refuse the order even though it appeared to be highly unfair to the party acting in person.

> *I mean I had one case where I was representing the wife, and there was a particularly … the husband was too vulnerable, but you know, he'd committed adultery and he just felt really bad about everything, and we worked out a split, I think we had a split of 92/8% or something, crackers, it was quite heavily weighted in our favour, and I told the client, "Look, the Judge is probably going to bounce this back and/or invite you in for a hearing", and he did, and we showed up, and the Judge told the husband "Are you sure you're aware of the consequences of doing that?", you know, he nodded, felt very guilty, and the consent order was made. So I think they're very good, the Judges, in being able to still act as a bit of a filter and you know stop things from showing the imbalance really.*

7.3.3 The District Judge perspective

All the judges made a clear distinction between contested and uncontested cases in terms of their general approach. In contested cases, they would be much more thorough. They suggested that they might refuse an order in a contested case which they would have approved in an uncontested case, for example an order in which a pension was being offset against a non-pension asset, and this might be one way of encouraging the parties to settle.

> *SDJ2: I would tell the people that at Final Hearing, subject to the Court adjusting interests, because of the factors in Section 25, they would deal with the house and the pension separately, so Final Hearing, other things being equal, I would give you each 50% of the house and each 50% of pension, however, if you want to agree*

something different, offsetting against each other, you're welcome to do that, and I'll probably approve it.

As a general rule, so long as the draft consent order looked fair on the face of it, they would not intervene. Their interventions were most commonly made as a result of lack of information or explanation of the reasoning behind the order, but they also described the difficulties inherent in making such interventions, for example not being able to tell what holes there were in the information. One pointed out the adverse effect of challenging orders on the parties' costs.

NDJM: ... and two key points being: solicitors on both sides – if you've got one self-representing party, then you would query it; and secondly, if it looks so out of kilter that you think…really don't understand and I can't see that any…any form of negotiation could have reached this, then I would query it... And part of the problem is, if we don't, we're actually running up the parties' costs, because every time we raise a query or list a hearing, they have to pay their solicitors for that privilege.

Two at least thought that specifically on pension issues interventions were relatively rare. But one judge gave a specific example and another gave a general one relating to pension queries:

SDJ2: I've had cases where I've sent the order back saying, "give me more information, is 40% of the Equitable Life pension, how is that in terms of the overall?"

WDJ1: What we do, we try and ask the petitioners to write to us and tell us the basis of the settlement, you know, they might say a clean break is achieved on a 50/50 basis together with a pension sharing order, or they might say, a clean break is achieved on 60/40 and there's no pension sharing order, so it's all, it's always there, and if they say there's a clean break on a 50/50 basis, I would look at it and say the pensions were the same, I'd pass it, if one had a pension of £100,000 and one didn't, I'd send it back and say, "well, hang on, what about the pension?".

Two of the judges contrasted family and civil case approaches.

WDJ2: You appreciate the difference in civil cases we just stamp it, we don't have to check the order's fair...

WDJ1: In ancillary relief we've got to check it's fair and I'm pretty sure, well we're [number] here, we all do it conscientiously.

The judges confirmed that the usual first step if they did not feel able to immediately approve an order would be a written query asking for more information or explanation. If this was not forthcoming, was inadequate or still suggested a lack of fairness, then the next usual step would be to invite the parties in.

7.4 The court location

7.4.1 The court file survey

We did not systematically analyse every variable for differences amongst the court locations, but mention below a few which emerged in the course of our overall analysis.

There were no statistically significant differences between the courts in terms of pension ownership or the making of pension orders, although there were two differences which were just short of significant. First, a higher proportion of the parties had relevant pensions in the North (84%) than in the South (79%) and West (77%). Secondly, however, as shown in Table 7.9, a smaller proportion of pension orders was made in the North than in the South and West.[227]

Table 7.9 Location/whether pension order made
(Base: cases in which relevant pensions disclosed)

	North		South		West	
	N	**%**	**N**	**%**	**N**	**%**
Pension order	10	10.8	23	23.0	18	18.0
No pension order	83	89.2	77	77.0	82	82.0
Total	93	100.0	100	100.0	100	100.0

In the South, the wife's occupation was less likely to be classified as managerial and professional or intermediate, and more likely to be classified as routine and manual, than in the North and West. Median income for the wife was lowest in the South at £13,308 and higher in the North (£15,564) and West (£15,996).[228] The difference in median net income by location was significant for wives, but not for husbands.[229]

There were some differences[230] amongst the locations in the total value of both the wife's and the husband's pensions, and once again it was the South where the wife's was lowest. As we described in Chapter 3,[231] the median total value for the wife's pensions was £24,796 in the South, compared to £37,914 in the North and £54,857 in the West. The median total value for the husbands' pension was also lowest in the South at £56,644 compared to £80,441 in the North and £82,734 in the West.

In summary, wives in the South were more likely to have a lower socio-economic status, lower median income and lower value pensions than elsewhere. There might therefore be an argument that they were more in *need* of a pension order. However, pension orders (in favour of the wife) tended to be associated with the husband having larger pensions[232] and

[227] When the North was compared to the South and West combined, the difference was just short of being significant. Chi-square test (with Yates Continuity Correction): p = .060.
[228] A Kruskal-Wallis Test revealed a statistically significant difference across the three locations: p = .016.
[229] The husband's median income was £21,996 in the North, £23,322 in the South, £21,594 in the West.
[230] These figures should be viewed with some caution given the substantial number of cases where the pension values were missing or unclear.
[231] Table 3.4, p 30
[232] Chapter 3, p 43

in the South the husbands had less in the way of pensions to share than elsewhere. Furthermore, the North showed the biggest difference in value between the wives' and husbands' pensions compared to the other locations (another factor associated with pension orders) and yet that court had the fewest pension orders of all. It appears that other factors, including court culture factors, may have been at work here.

There was also some variation between locations in the proportions of cases in which formal financial remedy proceedings were issued. As shown in Table 7.10, proceedings were issued in approximately one third of cases in the West, compared to 18% in the North and South combined. This difference was statistically significant.[233]

Table 7.10 The issue of proceedings by court location

Whether proceedings issued	North		South		West	
	N	%	N	%	N	%
Consent order only	91	82.0	104	81.3	88	67.7
Proceedings issued	20	18.0	24	18.8	42	32.3
Total	111	100.0	128	100.0	130	100.0

The proportion of cases in which deputy district judges (as opposed to full district judges) were involved in the making of the final orders was also significantly higher in the West (23%) compared to the North (12%).[234] We cannot comment on whether there was any statistical connection between the findings that i) more proceedings were issued in the West and ii) more deputy District Judges were involved in the making of the final orders in the West, but simply observe that, as we described at the beginning of this chapter, the district judges more often dealt with the contested and initially contested cases and the deputies with the uncontested cases. As the contested cases would be the more time-consuming cases, and there were more of them in the West, it is possible that more deputies were needed to help out with the uncontested 'box' work. Again, however, there may have been cultural factors at play in the practice of issuing proceedings.

7.4.2 The practitioner perspective

7.4.2.1 Variations amongst the courts

Most practitioners had had some experience of different county courts, although a few simply issued in their local court and had little experience of any others. Some Northern practitioners had noticed a difference in approach between the courts in the North and the South although by 'South' they usually meant London, and, even more specifically, probably

[233] Chi-square test: p = .004.

[234] This difference was statistically significant. Chi-square test (with Yates Continuity Correction): p = .031.

the Principal Registry.[235] The difference that several observed was that the South was more pro-wife and the North more pro-husband, but this difference was perceived to manifest itself more in the approach towards spousal maintenance orders than towards pension issues (and this was not entirely borne out by the findings of the court file survey).

> *... there is the old adage that we're a bit tighter up north, so if we've had a footballer's wife and we've gone down to London for that one, because you get more, you should get more and joint lives maintenance, whereas up here you're more likely to get a term order. How that affects pensions or not, I don't really know.*

> *Not so much in relation to pensions. I think pensions are, as I say, I think there's a pretty common approach across practitioners and the Courts on pensions. No, I don't think there's much difference... whereas there are huge differences between some Courts in the approaches to other issues. You know, for instance, in London, where there's any young children, you'll next to never get a clean break case, it'll always be joint lives, whereas I think the Judges up North are a bit tougher and they 'don't see it that way lad', you know.*

One made a similar observation, but saw the distinction as more between London and the provincial courts.

> *Whereas I think, certainly if I'm acting, whichever one I'm acting for, in my view, and I think this would be shared by other practitioners, the London Courts are very pro-wife, very pro-wife. I think the provincial Courts, certainly at District Judge level, take a much more pragmatic, harder line. That's not to say they make silly orders, but I think it's not necessarily a given for a wife as it would be in London. Basically, if you're acting for a husband, in London Courts you're on a hiding to nothing, you usually tell them, we're going to have to be more generous than you would expect to and want to be. Shouldn't be that way. But not usually over the pension, it's usually other things, it's usually about spousal maintenance.*

Others thought that the general court approach towards divorce financial remedy cases varied depending on whether or not the court was based in a larger city, one practitioner suggesting that the more astute judges gravitated towards the courts in the larger cities. A similar contrast was made between rural and urban based courts but specifically on pension issues, the rural ones having *'a lot less understanding of what a pension is'.*

One solicitor who had practiced in the Midlands and the West had in the past experienced different regional practices in relation to divorce financial remedy cases in general and pensions in particular:

> *I've found that there was a difference in practice because I went to a practice in the Midlands for a year and you find that there are different regional practices... I remember having three [pension] matters being dealt with roughly at the same time, one in [London], one down in [largish city], one [here], and all three had come out with different approaches, but that's going back probably five or six years now.*

[235] Our Southern court and practitioners were not based in London.

So at the time that we were interviewing the practitioners the differences between the courts were perceived to manifest themselves mainly in the general approach towards financial remedy cases, in whether they were more pro-wife or husband, and slightly less frequently in the level of understanding and sophistication in dealing with pension issues. One practitioner, however, observed that inconsistency amongst the courts and judges affected practitioners' confidence with pension issues:

> *In truth I don't think any solicitor feels totally confident because it seems to be changing all the time, and ... because we cover a lot of Courts, we see different District Judges taking different attitudes towards pensions*

A distinction was also made by one practitioner on how easy it was to get draft consent orders approved:

> *But as I said it totally depends which court you send it in to, whether the judge will be bothered about it, do you know what I mean? ...Yeah, well at [one local court] they will send something back for anything, that if you've not dotted the "i" they will send it back to you. Somewhere like [further away court] they will let anything go through [laughs].*

And by another on how rigorously the requirement to file a Form A with a draft consent order was enforced:

> *And again, you probably see a difference in courts, whether people file Form A for dismissal purposes… In [this court], they don't…they don't ever ask for it. I think [another court] tend to like it. So, again, depending on where you are... So, it does vary between courts, which isn't helpful, especially for practitioners who move areas.*

A few made a distinction in terms of the administrative speediness and efficiency of the courts, one practitioner choosing to go further afield because the delays at her local court were *'ridiculous'.* Apart from the practice with the Form A, which did not appear to particularly influence where the practitioner issued, all the perceived differences which we have described led to a certain amount of forum shopping, depending mainly on whether the practitioners were acting for the husband or the wife and how complex the matter was.

> *I think there is and I think you can, to a certain extent, you can forum shop or venue shop, and I think you can do the same with … if there was a complex area of law, I wouldn't stick it anywhere other than [this court], if I was acting for the wife, for instance, but if I was acting for the husband, who was trying to retain as much capital as possible, you want to go for a Deputy DJ who used to be an ex-miner, who thinks that as long as she's got £15 shopping a week she's fine, so you would go to certain, like [another] County Court or whatever, so there is an element of that involved.*

7.4.2.2 Variations amongst the judges

Practitioner' opinions varied quite considerably amongst the locations on how much consistency or inconsistency they saw amongst the judges at their local court on pension issues. In the North, approximately equal numbers of practitioners thought that there was or was not consistency amongst their judges on the issue of pensions or they could not say.

Some of those practitioners who saw their local judges as reasonably consistent were the ones who had commented on the difference in culture between London and the North. One practitioner, who saw little consistency and was quite critical about this, was one who specialised in acting for members of the police force; she had had the experience of a judge saying they could give no guidance on the pension at the FDR and just set it down for final hearing. For those who found it difficult to say it was because either i) that they had not tested the issue of pension often enough or ii) there were too many judges to say.

In the South, most practitioners suggested that there was little consistency amongst the judges, although two said they were getting better. The lack of consistency appeared to go right across the approach towards financial remedy cases and included pension issues.

> *So, I think lawyers and clients want as much certainty as possible and, whilst you can't get that with Court route, and it's a risk factor to be assumed by a client when going to Court, it is a lottery. And I know some lawyers on the circuit who are desperate to know which Judge is dealing with their case because they know that the approach will be different to the Judge in Chambers next door. So the lack of consistency maybe is a problem, but I don't know how that can be addressed because there's so much discretion available, yes, we can only go with the system as we know it.*

In the West, the majority thought there was a large measure of consistency amongst their local judges and on the whole they were complimentary. A couple of practitioners surmised that although there was some variation amongst their judges on pension issues, the judges did talk to each other and were gradually reaching a consensus.

> *...but they're all very good, and they all take the view, I think without exception, that a pension is an asset that has to be available to be shared, one way, or another, or the benefits have to be shared one way or another...*

> *...doesn't vary particularly within the Judges in [local] County Court. We're very lucky, I think we've got [number] resident District Judges there now, and although they've all got their own different personalities, they're fairly consistent with their approach in terms of finances, which is very helpful, and pensions, yes...*

Generally, where distinctions were made on the judges' approaches towards pensions, they were between older and younger judges, between full- and part-timers, and between those who had a family practitioner background and those who did not. Distinctions were also made between District Judges and Deputy District Judges, both in relation to their approach to pensions (depending on their experience) and also in relation to their approach to financial remedy cases in general, and draft orders.

> *I think some of the ones that may be coming up to retirement, whether their knowledge is quite as hot as it should be, I mean, it's difficult because they're probably cleverer than I am, but I maybe got the feeling that they haven't... certainly some of the younger District Judges, are probably a lot more familiar with it [the issue of pensions], and aware of it now.*

Now what I would say if you're sending in consent orders and that sort of thing it makes a very big difference which judge you… because sometimes you get deputy District Judges who query everything, and it's an over meticulous… or they not over meticulous, they're being very meticulous about the job. And then you've got all sorts of queries and questions, but I don't think that's because they're prejudiced one way or the other, I think they're just being very meticulous, and more concerned that they might make a mistake if you like, than the full time District Judges. I do notice that in terms of consent orders coming back, but again it's over the range of issues.

As with their comparisons between the courts, some practitioners saw a distinction between their judges on how pro-wife or pro-husband they were. Some judges were also seen as more pro-pension orders than others.

...my experience is that judges have favourite options and it varies from judge to judge, some judges like pension sharing, some judges like the offset route... I think it's from judge to judge. I don't find that pension shares are more popular in [this court] or [next], I just think it's a judge, judicial preference more than anything.

One Northern practitioner made a link between the judges' ability with pensions, their being pro-pension orders and their being pro-wife:

We do know that in [local court] and maybe my perception of that may be their ability to deal with pensions, for instance, if they are not very pro-pension, for instance, and again I'm going on a very massive stereotype that the woman's the one claiming against the pension, but if they are not very pro-pension, then maybe that makes me think they're not pro-woman, if you are pro-wife, so it may be that, but my general perception I'd say is ... on the overriding that we have pro-husband pro-wife.

Some primarily saw the variation between judges as a function of the wide discretion of the divorce law.

But it always will do, and it's an issue of matrimonial law isn't it? That it tends to… you've got this whole thing of fairness, which one person's idea of fairness is very different to somebody else, and that's for the judge to decide what's fair. And certainly what one judge will indicate at an FDR another judge could decide totally differently at the final hearing... but certainly that big case I had last week the husband was going full speed ahead because of the indication that was given at the FDR, and the judge at the final hearing went totally the other way, so we really lost out because of that.

7.4.3 The District Judge perspective

When judges mentioned differences between the courts, they tended to refer to socio-economic factors and the demographics of the area rather than to court culture as such, for example, London and Kent being areas where judges perceived that there would be cases with bigger or more sophisticated pensions than in their own courts because of the wealth and make-up of the local populations.

WDJ2: Yes, but I think that in London you probably do get a lot of pension sharing orders, and [London commuter belt areas], round there, etc. We get some here, you know, there are some very wealthy people living [here].

Possible differences in court practice or between judges were spontaneously referred to a couple of times, one in relation to the vetting of consent orders and litigants in person.

WDJ1: Well I know some Courts have a policy where there are any litigants in person they call them in. We don't have that. If you can understand it and it's fair, that's fine. If not, what I would do is write to them, and say, "How have you got to this settlement, what is the basis?"

One suggested that practice might vary between judges and/or have changed over the years:

SDJ2: If there's a valuable pension and they've managed to knock up enough length of marriage, if you're 35, you could have been married for 15 years, I think there's probably a danger of male middle class Judges saying, "oh well, she's got plenty of time to accrue a pension". I think that would have been the case years ago...

Generally, however, the judges did not perceive any major differences in the approach to pension issues between the courts or between the judges in their own courts.

7.5 Key points

- **The survey showed that proceedings were more likely to have been issued in cases with relevant pensions compared to those without, and in cases with pension orders compared to cases with pensions but no pension orders; this seemed more related to the general nature and value of the cases rather than to pension issues specifically. However, cases with pension orders tended to take longer to settle than cases without pension orders.**

- **Practitioners and judges saw pension issues as complex but not necessarily contentious; where arguments arose they tended to focus on the same three or four issues. Most practitioners did however agree that pension issues added to the length and cost of the cases, one of the biggest factors being the time and fees relating to implementation.**

- **The file survey showed that over three quarters of the parties had legal representation at the time of the final order, wives more so than husbands. Parties were more likely to be represented in cases where proceedings were issued and in cases where pension orders were made. The involvement of lawyers was almost certainly one of the determining factors in whether pension orders were made; pension orders were much less likely to be made where there was no lawyer input.**

- **Practitioners had limited but increasing experience of cases involving litigants**

in person, but rarely so where substantial pensions existed. Their experience was that judges were more likely to query draft orders when litigants in person were involved. Judges expressed varying levels of concern at the prospect of an increase in litigants in person particularly where there were pension issues.

- **In the court file survey, judges raised queries in nearly one quarter of the consent order only cases, approximately one third of which included a query relating to a pension and most of those related to the apparent fairness of the draft order. Practitioners' experience was that queries rarely related solely to pensions. Judges on the whole agreed that they would rarely intervene in consent order cases if the order looked reasonably fair on the face of it.**

- **There were no statistically significant differences amongst the courts on the existence of pensions or the making of pension orders, although the North had the fewest orders and the South the most. In the South, the wives were more likely to have a lower socio-economic status, lower median income and lower pension values than in the other two locations.**

- **Practitioners saw some differences amongst the courts but more in relation to spousal periodical payment orders and/or between those that were generally pro-wife or pro-husband than in relation to pension issues specifically. Opinions varied between the locations as to the consistency amongst judges within the same court. The judges suggested that any variations amongst the courts and judges arose from socio-economic demographic factors rather than from differences in 'culture' or approach.**

Chapter 8: Offsetting and Other Alternatives to Pension Orders

In this chapter we look at the main alternatives to pension orders, first, insofar as it was possible to identify them from the court file survey, then briefly as identified by the pension expert from the court file survey, and lastly from the perspective of the practitioners and judges. The most common alternative by far according to the practitioners and judges was offsetting, and until the introduction of pension sharing in 2000, that was the main way of addressing pensions on divorce. Offsetting is the practice of using non-pension assets such as the family home to redress inequalities of pension provision or, looking at it from the other perspective, using one's pension assets to boost the other's non-pension assets. We discuss why offsetting was seemingly so much more popular a remedy than pension orders, how it was usually achieved and how practitioners and judges actually calculated it. We also describe the other remedies which were adopted in place of pension orders, including spousal periodical payment orders, and we consider the extent to which pensions might simply have been ignored.[236]

8.1 The court file survey

It was possible to see that the issue of pensions had been addressed on the face of the final order in 287 of the 293 cases in which pensions other than basic state pension were disclosed (98%). In 224 of these cases (78%), the order simply dismissed all claims in respect of pensions. In 51 cases (17%),[237] there were one or more pension orders. In 12 cases (4%), there were recitals which specifically dealt with pensions, sometimes, for example, to say that each party was to retain their own.

Of the cases in which final orders simply dismissed claims to pensions, we found explicit indications of offsetting in 11 cases (5%); such indications were contained in either covering letters to the court when draft consent orders were submitted, or in explanations provided in response to queries raised by judges.

In other cases where there were relevant pensions but no pension orders, it was possible that the parties had either offset their pensions against each other's, or offset them against the non-pension assets, or simply ignored them. The number of variables involved and the lack of precise enough financial disclosure on the court files meant that it was not feasible to employ standard statistical analyses to quantify the extent to which offsetting had occurred. Our findings on offsetting therefore derive more from the qualitative than the quantitative data.

A spousal periodical payments order could be seen as one alternative to a pension order in providing for a spouse's future income needs. Such orders were made in 46 of the total sample of 369 cases (12%). Of those 46, 43 were made in favour of the wife (93%), and three in favour of the husband. The terms of the orders provided for a variety of durations.[238]

[236] See Chapter 1, p 1 for a brief resume of the law relating to pensions on divorce and the alternatives.
[237] See in particular Chapter 3, p 33
[238] Figures regarding duration of payments exclude six cases in which data was unclear or missing.

In eight of the 40 cases in which the duration was clear, spousal periodical payments were temporary measures, for example ceasing on sale of the family home or on implementation of a pension order, or linked to the wife securing employment.[239] In ten cases, the payments were for fixed terms of less than ten years,[240] and in a further eight cases they were for fixed terms of ten years or more. In several of these, the longer duration of spousal periodical payments was linked to the duration of periodical payments in respect of children. However, in six of the cases with fixed terms of ten years or more, payments were to be nominal.

In at least 14 cases,[241] spousal periodical payments were potentially for life, ceasing only on the earliest of certain 'trigger' events which included the death of either party. However, the trigger events most commonly included were the payee's remarriage or cohabitation for a certain period of time, or the youngest child reaching 18 or ceasing full time education, events which in most cases would long precede the payee's death.

In eight of these 14 cases, payments were nominal (for example £1 per annum).[242] There were just six cases (less than 2% of the total sample) in which spousal periodical payments appeared designed to provide a substantive income potentially for life, all in favour of the wife. The amounts in these cases ranged from £3,000 to £24,000 per annum. None of these cases included a pension order, and in all except two cases the pensions were modest. In one of the two cases in which the husband's pension might have been seen as big enough to justify a pension order, it had apparently been offset by a larger share of the capital to the wife.

Thus it appeared that only one of the substantive joint lives maintenance orders could have been used as a substitute for a pension order. These figures suggest that joint lives maintenance orders were an even less popular means of providing for the parties' long term future income than pension orders and they confirm other evidence of a powerful drive towards a financial clean break on divorce.[243]

We also looked at the court file data to see if there was any evidence of life assurance policies being used as a substitute for a pension order. Of the 43 cases in which insurance policies were dealt with, 10 involved their being surrendered and/or the proceeds being divided on maturity in the very near future. Policies were assigned or retained for the benefit of one or both the parties in 28 cases, and dealt with in some other way (such as being

[239] These included two of the cases in which payments were in favour of the husband. In this last case, the wife was studying for a professional qualification, and it appeared to be presumed that she would have her own earning capacity in the near future, which would negate the need for maintenance; periodical payments were to last for approximately a year, or until six months after she secured employment.

[240] Included in these ten cases was one in which payments were fixed for three years, then became nominal for a further 12 years.

[241] We cannot rule out the possibility that during data collection we omitted to record some cases in which death was included in the final order as a trigger event for the cessation of spousal maintenance; one would expect to find more than the 14 reported. However, this does not detract from the main point in the following paragraph concerning the number of substantive joint lives orders and the amounts to be paid.

[242] Including the third case in which payments were in favour of the husband.

[243] See Chapter 6, p 91 for a discussion of this point.

placed in trust for children) in four cases. Of these 28 cases, 12 included pension orders, and in three neither party disclosed any pension, leaving 13 in which pensions were disclosed but there was no pension order. However, there was insufficient information on the files to say what sort of policies they were, for example convertible term, endowment or life policies, and there were no obvious indications in any of these 13 cases that the assignment/retention of policies was designed to compensate for any lack of, or disparity in, pension provision.

There was clear evidence of new policies being taken out in only one case, included in the 13 in which there were pensions but no pension order. In this case, the husband agreed to take out life insurance for himself, the wife agreed to take out critical illness insurance for herself and the husband was to pay the premiums on both policies. From the terms of the order, these new polices appeared designed to ensure that the parties' young child would continue to be supported financially until he was 18, rather than making provision for the parties themselves.

8.2 The project expert's view

We asked the project expert if he could identify how the pensions had been dealt with, such as by a pension order, by an offset or in some other way. Of the 122 pension cases which he assessed on this point,[244] his view was that approximately one third were by offset, just under one fifth were by pension orders or by pension orders with partial offsets, and nearly one half were unclear or the pensions had not obviously been addressed at all.[245]

8.3 The practitioner perspective

8.3.1 Offsetting

We asked practitioners to tell us what they saw as the main alternatives to pension orders. All said offsetting in response, and some saw offsetting as the only alternative. However, opinions varied enormously amongst the practitioners as to how much they favoured offsetting. Some of the most hostile responses came from the more experienced or specialist solicitors.

> *I try to avoid offsetting like the plague*
>
> *...an absolute nightmare*
>
> *I think offsetting altogether is something I try to discourage...*

[244] The number of cases which the expert assessed on each point varied slightly: he looked at a total of 130 cases but did not assess all cases on all six points. See Appendix 1, p 194 for further explanation.

[245] We look at the way the pensions had been dealt with alongside the expert's assessments on other measures, such as the economic rationality of the approach, the fairness of the settlement quantum and the adequacy of disclosure, and also on the question of legal representation, in Chapter 9, p 142

Offsetting yes, dangerous, tricky...

Horse trading [offsetting] should be, in my opinion, avoided more than anything else...

Many, including some who did not hold themselves out as specialising in divorce pensions or finance, expressed a general wariness about the process of offsetting because of the technical difficulties of comparing pension assets with non-pension assets. The phrase *'apples and pears'* came up several times.

... it's beyond the abilities of a mere non-actuary to make any meaningful comparisons. So I think the practical and sensible way to deal with pensions is to treat them as their own species and avoid [offsetting] as far as possible...

In addition, the husband's need to re-house himself sometimes precluded offsetting:

But I think you might need to satisfy a judge that's the right thing to do, particularly if it means the husband is deprived of ability to house himself.

Others described some of the longer term disadvantages and uncertainties of offsetting, one for example pointing out that if there was a big disparity in the parties' retirement income it might appear very unfair to the rest of the family. Another looked at it from an investment point of view:

But if you've got bricks and mortar now, clients have been advised to think very carefully before choosing one or t'other, unless they've got a real sort of desire to stay in the marital home, because properties are devaluing. We don't know when they're going to take off again.

At the other end of the spectrum there were some who were generally in favour of offsetting, either for pragmatic reasons or because it suited their particular clients. One solicitor who specialised in acting for police officers, for example, raised a point mentioned by others (including one of the judges) that the wife might be able to downsize the family home once the children had become independent.

I'm a big believer that you know with a property, they're probably still staying in the former matrimonial home with the kids, it's probably going to be way beyond their needs once the kids are grown up and flown the nest, hopefully by that point there's no mortgage or it's been significantly reduced, that she can sell up and down size and you know any spare cash could be used to invest and that could be a pension pot.

Most solicitors, even those who were most averse to offsetting, acknowledged that there might be some circumstances in which offsetting would be appropriate. This tended to be in the needs driven cases where there were not enough pension or non-pension assets to treat them separately. If pension offsetting was considered appropriate it was generally where the parties were younger and the pensions smaller.

The most common scenario was to offset the pension against the family home, with the husband retaining his pension and the wife and children remaining in the family home, or the wife receiving the bulk of the net proceeds of sale of the family home in order to re-house herself and the children.

> *But the run of the mill cases have insufficient capital for say the wife to house [herself], she's in her late 30s, you might agree with the other side that she would have more capital so that she can achieve that housing, and the payoff is to trade-off the future income from the pension; at [age] 35/40 that will be a workable deal. There's not enough to go around but this is one way of making it work. So pragmatics and immediate needs will sometimes impact on pension cases.*

However, by far the most common reason given in favour of offsetting was the preference of the clients or the parties themselves, sometimes contrary to the solicitors' advice or against their better judgment. Some practitioners suggested that the initiative came more often from the wife, whose priority was to keep the family home for herself and the children, others saw the husband as the one more often encouraging the offset in order to keep his pension intact and quite often the initiative was seen as mutual. Occasionally it was suggested that the wife did not pursue the pension for fear of alienating the husband, notwithstanding strong reservations on the part of the solicitor. In any event, offset was much more common as part of a consent order and less likely to be the outcome if the matter were contested.

> *... I probably am wary that we maybe look at that a bit more than we should because I'm very often faced with wife with two children who wants to stay in the house, you know.*
>
> *Well if there are reasonably substantial assets, I mean, it's not uncommon for a couple just to want a clean break completely, so you might just completely offset the pension and be done with it. You often find this usually with police officers are very keen to maintain their pension, completely intact, so you'll often get, as long as there are other assets, then that's often the way that they would prefer to go.*
>
> *Sometimes I have one or two who would take the capital rather than pension, even though it's better for them to have a mixed bag of both, because the animosity that would be, or the hostility that would come from the scheme member, at the prospect of having his pension attacked, is so great that the wife takes the view that 'it would undermine our ability to co-parent our children'. Some people have such a terrible mindset.*

8.3.2 How the value of the offset was calculated

How the value of the offset was calculated in practice was seen, almost universally, as a vexing issue, and the approach varied a lot from one practitioner to another. A few suggested that there *was* a rough rule of thumb (or toe), at least six practitioners described it as 'finger in the air' stuff, one said '*It's far too complex for us to ever sort of stick a finger in the air*', yet another that '*we don't sit down and work it out on the back of a cigarette packet*'.

If you're going to do a set off there comes a point where you have to try and mentally turn that pear into an apple... but I just think it's you kind of wet your finger and put it in the air, to kind of get, this is the right feel of it, this is what suits the parties best.

But it was a bit of a finger in the air, not quite sure, it sounded right to everybody and it was acceptable to the parties, it was more art than science when it comes to offsetting.

There was in fact widespread, although not universal, agreement that some sort of discount should be applied to the asset that was being offset, to reflect the illiquidity of pensions and the fact that a large proportion of the pension CEV would be subject to taxation. But how the discount was calculated was again a moveable feast. Many admitted that it depended on who they were acting for; one said it was '*whatever you can get away with'*. Where formulae were suggested, they varied a lot, sometimes according to factors such as the type of pension, the ages of the parties or how close to retirement the pension holder was. 25% was a figure that came up more than once; apparently it was a rule of thumb applied by one of the South DJs.

I think as a very broad brush approach I think I'd probably say that £100,000 in a pension is probably worth around about two thirds of what £100,000 is in a property. So that's not an exact science but that would be a fairly broad brush approach that I would adopt.

But if you're asking me for a specific example, there is a local judge here who would as a rough rule of thumb take one quarter of the CETV as the equivalent liquid value of the pension fund, and so a lot of people in this area have used that as a rough and ready guide, and if you have that approach then it can be very easy to offset.

Some said it could only be done with the help of an actuary, but more as a guide than an absolute figure.

People often talk about discounting for liquid offsets... But again that's not something we can advise on what an appropriate discount would be, it's not a formula that really exists, although some solicitors like to think that it is, a few percentages are batted about here and there as though they're the gospel. I think it's something that you'd need to get expert evidence on.

There's no…there's no exact calculation, but it's usually accepted professionally … and again, with the reports I get from the actuaries, it tends to be 'thereabouts'. So we would usually say, you know, if the pension is worth £30,000, you would be paying £20,000 in cash to not claim against it, and then you argue that down or up, depending on who you're acting for [laughing]!

One suggested it would be totally inappropriate to use an actuary for advice on the amount of the offset or discount:

And the reason for that is there is no guide, and until and unless there is, why do you want to know what I think of today's weather, I mean, I may think it's fantastic, but

where does that take you? You may think it's horrid weather, so I take a view on the set-off value, you've got to feel your way, and okay, some of them might say, well that is arrogant, because somebody else can give you a lead, but no, because once that guy's given you a lead, it's like a dart in the board... Once it's in a report where a guy has said 'well I think an appropriate set-off...' it's just a subjective view.

Another experienced specialist argued that discounting was an increasingly rare and inappropriate practice:

So I always find the discounting approach not a particularly attractive one, because there's no particularly strong argument for it. So I think increasingly there tends to be an approach perhaps of comparing pensions and cash or properties as like with like. Maybe a slight discount, but certainly not discounted as heavily as it used to be. But you'll probably find strange regional variations on that... Depends who I'm acting for in negotiations of course. But no I find it actually rather illogical to heavily discount a pension, although if I were acting for a husband I would certainly run the argument, but I don't think logically or intellectually it holds a lot of water really.

We did not find any strong regional variations as suggested by this practitioner, although, as we mentioned above, it was difficult to gauge from the file survey the full extent of offsetting or discounting. However, as referred to above, the South practitioners more often mentioned (but did not always apply) a 25% discount, based apparently on the preference of one of their local DJs.

8.3.3 Other alternatives to pension orders

One practitioner said that a few of her clients chose to nominate their death in service benefits in favour of the children instead of going for a pension order in favour of the wife. Some practitioners mentioned joint lives maintenance as an alternative to a pension order, but far behind offsetting in popularity.

Maintenance, but actually when you're looking at the wealth in the pension that seems to be a silly way of going about it.

… usually we're looking for a clean break order, so offset is obviously an option, if not, periodical payments. Again it depends on what assets there are to share, are parties working, how old are they, are there any children.

One practitioner had had experience of arguing in court for a joint lives maintenance order instead of a pension order, but the argument had found little favour with the judge:

Well it would either be off-setting or joint lives maintenance, and again that's an argument that we ran, which was quite bizarre when I thought about it, but it was on our barrister's advice. We were acting for the husband, and we suggested that there shouldn't be a pension sharing, there should be a joint lives maintenance case, and I can see the logic that maximises the husband's pension so he's got more income to pay maintenance to the wife, but the judge just looked at us and said, "But if he dies she's got nothing and she's entitled to some of his pension." So I thought we were always going to lose on that argument basically, but we tried it.

8.3.4 Ignoring the pensions

We asked practitioners what factors would lead them to treat pensions as a significant aspect of the case, whether or not they resulted in a pension order. The factors which came up most often in the replies included i) the age of the parties and proximity to retirement, ii) the length of the marriage, iii) the size of the pension pot and length of time accrued, iv) the type of pension, v) the disparity in pension values between the parties and vi) the absolute or relative value of the non-pension assets. These were the factors which were most often cited by the practitioners as prompting them to treat the pensions as relevant and/ or investigate them more thoroughly, and they were also the factors which were most closely associated with the making of pension orders amongst the court file sample.[246]

Very few practitioners said that they would ignore the pensions if they existed at all. Some specifically said they would never ignore them. Those who did admit to ignoring pensions usually justified it on economically rational grounds, for example (and rather as with offsetting), when the pensions were small, the parties were young and/or the marriage was short.

> *If you have a couple in their 30s, and there is say £30,000 worth of pension, it [the pension] will pretty much get ignored, and certainly the judges that I go before in [satellite town 1] and [city 1] would encourage that. Length of marriage as well, so that if you've got a very short marriage you wouldn't look at it.*

One practitioner included ignoring pensions as just one of four possible approaches:

> *... your options are obviously four fold in a pension. You do nothing/ you just ignore it, you consider a set off, you consider a pension share, you consider an attachment.*

Another suggested that "*most people getting divorced would quite happily ignore them"* and that clients considered pensions only because she made a point of drawing them to their attention.

We briefly described earlier in this chapter the project expert's view that, in nearly half of the 122 cases which he assessed on how the pensions had been dealt with, pensions had either been ignored or it was unclear how they had been dealt with. This finding did not entirely fit with the responses of the practitioners, who suggested that they rarely if ever ignored the pensions. In addition, what the practitioners said about the circumstances in which they might ignore pensions appeared perfectly logical, and ran somewhat contrary to the expert's views on the economic rationality of the approach.[247] We could speculate as to why there was a mismatch here. It seems likely that it was more often a lack of clarity in the approach to pensions in the file survey cases assessed by the expert rather than a question of the pensions being ignored completely. However, there are other possibilities: perhaps the practitioners were describing what they saw as *best* practice rather than their day to day

[246] See Chapter 3, p 37 for a comparison between the cases with pension orders and the cases with relevant pensions but no pension orders.
[247] We discuss this more fully in Chapter 9, p 142

practice, or our sample of practitioners may have been on average more experienced than those who were acting in the file survey cases, or that clients were instructing their solicitors to ignore the pensions and possibly contrary to advice.

8.4 The District Judge perspective

The District Judges took a similar view to the practitioners about the factors which suggested to them that pensions would be significant.

> *SDJ1: ...And they've got to have people who are going to be of, certainly an age, married for a certain amount of time, and a pension of a certain value. Those are the three I suppose key things to look at whether you're actually going to be having it [a pension order] in any particular case...*

> *WDJ2: Well you've got to go right through the criteria and the Section 25 and, in any ancillary relief case we do, that is the checklist we use all the time and we're going to want to see the age of the parties, duration of the marriage etc. and what the assets of the family are. That's got to be the start point for everything and you just can't pile it anywhere, you've got to concentrate on those items.*

Offsetting was the only alternative to pension orders which the judges spontaneously mentioned, although maintenance was touched on as a temporary or long-term alternative. All judges appeared to agree that offsetting was driven very much by the parties themselves and that it was a frequently chosen route on divorce.

> *NDJ R And I would suggest to you that there's a very…very real percentage [we're] offsetting... because, as I say, it's much more prevalent, in my experience, for there to be offsetting against capital, where ... you've got wife, typically two children, relatively small income, priority to keep the house over her head, and all she wants is the capital in the matrimonial home, whatever it may be, so that she can have a roof over her head, and she'll worry about a pension on a rainy day, and husband, whatever pension [he had], he walks off with it.*

However, that was not to say that the judges would fully endorse an offsetting outcome if they were asked to decide a case, or give guidance at the FDR. Two judges encouraged pension sharing in preference to offsetting by expressly asking at the FDA or FDR what the wife planned to live on in retirement. If the wife said she planned to downsize and use some of the equity in the family home as her pension, then that might be enough to justify a proposed offsetting order.

One judge made it very clear that he would never order offsetting, and cited the case of *Martin-Dye*[248] in support.

> *SDJ2: What I won't do, at a Final Hearing, is make an order whereby I will do the offsetting... At an FDR I would very much give the message that, at a Final Hearing, a Judge is constrained by case law, and he's going to have to treat them apples and*

[248] *Martin-Dye v Martin-Dye* [2006] 2 FLR 901

pears separately...

The drive towards a clean break was seen as an influential factor in the parties' preference for offsetting, as well as the wish to avoid the fees for implementation of pension sharing orders.

> *WDJ2: ...and if you're talking of doing this, sharing, and the husband retains a quarter share in the house etc. they always know that's hanging over them like the sword of Damocles, he knows as well that she's going to get a quarter of his pension, or whatever it is, do they really want that, I don't know. I think they're all looking for clean breaks and trying to go their separate ways.*

The judges all emphasised that, whether or not the application was by consent, they were required to consider the whole picture and all the circumstances, including, as one specifically mentioned, how likely it was that the wife would remarry, or if they had any inheritance prospects. However, as we observed from the court file survey, where financial arrangements had been agreed between the parties, offsetting was rarely expressly referred to in the draft order. Several of the judges stressed, once again, how important it was for the practitioners to explain the rationale behind the proposed order in those circumstances, especially if it did not look completely fair on the face of it.

The judges fought shy of getting involved with any calculation of the amount of the offset or any associated discount. First, there was the widely held view that it was not possible to compare pension assets with non-pension assets. Secondly, as with all financial remedy decisions, too many factors came into play to make it a mathematical exercise. They were unanimous in rejecting the idea that there might be a rule of thumb to calculate the discount, for example where one was seeking to keep the family home and the other the pension of similar value. They had come across solicitors and counsel who tried to treat pension and non-pension assets as if they were the same and others who argued for a rule of thumb; such approaches were disapproved of. They suggested that calculating an offset could be a complex exercise and that a pension report could be helpful but only as a starting point.

> *WDJ2: That's asking how long is a piece of string, because there are so many factors coming into it, and you might have the husband's got this pension, the wife may have brought in some inheritance or something from the sale of the first house, etc., or something like that, no, I don't think you can say there is a rule of thumb.*
>
> *SDJ1: I think people, when they're getting divorced, they would like it to be mathematical. It's not, because you're dealing with apples and pears all the time. You're dealing with different people, wanting to achieve different things for different reasons, and you have to do the best you can. It isn't simply a mathematical adding up the matrimonial pot and dividing it by whatever percentage, it is not like that...*

In uncontested cases, the judges did not see it as their role to enquire in any depth as to the method of calculation or interfere with the agreement so long as the proposed order looked broadly fair. This appeared to be for both practical reasons, such as their volume of work

and time constraints, and also, unless the order looked grossly unfair, out of respect for the parties' autonomy.

> *SDJ2: If the result looks at first blush unfair, then one starts to ask questions and ask how they've sort of gone about it. If it looks broadly fair then I wouldn't bother.*
>
> *SDJ1: ...unless you're making the actual decision yourself, you're not concerned to say, 'is this the right answer'. What you're concerned to say is, 'is this within the boundaries that I might approve'... I'm not trying to change what they want to achieve or what they feel will be fair for them. What I'm trying to do is to avoid what is an obvious imbalance where somebody just doesn't know what they're doing, and is likely to get a very unfair deal for the wrong reason, like guilt.*

The District Judges had little to say on the question of joint lives maintenance orders beyond touching on it as a possible alternative to a pension order.

8.5 Key points

- **The remedy of offsetting was rarely expressly referred to in court orders or accompanying documentation**
- **Of the 122 court file cases disclosing pensions which were assessed by the project expert, his view was that just under one fifth were dealt with by either pension sharing orders or pension sharing orders with a partial offset, just over one third were dealt with by offsetting and in nearly one half of the cases pensions were either ignored or it was unclear how they had been dealt with**
- **Few practitioners said that they would ignore pensions and most saw offsetting as the most common alternative to a pension order, usually achieved by the husband retaining his pension and the wife retaining the family home**
- **Practitioners and judges described offsetting as being adopted in the more needs-dominated cases, driven largely by the clients themselves and primarily a consensual remedy; the practitioners expressed strong but varying opinions as to its appropriateness**
- **Calculation of the amount of the offset and any discount was seen almost universally by the practitioners as a vexing issue; opinions on how to go about it ranged from 'gut instinct' to rules of thumb with mathematical formulae, with and without actuarial advice; the District Judges disapproved of any rules of thumb**
- **The judges did not see it as their role in uncontested cases to question an**

offset in principle or amount unless it appeared on the face of it to be outside the boundaries of fairness; however, explanations of the reasoning were welcomed

- **Joint lives spousal maintenance was occasionally mentioned as an alternative to a pension order, but just six (less than 2%) of the 369 cases which we surveyed included substantive joint lives maintenance orders, ranging in amount from £3,000 to £24,000 per annum and none of those included a pension order.**

Chapter 9: Understanding Pensions, and Pensions on Divorce

In this chapter, we firstly describe the project expert's view of those court file cases which he assessed on i) how the pensions had been dealt with, ii) the economic rationality of the approach, iii) the fairness of the settlement quantum and iv) the quality of the financial disclosure on pensions. These assessments give some indication of the level of understanding which he perceived as existing amongst the divorcing public and the professionals involved. We then examine the practitioner perspective including views of their clients' understanding of pensions on divorce, accounts of their own training, understanding and confidence, and their experience of the judicial approach towards pension issues. Lastly, we describe the judges' perspective on practitioner understanding of pension issues and their own training and experience.[249]

9.1The court file survey and the project expert's assessments

The project expert assessed according to various measures a total of 130 cases from the court file survey which had disclosed any pensions other than basic state pension. Out of the total sample of 369 cases, 293 had disclosed the existence of one or more such pensions. The 130 cases which the project expert assessed were broadly representative of the whole sample on three key criteria: i) whether there had been a pension order or not; ii) the location – North, South or West; and iii) whether proceedings had been issued or not. The expert was given an anonymised summary of the case data which we had collected from each court file, including the terms of the final order, the financial disclosure and the background to the parties and the marriage. The expert did not assess all cases on all measures[250] but did so in most.

9.1.1 How pensions were dealt with

The expert assessed 122 cases to see how the pensions had been dealt with and concluded that just under one fifth had been dealt with by a pension order or by a pension order with a partial offset ('pension order cases'); just over one third had been dealt with by an offset ('offset cases'), and in the remainder, which was nearly half, pensions had not obviously been addressed or the type of remedy was unclear ('unclear/ ignored cases').

9.1.2 The economic rationality of the approach towards pensions

We asked the expert to give his opinion on whether the approach to the pensions appeared to be economically rational based on the data from the court files. By economic rationality in this context we meant: did the treatment of the pensions and the effect of the orders make sense in economic terms, and were they within the realms of financial reasonableness bearing in mind the court's wide discretion? In order to make that assessment, the expert looked at the effect of the order insofar as it was possible to ascertain that and took into

[249] It was beyond the scope of this study to obtain the first hand experience of the clients themselves on the issue of pensions on divorce, but this would be an interesting topic for future study.

[250] See the Appendix 1, p 194 for the reasons for this and further details of the sample which the expert assessed.

account factors such as the type and value of the pension funds, their value relative to the non-pension assets and between the parties, their ages and the length of the marriage. He assessed 118 cases on this measure and concluded that the approach to pensions was economically rational in just below one half, it was problematic/ not economically rational in approximately one fifth and unclear in approximately one third.

Examples of cases where the expert thought the approach *economically rational* included some in which the pension was too small to justify anything except dismissal of pension claims or a small offset, and that was what had been done. They also included cases where the pension was so large relative to the non-pension assets, and/or there was such a disparity between the husband's and the wife's pensions, that nothing other than a pension share could have been justified, and a pension sharing order had indeed been made. In other cases the pension and non-pension assets appeared to have been dealt with separately and rationally.

Examples of cases which the expert regarded as economically irrational or *problematic* included cases where a pension order would have made economic sense but there was no such order; alternatively the pensions were too small to justify the costs of a pension share but nevertheless a pension order had been made. These problems were often, but not always, associated with poor disclosure and/or fairness of the settlement quantum. Similarly, where the expert was *unable to say* whether the approach was economically rational or problematic, this was usually because of a lack of information on the court file about the type or value of the pensions in the case.

We considered the expert's assessments of how the pensions had been dealt with alongside his assessments of the economic rationality of the approach to the pensions – he had assessed a total of 110 cases on both counts. He assessed nearly three quarters of the pension order cases as having an *economically rational* approach, compared to about two fifths of the offset cases and virtually none of the unclear/ ignored cases. He assessed only three (13%) of the pension order cases as *problematic* in terms of the economic rationality of approach, compared to about one quarter of the offset cases and three fifths of the unclear/ ignored cases. The expert was *not able to assess* the economic rationality of approach in the remainder of cases, which represented approximately 15% of the pension order cases, a third of the offset cases and nearly two fifths of the unclear/ ignored cases. Again, in most cases this was because of a lack of information on the court file documents about the value and type of pensions but also in some cases about non-pension assets.

Of the three pension order cases which the expert assessed as problematic, two were cases where the pensions were too small to justify a pension order. In one case the husband's personal pension with a CEV of £8,000[251] was shared equally whilst the value of the wife's pension (believed to be ASP) was not disclosed. In the other case the wife was to take 100% of the husband's personal pension with a CEV of £4,000 whilst the value and details of her

[251] Figures here rounded up or down to nearest £1,000

SIPP were not disclosed. In the third case, the expert suggested that the wrong pension had been shared, with a loss to both parties of valuable benefits.

9.1.3 The fairness of the settlement quantum

The expert assessed 119 cases on the fairness, on balance, of the settlement quantum. One of the main factors which determined his assessment of the fairness of quantum was whether there had been an approximately equal division of pension and non-pension assets between the parties, or a logical explanation if not, such as the existence of a pension largely acquired before a short marriage. He concluded that the quantum of the pension settlement was, on balance, fair in about one third of the cases, it was unfair in approximately15% and unclear in nearly half.

We considered his assessments of how the pensions had been dealt with alongside his assessments of the fairness of the settlement quantum – he had assessed a total of 113 cases on both counts. He assessed the quantum of the settlement on balance as *fair* in over one third of the pension order cases, compared to about one quarter of the offset cases and only about 6% of the cases where pensions had not obviously been addressed or the approach to them was unclear. He assessed none of the pension order cases as *unfair* in quantum, compared to about one quarter of the offset cases and over half of the unclear/ ignored cases. However, he *was not able to assess* the fairness of quantum in nearly two thirds of the pension order cases, half of the offset cases and about two fifths of the unclear/ ignored cases, in most cases because of the poor quality of financial disclosure apparent from the court files.

9.1.4 Rationales and settlement objectives[252]

We asked the expert for his opinion of the apparent rationale behind the approach to the pensions. His opinion from the 119 cases which he assessed was that the rationale was sharing in 35 (29%), needs in seven cases (6%), compensation in 1, a combination or something else in 30 (25%) and unclear in 46 cases (39%).

We also asked for his opinion on whether the pension settlement was based on pension capital or projected income values. He had assessed the data from 119 pension cases on this point. His view was that the majority (61%) were based on capital, just seven (6%) were based on income, six on a different basis and 34 (30%) were unclear.

9.1.5 The adequacy and completeness of disclosure

The expert assessed 130 cases according to the apparent consistency, accuracy and comprehensiveness of the financial disclosure provided. We describe in more detail in Chapter 4 how the expert assessed the quality of financial disclosure but suffice it to say here that he considered the adequacy in the context of the whole case. For example, he might have assessed as adequate an imprecise pension valuation for a very young couple with small pensions, simply because the likely value and circumstances did not merit the

[252] We discuss rationales and objectives in more detail in Chapter 6, p 81

time and expense involved in securing a precise valuation. Conversely, he might have assessed disclosure as inadequate where a precise CEV provided by the pension administrators for a long-running final salary police pension had been accepted without any independent expert evidence.

Overall for the 130 cases assessed, the expert concluded that the financial disclosure was adequate in just under one third of cases, inadequate in two fifths and unclear in 29%.

We considered the expert's assessments of the type of pension case alongside his assessments of the quality of financial disclosure; he had assessed 122 on both counts. In his view nearly half of the pension order cases were *adequate* on financial disclosure, compared to less than one third each of the offset and unclear/ ignored pension cases. Just under one fifth of the pension order cases were assessed as *inadequate* on financial disclosure, compared to two fifths of the offset cases and nearly a half of the unclear/ ignored cases. However, he was *unable to say* if the quality of disclosure was adequate in over one third of pension order cases, in just under one third of offset cases and about one quarter of unclear/ ignored pension cases.

The project expert[253] assessed eight of the cases involving more than one pension share and although he could not say how fair he thought the quantum was in all the cases, in his opinion all except for one of the pension settlements appeared economically rational. In that one exceptional case there had been five pension sharing orders, the husband had been unrepresented and the disclosure was so inadequate it was impossible to tell how rational or fair the order was. However, it was approved by the Judge without any intervention.

9.1.6 Summary of the project expert's assessments

The measures which the expert used to assess the 130 pension cases could not be treated as scientific measures and have not been tested for statistical significance; the expert's responses were matters of judgment and opinion. His assessments of the different points often overlapped, for example he could not always tell how the pensions had been dealt with because the quality of the financial disclosure on the court files did not allow him to do so, or he was not able to assess the economic rationality of the approach to the pensions because he could not assess the fairness of the settlement quantum. However, his assessments do suggest two important findings, firstly that the overall quality of financial disclosure on pensions on the court files was relatively poor: in over two thirds of the cases which the expert looked at financial disclosure was assessed as either inadequate or unclear. Whilst this disclosure might not always have reflected the full disclosure which took place between the parties or their representatives, it would in most uncontested cases have reflected the full extent of the financial disclosure which the judges relied on as the basis of their decisions about the final orders. The quality of financial disclosure often fell far short of the standards which the expert expected and led to outcomes which he considered unsatisfactory for one or both parties. However, even if the disclosure did not meet expert standards, the question arises as to whether this was as much as could reasonably and realistically have been

[253] See Chapter 3, p 33 and Appendix 1, p 194

expected, given the constraints of time, costs and personal party priorities (which may not always have been apparent from the court file), or whether steps could or should have been taken to improve the quality of disclosure.

The second point is that cases with pension orders came out better on all measures than cases without pension orders, namely cases with pension orders tended to have demonstrated a more economic rational approach towards pensions than other types of cases, more of them appeared to be fair in the settlement quantum and adequate on financial disclosure. Offset cases came out worse than pension order cases on all three measures, and this, in so far as economic rationality and fairness of settlement quantum were concerned, reinforced the findings described in Chapter 8 about how difficult practitioners and judges found it to compare the values of pension and non-pension assets. Worst of all were the cases where it was unclear how the pensions had been addressed or where pensions had not obviously been addressed at all. We turn next to consider what difference legal representation made to the issues of economic rationality, fairness of quantum and quality of financial disclosure based on the project expert's assessments.

9.1.7 Legal representation with examples

As we discuss in Chapter 3, the question of legal representation is a complex one, but in this study the key for us was whether the court file records indicated that a solicitor was acting for one or both parties at the time the final order was made.

Our pension expert highlighted several cases from the court file survey in which he thought that lack of representation might have prejudiced one or other party on pension issues. We look first, however, at his general conclusions with regard to representation and financial disclosure.[254] As we describe above, he had looked at the data from 130 of those court file cases which disclosed pensions and assessed less than one third overall as adequate on financial disclosure.

Rather surprisingly, there was no obvious association between the adequacy of pension disclosure and representation, although some of the numbers are small and therefore cannot be treated as definitive. He assessed as *adequate* approximately one third of the cases where both parties were represented, one third where neither was represented, one third where only the wife was represented. Of the 13 cases in which only the husband was represented, the expert assessed the disclosure as adequate in less than one quarter.

Similarly, as we describe above, the expert had assessed approximately two fifths of the 130 cases as *inadequate* on financial disclosure, and when we looked at that in the context of legal representation, between one third and two fifths were assessed as inadequate in cases where both parties were represented, where neither was represented and where only the wife was represented. Where only the husband was represented, the expert assessed disclosure as inadequate in just under a quarter. In the remaining 38 cases (29%) the expert was *unable to tell* whether the disclosure was adequate or not.

[254] See also Chapter 4, p 47 where we discuss financial disclosure in detail.

We also looked at whether there was any association between the expert's assessment of the economic rationality of the approach towards pensions and legal representation, but again could find no obvious association. Around half were assessed as *rational* where both parties were represented, where only the wife was represented and where neither was represented. In the 13 cases where only the husband was represented three were assessed as economically rational.

One quarter or less were assessed as economically irrational or *problematic* where both parties were represented, where only the husband was represented and where neither was represented, and about one third of the cases where the wife only was represented. However, the expert was *unable to say* whether the approach was economically rational in around half of the cases in which only the husband or neither party was represented, and in one third or fewer when both parties or only the wife was represented, so apart from there being slightly fewer problematic or unclear cases when both parties were represented, no clear pattern emerged from this relatively small sample.

Where legal representation seemed to make the most difference was on the issue of the fairness of the settlement quantum. Overall, of the 119 cases which the expert assessed, he considered that 36% were fair, 49% were unclear and 15% were unfair. Here the settlement quantum was assessed as *fair* most often when both parties were represented (40%) and least often when the husband only was represented and the wife unrepresented (15%). The settlement quantum was assessed as *unfair* least often when both parties were represented (10%) and most often when neither party was represented (one third). However, the expert was *unable to say* whether the settlement quantum was fair or not in a large number of cases regardless of whether both, one or neither party was represented, including 50% of cases where both parties were represented.

We give below two contrasting examples of cases, the first of which raised several issues of concern, including the economic rationality of approach, the fairness of the settlement quantum and the quality of financial disclosure. The second case is one which the expert assessed as economically rational in its approach towards the pensions, fair in the settlement quantum at least as far as the pensions were concerned and full in its financial disclosure.

Example 1: A case identified by the project expert as raising issues of concern in relation to the economic rationality of approach, the fairness of settlement quantum and the quality of financial disclosure

The wife was in her late forties and the husband mid fifties. They were married for 26 years and had two adult children. The wife was a health support worker earning £500 net per month and the husband a civil servant earning £1,450 net per month. The financial proceedings were settled by consent on the basis that the wife would transfer her interest in the family home to the husband in return for a lump sum of £20,000, they would each retain their own cars, the wife would transfer a policy to the husband and he was to secure her release from, and indemnify her in respect of, an unsecured loan. All other claims, including

for pensions, were to be dismissed with no order as to costs. The husband was represented but the wife was acting in person.

The statement of information recorded that the wife had no capital and the husband had just over £120,000; the pension details for the wife were given as 'zero' and for the husband 'a Civil Service pension, 'value unknown'. The wife gave no details of plans for her accommodation except an address; the husband was to remain in the family home. She intended to cohabit; the husband had no present intentions to cohabit or remarry.
The District Judge who considered the proposed order asked for more details about the parties' finances, in particular whether the mortgagee had approved the transfer, the amounts owing under the mortgage and the unsecured loan and the value of the policy, but not about the pension. The husband's solicitors duly sent a copy of the redemption statement to the court and the parties attended in person. The judge's note records that the equity was £90,000, the unsecured loan £15,000 and that the policy had no surrender value. It also recorded the fact that the wife had not taken advice but thought that the order was fair. The order was then approved as drafted.

Example 2: A case identified by the project expert as demonstrating an economically rational approach to the pensions, a fair settlement quantum and adequate disclosure

The wife was a 50 year old administrator earning £11,000 per annum net and the husband a 55 year old manager earning approximately £100,000 per annum net, but shortly due to retire. They had been married for over 25 years and had two adult children. The non-pension assets, including the family home and other properties and investments, totalled over £800,000 net and the pension assets about £450,000 including the husband's final salary pension with a CEV of over £400,000. Both had some additional state pension but the values were unspecified. Neither had any present intention to cohabit or remarry.

The case was settled some time after proceedings were issued on the basis that the husband received rather more than 50% of the non-pension assets, the wife was to receive a percentage of the husband's pension specified so as to achieve equality of pension income, and in addition she was to receive periodical payments of £7,000 per annum for a period of eight years but reviewable in amount and term. Both parties were represented and a joint pension expert was engaged. A copy of the report was not on the court file but it was evident that full details of all the pensions had been obtained by the parties' expert and the percentage share worked out accordingly.

9.2 The practitioners

9.2.1 Practitioners' views of their clients' understanding of pensions on divorce

It was widely agreed by practitioners that the issue of pensions on divorce was one of the least well understood by clients. Only one solicitor suggested that, at the point of the initial consultation, clients' knowledge of pensions was no better or worse than their knowledge of other assets; most practitioners perceived their clients to have less knowledge and understanding of pensions than of other assets, and even less of their relevance on divorce.

> *Pensions they are worst informed about definitely, because it's far off and in the distance...*
>
> *… most of them don't even know you can claim against a pension, it's basically dividing up, because the two, the sort of things that people glean from Ally McBeal or the other TV documentaries are I can get my maintenance and I can get some capital, and pensions very rarely … seem to be as sexy … as you can imagine, a sexy word in TV, so they know what they get off TV, that never rarely involves a pension share, so unless they've done a little bit of digging themselves, which few of them have, they wouldn't really realise.*

Of course, there were exceptions, and the key to a better understanding of pensions was basically how interested the clients were. The groups most frequently mentioned as having a better grasp of, or interest in, pensions in general were 1) older people nearing retirement, 2) the better educated, 3) the generally financially 'savvy', such as businessmen or financial advisors, and 4) those who had the bigger and better pensions, such as policemen.

> *I guess again going back to the young people's thing they're probably less concerned, but that is just an age thing, and I think we're all like that. But there's a point, why do I need to think about pensions? Not a lack of understanding as such, just a lack of interest.*
>
> *A very few do, you may have some very financially literate clients. So if I have a Chief Executive type who's you know in a company, part of the company pensions scheme and understands how it works and what the trust rules are and so on, great, they know their stuff and they are financially astute people. Eight out of ten, clueless, seriously clueless, don't even read their annual statements; don't know what they're going to get, vastly under-pensioned.*
>
> *The people with the big pensions understand them quite well. Everybody else isn't really very interested and doesn't really follow.*

Women tended to be seen as having less understanding than men of pensions, particularly those who had little experience of the employment market, although this was acknowledged to be somewhat of a stereotype and far from universal.

> *This is a generalisation, women tend to have a poorer pension provision if they've had children, tend to, that may change as there are more men taking care of kids and becoming part time workers. But their level of lack of knowledge is quite scary.*

Knowledge of the relevance of pensions on divorce was generally said to have increased over recent years – these days more clients were aware, and indeed accepted, that they might have to share a pension, or at least take it into account, as part of the financial settlement. However, that was often the limit of their knowledge, and may have been accompanied by misconceptions, such as automatically being entitled to half, being able to take their share as cash now, or having a continuing interest in future pension contributions after the divorce. Solicitors suggested that many clients understood the basics, but little more. For example, the concept of a cash equivalent was new to most clients, and appreciating how that converted into an income on retirement could come as an unwelcome discovery.

> *I've noticed a change in attitudes. I'm getting husbands who come in, they're very sore about it, but they will take advice whereas 10 years ago they thought that their sheer wilfulness of refusing to share it would change the outcome of the cases and it didn't.*

> *I don't think anyone has an idea of their cash equivalent transfer value anyway, it's not the sort of thing you have in your head is it?*

> *Little. I think pensions scare people as well. I think they massively confuse people and when they see that their husband or wife has £200,000/£300,000 in a pension pot somewhere, you know, they rub their hands together and they think ching ching...*

> *I think more people are now aware of pension sharing as a part of divorce, that it's part and parcel of the sort of settlement ideas now. I think they don't realise how little money a pension pot is going to pay them when they retire and what the effect of that is on - and especially women the effect of having career breaks what that's done to both their state pension entitlement and their personal investments.*

Solicitors seemed to take pride in tailoring their advice to their clients' particular circumstances but often described keeping it as simple as possible, and not attempting to explain the finer points, such as moving target syndrome, or even attachment if they felt that it was unlikely to be appropriate. As a general rule, solicitors felt that clients understood the advice on pensions and their options sufficiently well, although one solicitor said it was surprising how often they had to repeat the term 'cash equivalent transfer value' and another how often they had to explain the meaning of a pension sharing order. It was an area where solicitors felt that their expertise could be especially valuable to clients, more so perhaps than other areas, because it was rare for clients to have the same level of knowledge and understanding as the solicitors. One told us that her clients were often pleasantly surprised by the fact that pensions were not 'off limits', and another that most people were 'delighted' by her advice, at least those who did not have pensions of their own.

> *I mean I think for those sorts of things you need a solicitor to help you. I'd like to think that my clients understand what's going on after they've spoken to me, but who knows, but again, I think with solicitor's assistance, I think they do tend to understand, they seem to get it.*

But also it's because people are having to think about their retirement and what life will be like after the divorce and that's very difficult for them to do, imaginative leap. Until you say to someone look you're going to have 20p a week to live on if you're not careful when you retire, it doesn't quite sink in.

We were given a few examples of clients' reticence in accepting basic advice on pension options, but these tended to be a dying breed, for example older men who felt that they had 'paid for everything', or police officers who understood but could not accept the advice that they would have to share their pensions with their wives. At the opposite end of the spectrum was the wife who felt guilty about claiming a share of her husband's pension. She may have had no real experience with managing money and needed a financial advisor to illustrate the day to day implications of the various financial options. One solicitor suggested that clients who had suffered domestic abuse could be unreceptive to advice on pensions, fearing to upset their spouse by claiming against something which the spouses chose to believe belonged to them.

A lot of people without pensions still think it's a little bit morally unfair to attack their spouse's pension and it takes quite a lot of explaining and you have to compare their incomes and explain to them how much … I think once they see the cash value of the fund, then common sense comes into it, and they realise, and if you explain to them, well, look, you've looked after the children, you haven't worked, but you still do get clients who absolutely insist they do not want to touch their husband's pension, at all.

Gentlemen, you do get certain gentlemen who have a very old-fashioned view, it goes with the same view, "well I've paid for everything" and a failure to recognise wife or other partner's contribution to her household or children, and in a similar way that they say "well I've paid for everything in the house, I've paid for all of my pension, why should he or she benefit from a share from that?".

Solicitors often commented on how financial advisors could help many of their clients understand pensions, and form a realistic picture of their future and make informed decisions. Where pension actuaries or similar experts were instructed, much of their advice could be beyond the understanding of clients, and sometimes of the solicitors too, but solicitors tended to be able to highlight the key points and the result was that pension issues would usually be settled without further litigation.[255] One solicitor suggested it would be helpful if there were more 'easy to understand' literature on pensions.

We do send out literature in relation to ancillary matters but I certainly think, on something like a pension, additional easy to understand literature would be of great benefit to the profession, but it would have to be written by an expert who is not only an expert at the subject but was also pretty good at communication.

[255] The role of pension experts is discussed in detail in Chapter 5, p 68

9.2.2 Practitioners' own training, confidence and understanding of pensions

Practitioners reported participating in a variety of training on pensions. This included courses specifically on pensions, and also more general courses providing updates on divorce or family law, of which pensions issues were one of several elements. Roughly equal numbers recalled attending one or both of these two types of training. The majority had done so within the previous 12 months or so. Those who dealt with pension cases more regularly tended to have had more, and more recent, training specifically on pensions and be keener on having it.

In most instances, training was external, and a variety of providers was mentioned: Resolution, Jordans/Family Law, and barristers' chambers and IFAs who were said by several interviewees to offer free seminars. Some practitioners from larger firms, or from firms with larger family departments, also reported that their firms had arranged training on pensions in-house provided by either in-house lawyers or invited speakers.

Training mostly covered the treatment of pensions on divorce. A small number of practitioners had also attended courses which dealt with wider aspects of pensions, such as types of investments, and the limits on contributions to pension funds. The in-house training was generally very well received and targeted. Views on the IFA or pension provider seminars were mixed: described by two specialists as *'very useful'* and *'brilliant'* respectively, and by another who said it was *'probably a lot more useful than'* a general family law update which had *'a bit of pensions in…although not a massive amount'*. A non-specialist described it as pitched too high and that *'pension providers do not make good trainers'*.

Practitioners generally appeared satisfied with the availability and utility of training on pensions. A few referred back to the flood of training opportunities in 2000 when pension sharing was introduced and for a minority that was their last main training. One felt that there was a lack of accessible courses in their location. Another relatively recently qualified solicitor noted that there was little on pensions in the solicitor professional qualifying courses.

Practitioners' levels of confidence in dealing with pensions on divorce were varied. A minority – almost all of whom specialised in divorce financial cases, expressed high levels of confidence in their knowledge and understanding. For example:

> *I think I know as much as I would be expected to know and probably a little bit more.*
>
> *…pensions is part of my day to day vocab and my day to day working life…I'm quite comfortable with finances full stop.*

A small number of interviewees, who did not deal with many cases in which pensions were significant, indicated low levels of confidence; some of them appeared to have drawn on other sources of support, such as more experienced colleagues, and some not.

> *I'll probably be the first person to say that I'm not, don't consider myself to be a genius on pensions or pension sharing, sharing orders. And I suspect that's*

something you might find commonly, you know, this is something that I think probably a lot of lawyers, unless you do it all the time, struggle with, you know.

No I don't feel confident. I don't think we have enough of them to... I think it is one of those areas where you need the backup.

Most however declared middling levels of confidence; they variously described themselves as 'fairly', 'relatively', 'reasonably' or 'pretty' confident in dealing with pensions generally, but felt they lacked confidence regarding one or more aspects. These practitioners (and others) cautioned against over-confidence, and emphasised the importance of lawyers knowing their limits, and the value of bringing in relevant expertise where appropriate:

…if you look at a broad spectrum of pension knowledge, there's no way that I'm ever going to say, yes, 100% of the way, I know all about pensions, and I'm very comfortable with talking and advising on them right throughout, but the level of my understanding of pensions is at a level where I can discharge my functions as a lawyer, and then the rest can be topped up by someone who definitely knows what they're talking about, every single nook and cranny.

Fairly confident, you can never assume you know everything, that's when you start making mistakes. We are encouraged that if we're not sure obviously the partners here have got extensive knowledge, and we refer. We've got a good network of IFAs that we work with, actuaries that are quite happy for me to ring up and go, 'Is this right? Am I getting this right?'

Many interviewees stressed how complex an area pensions on divorce was, and one which many lawyers would find difficult:

I would say generally most lawyers if they're honest would say they're not as expert on pensions as they really ought to be.

I think that confidence grows with time and experience. I can imagine that a newly qualified solicitor would feel quite daunted by pensions.

There's so many different types of pensions as well, and no matter how many courses you go on, you have to keep refreshing your memory about them…

Specific areas mentioned where knowledge or confidence was lacking included interpreting actuary reports, when and how attachments might be appropriate, complicated SIPPs, 'more complicated structures', pension rules and regulations and the Pension Protection Fund. Practitioners also often mentioned the difficulties of knowing when a CEV could be relied on and how to calculate an offset, as we discuss in more detail elsewhere.[256]

I think it's an under … it's an under-understood … it's an area that's not very easy to access from a client's point of view and from a solicitor's point of view, and there needs to be a bit more guidance about how we approach the cash equivalent value

[256] Offsetting is discussed in Chapter 8, p 131 and issues about CEVs in several chapters but particularly Chapter 5, p 68

or the cash equivalent because, none of us, we're all in the dark really, it's just … it would be nice to know that 60p in the pound is the figure that we would do for an offset, and if that's the way it's done, or, this is how you approach it...

9.2.3 Practitioners' experience of the judicial approach

The main source of the practitioners' experience of the judicial approach to pensions was through representing their clients on FDAs and FDRs.[257] Very few solicitors had had much experience of fully contested hearings, and most of those who had said that pensions were rarely the issue, or if they were it was very much as part of the wider picture.[258] Similarly, by the time cases reached the FDR stage, most pension issues had been agreed, quite often with the help of an actuary or pension specialist. As a result, it was rare that the judicial approach to pensions was put fully to the test.

> *... there are very few cases where you're fighting an issue to do with a pension fund. It's usually a very peripheral issue. It's usually sorted... So there's very few cases where a Judge has to get hands on involved to do with the pension fund.*

> *I've not come across a case yet where the only issue that the Judge ultimately has been asked to decide is how the pension should be split. I think Judges, having heard everything, will form a view and then you know slot the pension in that overall view.*

Judges were on the whole seen as supportive of obtaining expert evidence in cases where the parties were older and/or the CEVs were larger enough, and welcoming of the expert advice once it was obtained.[259] There were very few examples of cases in which the expert's recommendations had not been accepted by the parties, their representatives or the judiciary or settled on that basis.

> *I've never seen a pension issue being thrashed in court actually, I think it's always you get your evidence, the position is clear hopefully, and I think a district judge will follow what the advice was from an actuary or whatever that might be.*

> *... if they know they're actually going to have to make a decision and say this much percentage to so and so they like to have [an actuarial report]. I don't think they're frightened of it at all, perfectly happy to make the orders.*

Practitioners described the general judicial approach towards pension assets and orders on divorce as very similar to their own.[260] The key indicators of a pension being significant to the judge in any one case were seen by the practitioners as the ages of the parties, the size of the CEVs, the length of the marriage, when the pensions were accumulated and any disparity between the parties' pension provision or capacity to accumulate pensions in the future.

---

[257] See Chapter 4, p 47 for an outline of the court process in divorce financial remedy cases.
[258] See Chapter 7, p 112 for a fuller discussion on the contentiousness of pension issues.
[259] See also Chapter 5, p 68 on the Role of the Pension Expert.
[260] See also Chapter 3, p 31

I wouldn't say they've got any particular different attitude to the discussions you have with the solicitors going round and round anyway, I think it's the same discussion you're having.

They never go overboard and say this is a very valuable pension or anything like that. I actually think the ones where we've gone to a final hearing I think all of them have had a pension share, and I think that approach is just quite measured and it's another asset in the case.

The practitioners, however, gave a strong impression that there was a two-way knowledge exchange on pensions between practitioners and judges, supplemented by the expert reports.

... I think what's more difficult is educating the judge that it's not just about the CETV, there are things beyond that, other benefits beyond it, particularly with those schemes that I mentioned before, the added benefits, being able to leave early etc.

...I've spoken to a couple of District Judges, in confidence, who have said they don't know what's going on with … they are listening to the advocates, they're very open about it, say "have I got the power to do this, what is this, what is that"...

I think they probably tend to shy away from wanting to do them because of the associated costs, but I've learnt a lot from the Judges here that have taught me how you know the best way things should be dealt with and those sorts of things, yes, I think they approach it quite well.

Many practitioners expressed an interest in the judges' level of knowledge of, and training on, pension issues; some expressed more confidence than others.

It's useful to know what training the judges have got and what knowledge they have, but he's not going to give you his CV before you go in. So you assume that the judges are well trained. But it would be useful to know to what level that goes to, and whether they are able to access any support if they're not sure. Do they talk amongst themselves, do they speak to barristers, have they got an IFA that they…? Just to see if they're not sure about something.

I would just love to know how they deal with pensions. Do they just literally listen to the person who's giving submissions and take what they say, or do they have their own, are they taught themselves how to do it, I don't know...Do they know how to read actuaries' reports, do they go on these courses, I'm not sure, but no, that would be quite interesting.

I suspect they're undertrained in pension sharing, they do their best but I think once you're in the arena of the more complex side of pension sharing they're probably a bit at sea. Down to the lawyers to assist with that I think.

Their level of understanding is reasonably good. Remember, with any tricky pensions case, they've probably had the benefit of being able to listen and ask questions of an expert, so over a period of time, what with the training they get, and with the hands on experience in Court, they do have a good level of understanding of the problems as well as the benefits.

Criticisms of specific judicial decisions on pension issues were rare. Of those that were expressed, some related to procedural issues and others to more substantive issues. Examples on the procedural side included the occasional refusal by a judge for the appointment of an expert[261] and another's setting down for final hearing without the wife providing a CEV. The more substantive decisions which were questioned included one judge almost uniformly applying a 25% discount to pensions in offset cases, one suggesting that a pension of £100,000 was not significant enough to merit adjustment when the other party had none, one applying a simple formula to a pre-acquired pension apparently without taking into account the wider circumstances and lastly one adding pension and non-pension assets together.

> *When I was a trainee we had a case where the husband's pension was worth £100,000 and the wife didn't have one, and the judge said it wasn't a pensions case, which I thought was… they were an older couple as well, and I was really disappointed with that...*[a relatively newly qualified N solicitor]

> *For example, this broad brush approach with the 25%, that wasn't any kind of rule, it was just something that this Judge routinely did, and it's a bit, you know, is that right, is that wise, and what have you.*

A few practitioners expressed the view that judges' approach to pensions had improved over the years, in taking pensions more into account, understanding them better and being more prepared to make pension orders:

> *Well they're certainly far more on the ball than they used to be as are all of us, and as I said I think they're less likely to adopt a set-off approach, more likely to go down the pension sharing approach.* **And that's a change over the years?** *I think so yes... The judges seem to have more of an awareness of what's involved in pensions.*

> *I think certainly I had some time ago the feeling they didn't really understand them much more than I did, you know, and there was a bit of a nuisance if you like having to look at the pensions.*

There was a range of opinions on the broader judicial approach, perhaps reflecting the wide variety of judges' approaches to the issue of pensions. A few suggested that judges liked to keep things 'simple', preferring not to go into detail on the technical issues, tending to be 'black and white' or 'clinical' in their approach.

> *Judges tend to be very clinical about the issue of pensions, they want to know what direction you're taking this pension case in. Are we looking at pension share or are we looking at offset, they just want to know very clearly and concisely, early doors, is the wife wanting an offset or is she wanting a pension share...?*

> *I would still say many are not technically minded about pensions but they have a broad brush understanding, which is mostly enough actually.*

[261] Described in Chapter 5, p 75

Some judges can drive you nuts because they grandstand and they're not looking at the technical issues. Most try as hard as they can to get it right, they really do. It's very difficult for them and they have very limited time, and they're under a great deal of pressure, and they've got more important things to be doing than arguing about people's pensions because they are swamped with children cases.

Two specific criticisms of judicial understanding were made. One practitioner who frequently acted for police officers thought that many judges did not understand police pensions and gave an example of a case where the judge at the FDR had admitted to that and listed it straight for final hearing as a result. Another practitioner perceived a limitation relating to pensions in payment.

I think that perhaps they ought to look a little bit more closely as to you know where pensions are in payment, you know, and a sharing is ordered, how soon before the wife gets her hands on the share, you know, things like that.

Views on how the judges dealt with the FDRs in general were mixed. Some were seen as giving very helpful guidance, others less so. One practitioner suggested that judges were sometimes reluctant to give guidance at an FDR because they were then precluded from dealing with the final hearing. One mentioned how often judges raised the issue of costs.

I think, again, judges in ancillaries are so concerned about costs. More and more, when you're before the court, every single time [laughing], the judge will say something about your Form H and say something to the parties about "You need to sort this out - stop paying your lawyers money to come here!" They love to tell clients off for spending money on us.

Two Northern solicitors expressed some reservations about what they saw as a culture of the judges trying to please, or disappoint, both parties equally, a practice which could be particularly inappropriate when dealing with pension issues.

I have had a situation where we went to, I think it must have been an FDR, yeah it would have been an FDR, and we were with the wife and we said we want 60% or whatever it was, because we wanted equality of income, and the husband said but no we want equality of capital value, and the judge said why can't you do a bit of both? So you're like well okay let's go back to the beginning. So I don't think they get pensions a lot of the time, certainly not the District Judges.

Obviously if it's litigated, and I don't know, again, this is a real issue that I have, because again, not a criticism of the judiciary per se, but there seems to be this over arching culture, since I've been practising as a family practitioner, of making both parties as equally disappointed as the other, so nobody cartwheels out of a Court and obviously, within this, is the pension sharing argument. But the problem is you will have a practitioner who really doesn't know what they're doing, doesn't know the Court approach, doesn't know the case, or doesn't know the process, it will turn into who shouts the loudest, so whilst you put a legitimate claim down as to what you think an appropriate pension sharing order is, you'll have someone who doesn't know

what they're doing, will even on some cases try to treat it as liquid cash, and say therefore we want X percentage of the pension share, and the Judge, if he's not robust enough, or she's not robust enough, will try to find this equal mid-point to make them both equally disappointed, and I think that is when the client really suffers... They kind of compromise things, fluff things, if I could use that word, and both parties, and Court seem to sort of pat themselves on the back, the Judges seem to pat themselves by saying they both should go out with their heads held in shame basically.

9.3 The District Judges

9.3.1 The judges' views of the practitioners' understanding and approach

There was a general consensus amongst the District Judges that practitioners' understanding had improved over the years but that it was still patchy and variable. A distinction was made between specialists, who were described as on the ball, and high street firms, who 'dabbled' and took too many risks. A few specific failings of practice or lack of knowledge were mentioned, including overlooking the advantages of attaching death in service benefits and the disadvantages of nominating them, too simplistic an approach to pension sharing, comparing pension and non-pension assets as if they were the same and not instructing pension experts often enough.

WDJ2: They are clearly alert to the problems and I think they realise a lot more now than when I started off... Solicitors in private practice you know almost 35/40 years ago, did I pay as much attention to pensions then, in 1973, 74? Probably didn't. Now I think all the solicitors want to know is, is there a pension and, if so, what size is that pension, and they do pay attention to it, yes, and I think they are generally clued up about it, I'm not saying they're all pension experts, they're not, we're not pension experts.

NDJR: Well, the only thing that I would find is that, still, practitioners take too much risk. There's still the lack of understanding. They start talking about sharing pensions without a proper report... I think there are going to be a few negligence claims against solicitors.

NDJM: Because there is…there is a very simplistic approach, particularly where the amount, the pension pot is not big, certainly where it's, say, under £100,000, of simply saying, well, let's look at the CETV and essentially treat that as a capital asset, a different class of capital asset, not an immediate capital asset, but, you know, you can achieve equality just by dividing it in half or by…if there are two pensions, by equalising the CETV, which, as we know, is dangerous, but I find that is a very common approach.

Some judges acknowledged that they relied on the practitioners to advise them on the law and to alert them to particular points of importance in relation to the pensions, it being down to the practitioner to argue their case and clarify what they were trying to achieve.

SDJ1 Well if their lawyer's doing their job right, they're going to be telling you what the additional effect is going to be of it being a particular sort of pension fund...
I was always taught, as a young lawyer, that you've always got to think in your head what the end product is, who you're trying to persuade to do what, and if you don't give them the information, how can you persuade them. And that's the biggest failing.

NDJS: They would come to a final hearing with those positions already defined, that "this is what my client would be seeking - it is an income stream", or whatever. So, you are working between those, because it's not for you to make their case out, is it?

It was also generally agreed that pension orders and annexes were fairly straightforward and that the drafting of them did not require a great deal of expertise once the percentages were agreed. More than one judge referred to the use of Resolution precedents with approval. However, recitals were sometimes said to be inadequate, and the supporting statements of information and covering letters were often thought to be lacking[262], particularly with regard to explaining the rationale behind the order and how the percentages had been worked out.

SDJ1: Rubbish. Some solicitors, who are experienced, they not only know what to do, but they will give you a schedule which shows you what it's actually doing, and what the effect is. 'This is what we've got to deal with, this is how we're proposing to share it, that's the effect of it.' And many of them will write you a letter which explains it, which is immensely helpful. The ones who just fill in the form... they don't, except in the simple cases, give you the sort of information that you actually need. They don't give you the bits of information, like the inheritance that might help you to balance things and see where it all fits into the scale of things...

SDJ1: Consent forms, it's definitely the financial form that's the problem, not the consent order itself. Because they know they can suck it and see and try and get something past the Judge, even if they think it isn't going to work, that's fine, that's part of the game.

9.3.2 Judicial training and experience of divorce pension issues

All the judges that we spoke to were very experienced, one having been appointed in the early 1990s and the most recent in 2008 (and that judge had had many years in practice as a family solicitor before that). All were either full-time or 80% full-time. Most had been sitting in their present courts for some years but had experience of other courts as well.

However, the percentage of divorce financial remedy work in the judges' caseloads was relatively small. One suggested, as had a few of the practitioners, that financial remedy work had fallen off in recent years with the recession. Whilst family (as opposed to civil) work formed between 30 and 60% of their total caseloads, by far the bulk of this was made up of private or public Children Act work. One District Judge who had a commercial background did very little children work but his financial remedy work comprised one day in every nine, plus perhaps one consent order per day as part of his 'box' work, and that was apparently more than either of his colleagues . Thus the day to day practice of the District Judges was somewhat of a contrast to the day to day practice of the practitioners who participated in the

[262] See Chapter 4, p 49 onwards for a detailed discussion on the issue of financial disclosure and statements of information.

study, the vast majority of whom practised family law to the exclusion of all else and of those over two thirds specialised in financial remedy work.

Formal training for District Judges now apparently comprises one compulsory national training day a year, plus one two-day course a year, recently reduced from three days. It is up to the judges to choose their own course, for example civil or children, and no part of the programme is compulsory. Until recently there had been no course comprising solely divorce financial remedy work; there was simply a bolt-on option of financial remedies included in the private children law course. Thus, of the seven judges whom we met, three had not had any judicial training on divorce financial remedies for at least three years, two had not had any for at least two years and only two had had any in the past year.

The course choices for most of the judges, whose caseloads were largely made up of civil and children work, were perfectly logical. However, the result was that (apart from special judicial training around the year 2000 when pension sharing was introduced) training on pensions on divorce formed only a very small element of the optional financial remedy section of the annual two day training course, and some would not have had the benefit of any at all. This again contrasted with the practitioners' training on pensions, the majority having had some training in the last 12 months or so, albeit some at a very basic level.

Views of the current judicial training system were mixed. One described it as 'a joke'; others were more positive.

> *WDJ2: ...if you're doing 40% or 50% family, you should be going on courses... I went on two civil courses, annually, and I suddenly realised that I was feeling very weak, and I'd chosen my course again, for 2013, and I've now cancelled that and I brought it forward to November deliberately to go on an ancillary relief financial matters, because I wanted to be up to date on it.*
>
> *SDJ1: The difficulty is that people get options as to what they do, that's one, so they don't necessarily have to go and do that course, they can choose what is suitable for them, which is a good thing, because that means one gets the training to a certain extent that is helpful to you.*
>
> *NDJM: Because of the amount of work involved in preparing it - they're extremely detailed - they only vary the courses every few years. But the ancillary relief is a new one. I mean... I went on it last year, when it was run as a pilot. Previously, it had only been a bolt-on element to something else. So, it's a distinct improvement that there's now a specific family money training course.*

As to the usefulness of the pensions training element, one commented:

> *SDJ1: I think it depends what stage you're at. I've been out of practice a long time now. And I don't think that there are new issues about pensions generally, so I've probably heard it all. And the detail of it, in any case, as I say, is probably beyond what I need to know, most of the time. But people coming into it who haven't had that experience, it's essential and good. And they get people like [DJ pension specialist], who knows what he's doing. But the problem sometimes is that it's a bit more complicated than people can take in.*

District Judges had other ways of keeping themselves updated, such as through printed or on- line Family Law Journals, the judicial Family E-letter, and sharing books bought with the benefit of their respective library budgets. In addition, the judges at the two larger courts mentioned chats over lunch and coffee when they might feedback on recent courses and cases to each other. Another mentioned a financial remedy committee on which local practitioners served, and bi-monthly court business meetings which might include practice issues. WDJ2 made a general observation:

> *I mean ancillary relief, I was commenting the other day, I know the Government are looking at it, but it must be the most successful part of the legal system, if you look at appeals and everything, I mean, there's very rarely any appeals from it... Ancillary relief works through pretty well, I think.*

9.4 Key points

- **Based on 118 of the court file cases which disclosed a pension other than the basic state pension, the project expert assessed approximately half as having an economically rational approach towards the pensions; in the remainder the approach was either problematic or unclear; cases with pension orders tended to present a more economically rational approach than cases dealt with by offsets; none of the cases where the approach was unclear or the pensions had been ignored were assessed as having an economically rational approach**

- **Based on 113 of the court file pension cases, the project expert assessed the settlement quantum as fair in approximately one third, unfair in approximately 15% and unclear in about half; a greater proportion of cases with pension orders were assessed as fair than offset cases, and only a small minority of cases where the approach was unclear or pensions had been ignored were assessed as fair**

- **Based on the financial information from 130 of the court file pension cases, the project expert assessed financial disclosure as adequate in below one third and in the remainder it was inadequate or unclear; in most uncontested cases this information would have been the same information on which the judges relied to make their decisions; financial disclosure was more often adequate in pension order cases than in offset cases or in cases where the approach was unclear or pensions had been ignored**

- **Legal representation did not appear to make much difference to the project expert's assessments of the economic rationality of the approach towards pensions or to the adequacy of disclosure; however, the settlement quantum was assessed as fair most often, and unfair least often, when both parties were represented, and the opposite when neither was represented**

- **Most practitioners thought that their clients' general awareness of taking pensions into account on divorce had improved over recent years, but compared to other issues there was still a low level of understanding of pensions, and a lack of interest in them, especially by women; practitioners saw their role of advising clients on pensions as particularly valuable relative to other financial issues**

- **The practitioners themselves expressed varying levels of confidence in dealing with pension issues; the more experienced they were the more importance they tended to place on training and expert support; most had had some training on pensions within the last 12 months although for many that merely comprised a small element of a one day general family law update**

- **Practitioners had limited experience of the judicial approach because pension issues were rarely contested; where there was a pension issue, a two-way knowledge exchange took place between practitioners and judges, backed up by expert reports; criticisms of specific decisions on pension issues were rare but some practitioners perceived a lack of judicial understanding of the more complex issues**

- **The District Judges' view was that practitioners' understanding of pension issues had improved over recent years but that it was still patchy; in consent order cases the judges repeatedly emphasised the need for the practitioners to explain the reasoning and effect of their proposed orders**

- **Financial remedy work formed a relatively small proportion of the District Judges' workload compared to civil and children work, and they tailored their judicial training accordingly**

Chapter 10: The Vignette and Practitioner Responses

In this chapter we outline briefly the answers that the practitioners gave to us in response to a vignette which we had sent to them a few days ahead of their interview. The vignette was a short fictional case history with no absolutely right or wrong answers; it was intended as a standardised way of exploring the practitioners' approach towards various issues around pensions on divorce. We purposely kept it as simple as possible so that practitioners could absorb the relevant information quickly and answer questions without much advance preparation. We discussed the vignette with 30 of the 32 practitioners at the end of their interviews. The actual vignette is shown below, together with the list of broad questions which the practitioners did not see in advance.

Vignette

- You act for the wife (W) and the husband (H) is represented by another solicitor.
- H and W separated about one year ago and the decree nisi has just been granted.
- They were married for 20 years up to the date of the decree nisi following five years cohabitation.
- H and W have two children– a daughter aged 20 in her second year of university and a son aged 14, living with W in the family home. H is lodging with friends but making the repayments on the mortgage, plus the council tax and insurance on the family home and an allowance to the daughter.
- Some informal financial disclosure has taken place and negotiations are just commencing.

	Husband	**Wife**
Age	50	49
Health	good	good
Occupation	Senior engineer	Administrator/receptionist
Hours worked	Full time	Part time (20 hours pw)
Length of current employment	22 years	6 years
Previous employment	7 years	10 years (to age 29)

	Joint	**Husband**	**Wife**	**Total**
Income net pcm Earnings Child B; Tax Cs		3,000	1,000 200	**4,200**
Family home	245,000 less mortgage 40,000 sale costs 5,000 Equity 200,000			**200,000**
Other assets Cash ISA		10,000		**10,000**
Total assets	**200,000**	**10,000**	**0**	**210,000**
Pension CETV		**160,000 (final salary)**	**10,000 (personal)**	**170,000**

Questions/topics for discussion

1. What do you see as W's main financial options?
2. Is there any other disclosure that you would seek on the pensions?
3. [if not mentioned] How important is it in your opinion to get a valuation of H's/ W's Additional State Pension?
4. How likely is it that you would advise W to go for a pension order? Factors?
5. [If likely/ possible] What kind of pension order? Reasons?
6. [If unlikely] What other orders would you see as most appropriate?
7. Where off-setting is an option, how would you calculate the appropriate sum?
8. How likely is it that you would instruct counsel? Factors?
9. How likely is it that you would recommend a pension expert and if so what kind of expert? Factors?
10. What would you see as the main rationale behind the proposed settlement (eg needs, compensation, sharing)?

10. 1The advice on, and expectations for, the proposed orders

Over two thirds of the practitioners were clear, albeit with varying degrees of certainty, that they would positively advise the wife to go for a pension sharing order in this scenario. The main points which they made to support this approach were the length of the marriage, the size and type of the husband's pension and the disparity of pension provision.

> *I mean there obviously is the question of a pension sharing order, okay, dirty great big difference in the values of their pensions, quite a long marriage... She was 49, so not a huge amount of working life left in her, so instantly it is like an important pension question.*
>
> *...and there would be a pension share...I wouldn't hesitate on this one...I'd be negligent if I did.*

Most, but not all, practitioners thought that the case would actually be resolved in this way, but that depended to some extent on the parties' priorities, particularly the wife's (she being the notional client). They needed to know how strongly the wife felt about sharing the pension and meeting her longer term income needs, as against having a larger share of capital now towards her immediate housing needs. The husband's preferences were also likely to affect the outcome of the negotiations, particularly how keen he was to keep his pension intact. A few practitioners suggested that a pension share was the only viable option because a straight trade-off between house and pension would be unacceptable for the husband, given his need for capital to re-house himself.

However, for one practitioner at least, the pension would be brought in at the end of the exercise as a balancing asset rather than one in its own right:

> *...you can have all the pension sharing in the world, but if you haven't made your plan for your accommodation you're starting from the wrong end of the telescope as far as I'm concerned... So I don't start with the pension if you see what I mean? I'm using the pension to balance up the scales at the end, not at the beginning.*

Most practitioners thought that, irrespective of the pension issues, the wife would retain a larger share of the equity in the family home by virtue of the fact that she would have a dependent child living with her and she had limited mortgage capacity. The most often quoted division was 60/40% in her favour, but the lowest was 50% and the highest 70 to 80%, depending partly on whether there was to be an immediate or a deferred sale.

Of those who clearly favoured a pension sharing order approach, a few suggested that there might be a partial offset of the pension against the family home; if the wife was unable to afford to buy out the husband or re-house herself and the son on her 60% (or similar) share, she might give up *part* of her share in her husband's pension in return for a greater share of the equity – a 'mix and match' approach.

> *She's going to take the lion's share of the equity, you know, and I would be saying that there may have to be some recognition of that in the pension share. But that's not to say she wouldn't get a pension share, I just don't think it's probably going to be 50/50, it might be 70/30, something like that.*

> *...are you sure you want your assets as bricks and mortar which you live in, you can't benefit from and don't give you an income, aren't you better off mixing and matching your assets, some capital from the house maybe in a few years time, so you'll be covered for the next few years, but also pension for your future. That mix and match approach which gives someone a bit of everything is more important I think.*

Only one solicitor suggested that a pension attachment order might be more appropriate than a pension share; that was because on a sharing order an internal transfer was probably not an option and the benefits of the final salary scheme could not be matched pound for pound by an external transfer to a money purchase scheme.

Just a handful of practitioners favoured a straight offset of the husband's interest in the home against the wife's interest in his pension and thought that the figures could justify such an approach. The main reasons advanced for an offset were that the wife's priority had to be keeping the family home and giving her full and immediate control over her share of the assets; the alternative of a sale of the family home was potentially disruptive, and an order whereby the husband retained an interest in the family home to be realised on certain trigger events was potentially restricting for the wife, delayed the husband realising his interest and would not achieve a real 'clean break' for either party.

> *...If he was prepared to give her the £80/85k that I think he's entitled to in the house, no, I'd offset because I think a house is more important to her now, and £80,000 is more than the cash equivalent value of the pension that she's giving up.*

> *...if they were to say, "I don't know please advise me", I would probably lead them down the offset route... So what I like about the idea of offsetting is if we can get the house transferred outright to her, she will have full and ultimate control over that property, she could sell it and downsize whenever she wants, she doesn't have the husband looking over her shoulder in terms of a future sale, and she doesn't have to wait for any of her money like she would do with a pension sharing order.*

A similarly small number of practitioners were uncertain about the best option and were torn between a pension sharing order and an offset, ruling out neither absolutely. The biggest reason for uncertainty for all practitioners, whatever their view, was what the client wife's wishes were and how strongly the husband felt about it all.

> *There's equity of £200,000 so you'd go through with what her immediate needs are. If she's the type of person who is more concerned with security in the future, she might determine it for you, that she wants the pension share on benefits, but I would be advising her to forego that at the moment and look more to the capital.... my guess would be that you could structure an argument, it would be you know he keeps his pension, she keeps the house.*

But the less experienced practitioners tended to be less proactive in their advice and more inclined to be led by their clients:

> *I don't know. It's going to be dependent on her instructions, to be perfectly honest, I always hide behind that, I mean, just from experience, clients always have very strong feelings about it.*

Few of the practitioners would be drawn on how they might calculate the offset. Most thought a straight trade-off for the wife of house against pension was optimistic; one ventured 75% as more realistic; a few said they would consult an expert for advice; one said: '*... if he is wanting to keep his pension so desperately, there would have to be a hell of a concession on the family home and on the income, the sort of spousal maintenance order.*'

Many practitioners saw spousal maintenance as part of the package; in most cases they implied that this would be a short term provision, and would be in addition to the child support which they estimated at £450 based on the Child Support Agency formula. Some

suggested that the wife's claims for maintenance might be capitalised and offset against the husband's share of the house or his pension.

10.2 Pension experts

We asked practitioners whether they would recommend a pension expert in this case. Over half were certain that they would want to instruct a pension expert and would advise the wife accordingly. In almost all such cases the expert would be an actuary. Most practitioners who had favoured a pension order also favoured instructing an actuary. The two main purposes of instructing the actuary were 1) to check the true value of the husband's CEV and 2) to find out what share would be needed to give the wife equal pension income. Two of those advocating an offsetting approach also favoured instructing an actuary in order to get advice on a fair value for the offset. The fact that the pension CEV was substantial and that it was a final salary scheme were the reasons most commonly given to justify seeking the expert's advice.

> *... I think the fact that it's a final salary scheme makes me more likely [to instruct an expert]; if it was a money purchase scheme I'd probably in practice be less likely to, at figures of this level, because you've got a bit more of a confidence that you know what's sitting there.*
>
> *I'd probably say that we'd be looking at a pension share on an income basis, and that's how we should approach the instruction of an actuary to do that.*

One practitioner suggested that his approach towards instructing an expert might differ depending on who he was acting for:

> *For the wife you would I think. For the husband I think you'd probably put up token resistance and say, "well, if she wants it, let her go ahead and get one", but I think there's enough potential benefit for her, for £850,[263] you know, if the value of the fund was pushed up by £10,15,20,000, it would have been worthwhile, so yes, I probably would.*

A few solicitors suggested that they would want to instruct an Independent Financial Advisor [IFA] as well, to give the client wife some idea of what benefits she might get with a pension share, and/or where she might transfer her share:

> *I'd probably have a quiet word with [an IFA], I still would do that. Because I do think sometimes if you just set the figures down, wives, again this may be a little bit of a change in the last couple of years, if they can see what they could have out of a pension share as against what they could have by way of offset it does very much cement the mind down.*
>
> *The problem, if it stays in his pension scheme, is that she might not be able to access it until she's 65 so she would need IFA advice on that. It could be a really*

[263] £850 was the fee which the practitioner anticipated would be payable for an expert report.

good scheme, she might want to stay in there, but she'd have to look at the death benefits side of it as well. Will she be able to transfer out too? If she's going to transfer out she needs an IFA advice on where that goes.

The relative cost of actuaries and IFAs was a factor for practitioners in deciding whether to instruct one or both:

I'd probably do it for an IFA first of all because if she's only earning £1,200 in income of her own... She'd have to use some of her cash to pay for her legal costs or borrow the money, so legal costs for her is going to be fairly key, and so the advice and the way that you run the file has got to match the fact that she's got to be able to afford to pay for it.

A handful of practitioners were clear that an expert report would not be appropriate. The main reasons they gave were that a report was not necessary, would add unnecessary complications and cost, or the expert would have to make too many difficult assumptions.

Not that, no, I don't think. I tend to try and keep it simplistic as possible.

I don't think I'd need an expert report, if that's a final salary scheme, providing I've got the relevant information from the Trustees of the fund, I don't think it would warrant a formal expert valuation.

I mean you can always have the conversation about getting an actuarial report, but I mean, looking at the income figures, I can't see that really functioning.

And I'd also then put a doubt into her head as to the value of any actuarial report, because of the assumptions that they would have to make. Nobody knows what's going to happen to the economy in six months' time let alone ten years' time.

A similar number were uncertain about the merits of instructing an expert, would only instruct in certain circumstances, for example if there was going to be a pension sharing order, or needed more information about the stance of the parties before they could decide.

I might be tempted with a pension expert depending on you know if his second pension was anything worth getting excited about.

Depending on what she wanted to do with the pension and what his terms were, and what his stance was. If he's going to be difficult the chances are I'm more likely to instruct an expert. And also depends on what she wants, if she just wants to walk away with the house, no.

Virtually none of the practitioners would have instructed counsel unless the case ended up as fully contested, and then the purpose would be mainly to enlist the counsel's advocacy skills rather than his or her pensions' expertise. It was generally thought highly unlikely that the case would be fully contested unless the husband happened to be particularly difficult.

10.3 Pension disclosure

Two solicitors suggested that if an expert was instructed they would leave it to him/her to secure all the financial disclosure on pensions that was necessary. All practitioners said they would need up to date CEVs and for some that might include an actuary reporting on the true value of the husband's pension given that it was a final salary scheme. Several suggested that in addition they would ask for a copy of the scheme rules and a breakdown of the benefits, details of the ages when the parties would be able to draw the benefits, and check the scheme's solvency.

Some spontaneously indicated that they would be seeking details of both parties' additional state pensions; others confirmed the same but only on being prompted. A few referred to their practice of exchanging Form Es on a voluntary basis, with the implication that details of ASP would be provided for both parties. One said she would ask for details of the husband's ASP only, and did not think the wife's would be necessary. A handful clearly thought that ASP was either irrelevant or likely to be of minimal value so not worth bothering about.

10.4 Rationales and objectives[264]

Virtually all the practitioners saw the vignette as a needs case, there being first and foremost housing needs for the wife and children, but also housing needs for the husband; secondly income needs for the wife.

> *Well needs trumps all, so where you've got a case there, which is you know, limited assets, modest income, you know immediately you're on a needs case, particularly when you see children, it's a needs case, and therefore your immediate focus on those cases on need is house, and you've got to sort that one out, and then the rest will fall into place.*

> *Well I'd start by saying it's a needs case, meaning that the financial needs are the main factor under the Matrimonial Causes Act. They don't have really any spare money largely, it's not quite enough to go round splitting it, so I'd start with that basis.*

It was the wife and son's housing needs which for most practitioners justified her getting the larger share of the equity in the home. However, the husband's housing needs meant that there would be pressure on the wife to sell the house, downsize, and release some capital to the husband for a deposit, whilst retaining enough equity herself to ensure that a mortgage on her new home was within her capacity.

The wife's income needs appeared to be regarded by most practitioners as a short term issue, justifying a term spousal maintenance order pending her either being able to increase her earnings, or draw benefits under her pension share (for those who considered a pension order appropriate) or (for those who expected her to retain the whole of the equity in the family home) selling the family home at some point in the future and using some of the proceeds to live on. Just two had mentioned compensation as a rationale secondary to

[264] See Chapter 6, p 81 for a general discussion of rationales and objectives.

needs, one of whom saw it as relevant to the question of spousal maintenance:

> *Obviously she needs to meet the needs of her and her son, secondary the daughter. Compensation, well she's given up her career to look after the children. That's why there's an argument for maintenance potentially.*

However, the fact that it had been a long marriage meant that the starting point for most practitioners was an equal division of capital, income and pensions, equality only being deviated from to the extent that the parties' and children's needs required that. And the fact that the wife needed a greater share of the equity because she was the main carer of the son did not mean that she should receive less than 50% of the pension; most practitioners suggested that she should expect something close to 60% of the equity in the home as well as a 50% share in the pensions. One practitioner appeared to distinguish a needs rationale for the house and sharing for the pension (although expressing it rather differently):

> *The reason I view that she gets more of the equity in the house is because of her mortgage raising capacity and she's got lower earnings than the husband etc. so if you were having like a typical sort of Mesher type order, with the two thirds/one third, or something like that, I personally then wouldn't see that having a knock on effect on what she would get from the pension... I don't tend to look at pensions so much on the needs side of it. I do tend to look much more on like an entitlement and fairness, trying to get that sort of 50/50 situation.*

Only one practitioner suggested that part of the husband's pension should be ring-fenced for him on the basis that it had been acquired prior to the marriage; all others considered that the whole of the pension should be taken into account for the purposes of the 50% division. In most cases this was justified on the basis that it had been a long marriage and/or that the principle of equal sharing should apply. However, one of the most experienced solicitors specialising in pensions suggested that it was still governed predominantly by a needs rationale and section 25 factors:

> *I presume the bulk of the pension has been built up during their time together. They separated a year ago. His pension has been built up during their time together; there wouldn't be much of an argument to say that any of it should be excluded. She's obviously taken time out to raise her family, which is the reason why she's only got six years in her current employment, and that's the reason why she's not been able to build up… there's not enough money in this case in my view for a contribution argument here, it's part of a needs case, and that would be mopped up in section 25 factors including contribution.*

In addition, the objective of the majority of practitioners who favoured a pension sharing order in this case was to achieve equality of pension income, as opposed to simply splitting the CEVs equally. This suggested that both a needs and a sharing rationale were at play, ie future income needs but also (equal) sharing. This mix of rationales echoes the findings discussed in Chapter 6 that, although practitioners might define their cases as mainly 'needs' cases (including here the vignette), in practice and in trying to achieve a fair outcome they were approaching them from the perspective of a combination of both needs and sharing,

and/or defining the rationales slightly differently.

10. 5 General comment

The vignette was a relatively straightforward and typical example of family finances but nevertheless potentially gave rise to a large variety of outcomes, two of which we work through below. It was interesting, therefore, that there was such a large measure of agreement amongst the practitioners as to the broad approach. Where there was uncertainty this was often because of the missing but essential ingredient of the priorities of the parties themselves. The extent to which the practitioners sought to influence their client's priorities varied quite considerably and the more experienced tended to enlist the help of an IFA. It could be that, having spent an hour or so discussing pensions on divorce with us, the issue was much more in the minds of the practitioners than it might otherwise have been and that their answers were influenced by that to a certain degree.

10.6 The broad net effect of two potential outcomes

1: Straight offset with no spousal maintenance

	Husband	Wife	Total net
Income net pcm			
Earnings	3,000	1,000	
Child Benefit and Tax Credits		200	
Child support	-450	450	
Total net	2,555	1,650	4,000
Family home gross 245,000 - mortgage 40,000 - sale costs 5,000 Net equity 200,000		200,000	200,000
Cash ISA	10,000		10,000
Total net assets	10,000	200,000	210,000
Pension CEVs	160,000 (final salary)	10,000 (personal)	(170,000)

2: Full pension share based on equally shared combined CEVs[1], 60% of the equity to the wife and no spousal maintenance

	Husband	Wife	Total
Income net pcm as above	2,555	1,650	4,000
Family home net equity as above	80,000	120,000	200,000
Cash ISA	5,000	5,000	10,000
Total net assets	85,000	125,000	210,000
Pension CEVs	85,000	85,000	170,000

Unknown quantities include the price of suitable alternative accommodation, the parties' respective mortgage capacities and monthly costs, the wife's capacity to increase her earnings, the husband's contribution to daughter, intentions to remarry/cohabit, the value of the additional state pensions, the projected pension benefits and age each can draw them, the parties' wishes.

[1] In practice the division is more likely to be made on the basis of equality of pension income.

Chapter 11: Conclusions

In this chapter we draw together some of the main findings of the study, both quantitative and qualitative. We consider the wider practice and policy implications of our findings and the longer term prospects of evening out pension provision across the divorced population. Finally, we suggest some ideas for future research in or relevant to this field.

This study focuses on a relatively niche area of family law – pensions on divorce. It is an issue which arises with varying frequency for all family lawyers who offer advice on finances on divorce, but is specialised in by only a few. Of 2,046 Resolution[265] members practising within a 50 mile radius of London, for example, just 17 are shown on the website as accredited specialists in Pensions.[266] The attention given, and the steps taken, on divorce in relation to pensions, however, can have profound consequences for the long-term security and quality of life for those who are divorcing. The consequences are also potentially widespread: according to the latest ONS figures, 42% of marriages end in divorce,[267] and the proportion of over 65 year olds who are divorced has increased from 5.2% in 2001 to 8.7% in 2011.[268]

A: The incidence of pension orders, the alternatives and their economic rationality

❖ Pension orders remain the prerogative of a relatively privileged minority

The Judicial and Court Statistics show that the incidence of pension orders has increased very little over the past few years and that current numbers (about 10,000 per year) are still only about one fifth of the original predictions. Given that only approximately 37% of divorces over the same period included a financial order, the percentage of all divorces which included a pension order amounted to only around 8%.[269] Our court file survey included only cases with a final financial remedy order, and of those we found that just under 14% included one or more pension orders.[270] This represented about 17% of all cases which disclosed one or more relevant pensions, that is to say, any pension other than the basic state pension. Pension attachment orders in our file survey were non-existent – where

[265] Resolution is the main association of family lawyers and other family law professionals in England and Wales: www.resolution.org.uk

[266] This compares to 62 in the next nearest field of complex finance and property matters, and 331 in Children Law.

[267] ONS Statistical Bulletin, Divorces in England and Wales - 2011

[268] ONS Statistical Bulletin 6 September 2013, *What does the 2011 Census tell us about older people?*

[269] The number of pension orders for 2010 was 10,205 and decrees absolute 121,300 – the equivalent of 8.41%. Although the pension orders do not necessarily relate to the decrees absolute in the same year, the numbers and percentages for the years either side are similar. However, as some cases will include more than one pension order, the actual percentage of cases with any formal pension provision is likely to be lower, hence our estimate of 8%. Judicial and Court Statistics 2010

[270] This was about 1.5% higher than the Judicial and Court Statistics for 2010, but the figures are not directly comparable. The Judicial Statistics show that pension orders represented just over 12% of total disposals (of which there may be more than one per order)but they include all financial remedy orders, whether final or not, and that would go some way towards explaining why they are lower than in our survey.

pension orders had been made they were all for pension sharing – and pension attachment was highly unpopular with the practitioners.

Our court file survey has shown that pension orders are associated with cases in which there is higher capital and pension wealth, and with husbands who have higher income wealth. The median of the combined capital assets for both parties (excluding pensions and where it could be reliably calculated) was £329,000 for those cases which resulted in pension orders compared to £125,000 for those with pensions but no pension order. The median of the combined total pension values for both parties (where they could be reliably calculated) was £290,000 in pension order cases compared to £109,000 in cases with relevant pensions but no pension orders. The median of the husband's total net income in pension order cases was £31,000 compared to £22,500 for those with pensions but no pension order, and he was more likely to be from a professional or managerial socio-economic class.

Pension orders in our dataset were also strongly associated with older couples and longer marriages.[271] The average age for both wives and husbands in pension order cases was 51, compared to 42 and 45 respectively in cases with pensions but no pension orders. The median length of marriage in pension order cases was 25 years to the date of the final order compared to 11 years for cases with pensions but no pension orders.

Some of the practitioners and judges who took part in this study suggested that the low incidence of pension orders was a function of either: a) people not having any pensions to speak of, b) marriages getting shorter, or c) people divorcing at a younger age. In fact, these theories were by no means fully borne out by our study or by national statistics. The large majority (80%) of our cases disclosed one or more relevant pensions; the fact that many were of relatively modest value does to some extent support the professionals' explanation for the low incidence of pension orders. However, ONS figures show that the average (mean) age for men and women who divorce is slightly but gradually increasing and is now 42.1 for women and 44.5 for men; these are the sort of ages at which most practitioners suggested they would start seeing pensions as significant. The length of marriage is also slightly increasing, the median in 2011 being 11.5 years.[272]

Most practitioners and judges saw pension sharing as a positive addition to the choice of remedies and had generally welcomed its introduction in 2000. Their experience was that pension issues usually settled and were less contentious than, say, the family company in bigger money cases and the family home in smaller ones. Practitioners suggested that over the past decade there had been an increasing acceptance by their clients that pensions be taken into account on divorce. Yet our study confirmed the low incidence of pension orders shown by the national statistics and further indicated that they tend to be restricted to a particular socio-economic group. So the apparent acceptance of pension sharing, and the

[271] Our findings support those of an Australian study, that spouses who went for pension sharing were more likely to be over 55 and from relatively wealthy marriages, Sheehan, G., Chrzanowski, A. and Dewar, J. (2008) *ibid*.
[272] ONS Statistical Bulletin, Divorces in England and Wales – 2011.

lack of contentiousness around pension issues, does not appear to be translating into any significant increase in the number of pension orders.

One possible reason for this might be that the spouse who has been contributing to the pension is more reluctant to share it than other assets. Some examples were given of client resistance to pension orders, mainly relating to the more traditionally male, public sector pension schemes such as the police, fire and armed services. Those pension funds tend to be the more valuable ones and as such we might have expected them to feature in our file survey as the subject of pension orders more often than they did.[273] Survey analysis on that point was to some extent hampered by lack of disclosure of the type of pension; the D81 Statement of Information does not require details of the type of pension and the Form E, which does, was not always fully completed. However, it is possible that client resistance to pension orders did have the effect of reducing their numbers. Amongst our sample of solicitors there were a few who specialised in acting for particular sectors such as the police; they understood the complexities of such pension schemes well and fought to protect their clients' pensions from pension orders as best they could.

In addition, our discussions with the practitioners and judges revealed that the same few issues around pensions arose repeatedly in solicitor negotiations and sometimes entered the court arena. These arguments included i) how to value an offset, whether to apply a discount and if so, how much; ii) whether the objective of a pension order should be to equalise the pension capital or the pension income; iii) the extent to which pensions should be ring-fenced if they were not acquired during the marriage; and iv) whether a pension expert should be instructed.[274] Practitioners tended to adapt their arguments from case to case, depending mainly on whether they were acting for the wife or the husband. Some saw this as just part of the process, but for others the lack of clarity on these issues in statute and/ or case law was off-putting and deterred them from pursuing a pension order in all but the most obvious cases. This may provide a further partial explanation for the low incidence of pension orders.

- **Offsetting remains the most common alternative to pension orders and most popular with the parties themselves**

The findings of our study confirmed previous empirical research that offsetting the pension against non-pension assets remains the most popular alternative to pension orders.[275] Offsetting one party's pensions against the other's is another way of dealing with pensions on divorce and our sample certainly included cases where they appeared to have been dealt with in that way. The practitioners and judges almost unanimously confirmed that offsetting

[273] We know that public sector pensions cover approximately 20% of the total workforce, Salter, D. (2010), 'Pension Sharing and Public Sector Pensions', *Family Law* 482. However, it was not possible to tell with any accuracy what proportion of our sample were within the public sector and this assumption could not be fully tested.

[274] These arguments are discussed in more detail in Chapter 7, p 100

[275] See, for example, Arthur, S. and Lewis, J. (2000) *ibid*; and Perry, A., Douglas, G., Murch, M., Bader, K., Borkowski, M. (2000) *ibid* pp 30 – 32.

was the main alternative to pension orders, and the project expert took the view that just over one third of the pension cases which he assessed had clearly dealt with the pensions in this way. There were almost certainly more, but offsetting is rarely referred to expressly in the financial remedy orders or accompanying documentation and it was often difficult to tell with any certainty whether that was the way that pensions had been taken into account.

Joint lives spousal periodical payments or secured periodical payments do not appear to have been a popular alternative to pension orders, or indeed popular at all as a way of distributing income throughout the parties' later years. Just six (less than 2%) of our total sample of 369 final orders included a substantive joint lives maintenance order and those cases, almost by definition, were the bigger income cases. None of them included a pension order; in fact only two of them included a pension which could have been regarded as big enough to justify a pension order and one of those was dealt with by the wife receiving a larger share of the non-pension capital. Thus, in only one of those cases could the periodical payments order have been seen as a genuine alternative to a pension order. Nominal spousal periodical payment orders were slightly more common but many of those were to cease at the same point as the child periodical payment orders.[276]

Amongst the practitioners, there was a wide range of opinion on the *merits* of offsetting. Many of the more experienced or specialist solicitors, although not all, were strongly opposed to offsetting, but those solicitors tended to act for the higher net wealth end of the market where pension orders may well have been more appropriate. The less experienced solicitors and those who had a less specialised family law practice tended to favour offsetting as a pragmatic remedy, but they more often acted for the lower net wealth end of the market where pension orders may have been less appropriate. The others who expressed a preference for offsetting were those who acted for members of the more valuable public sector schemes, such as the police. The District Judges were normally happy to approve a draft consent order in which offsetting was involved so long as it did not look grossly unfair on the face of it, and this was partly out of respect for the parties' autonomy. However, one judge made clear that case law constrained him from making any such order at a final hearing.

The most common reason given for the apparent popularity of offsetting as a way of dealing with pensions was the wishes of the clients themselves, and these often won out despite contrary advice from their solicitors. Offsetting clearly has some appeal to spouses as a relatively simple way of bargaining with each other on divorce and trading family assets.

Another explanation for its popularity amongst the parties themselves may stem from a combination of legal, economic, social and cultural factors. Any dealings with finance and property on divorce must give first consideration to the welfare of any children of the family[277] and one of the main priorities there is to provide a home for the children during their

[276] See Chapter 8, p 49 for a fuller description of the incidence of spousal periodical payment orders in our dataset.
[277] S25(1) Matrimonial Causes Act 1973 as amended

minority.[278] Many couples do not have sufficient resources to re-house both of them following divorce. Although there are ways for the parent with primary care of the children to secure their occupation of the family home without giving up all their pension claims, they often involve *Mesher*-type orders, the effect of which is that the parties remain tied together through the property, usually until the children reach 18 or complete their full-time education, or the occupying spouse's death, remarriage or cohabitation, whichever is the earlier. Such orders have a certain logic to them in the right circumstances but they have fallen out of favour for numerous reasons, not least because of the strong drive towards a capital and income clean break preferred by most divorcing parties.[279] Indeed, our file survey showed that only 18 out of 300 orders (6%) dealt with the family home in that way. Offsetting the pension against the family home may have been the preferred option in such cases.

Case law has given little clear guidance on the principles to be applied to valuing in offset cases. Most of the practitioners and all of the judges who took part in the study were aware of the cases which made clear that pension and non-pension assets could not be compared and should be treated separately[280] and they frequently referred to the 'apples and pears' argument. Most reported cases being the bigger money cases, the reality was that their decisions could be difficult to apply in the smaller money or more run-of-the-mill cases. Whilst offsetting remains popular with the parties themselves, who may not appreciate the finer points of the apples and pears argument, it becomes rather problematic in practice, particularly in deciding how to *value* the amount of the offset fairly. As a result, for the practitioners that appeared to be one of the most troublesome issues in pension cases.

- **The project expert called into question the economic rationality of the approach to pensions in a significant proportion of the cases examined**

Offsetting was the main way of dealing with pensions on divorce before pension sharing was introduced in 2000, and the question arises as to whether there was any evidence from our study to suggest that old habits were simply dying hard with pension sharing a missed opportunity, or whether offsetting was indeed an economically rational way of approaching the pension issues.

The project expert addressed the question of the economic rationality of the approach towards the pensions in 118 of the court file cases in which pensions had been disclosed, effectively considering whether the approach towards the pensions and the effect of the orders made sense in economic terms and whether they were within the realms of financial reasonableness, bearing in mind the court's wide discretion. His conclusion was that, of the cases which had been dealt with by way of offset, only about two fifths demonstrated an economically rational approach; about one quarter was problematic and one third unclear.

[278] See, for example, *B v B* [2002] 1 FLR 555

[279] *Hanlon v Hanlon* [1978] 2 All ER 889 at 892-3, CA, per Ormrod LJ; *Mortimer v Mortimer-Griffin* [1986] 2 FLR 315

[280] See for example *Maskell v Maskell* [2003] 1 FLR 1138 and *Martin-Dye v Martin-Dye* [2006] 2 FLR 901

In other words, offsetting was not the most economically rational approach or its rationality was unclear in the majority of cases. Pension order cases, on the other hand, came out relatively well on his assessments, three quarters demonstrating an economically rational approach.[281]

Another way of dealing with pensions on divorce, of course, is simply to leave them out of account. The project expert's opinion was that the pensions had *either* been ignored *or* it was unclear how they had been dealt with in nearly half of the 122 pension cases which he assessed. Virtually none of those cases displayed what he considered to be an economically rational approach to the pensions and he regarded about three fifths as problematic.

Very few of the practitioners to whom we spoke, however, admitted to ever 'ignoring' pensions or leaving them out of account if they existed at all. The introduction of pension sharing in 2000 had at the very least raised the profile of pensions; practitioners described how the flurry of courses and articles around that time had increased their awareness of the importance of pensions. However, it *is* possible that practitioners were missing opportunities to secure pension provision for both parties by means of pension orders. The best interpretation of the fact that the practitioners' stated approaches did not entirely match the pension expert's view of the court file survey data[282] was that, even if pension orders were not being made in vast quantities, practitioners were taking pensions into account in the majority of cases. The difficulty appeared to lie more in *how* pensions were being taken into account, and how *unclear* the approach was, rather than in the pensions being ignored completely.

B: The valuation and financial disclosure of pensions

- **Expert assessment of court files indicated inadequate or unclear financial pension disclosure in approximately two thirds of cases and yet in uncontested cases this is the information on which judges were relying to make decisions**

The pension system in the UK is one of the most complex in the world, with different tiers of state, occupational and private schemes, all with their own statutes, regulations and benefits, and none of which is directly comparable to the other. Comparing a defined benefit pension with a defined contribution pension, for example, is not comparing like with like. The starting point for any dealings with a pension on divorce, no matter whether a sharing order or an offset is proposed, is to obtain an accurate and up to date valuation. The prescribed method of valuing pensions on divorce is the cash equivalent valuation, the 'CEV' (or 'CE'). The CEV, however, can give a misleading impression, first that the pension can be treated as a

[281] The numbers, however, are small, and at best indicative of possible trends which would merit further investigation.

[282] We are aware that the profile of our sample of practitioners, although diverse, may not have fully reflected the profile of the practitioners who happened to have dealt with the cases in the court file survey, and/or even possibly that there was an interviewer effect here.

simple capital asset and thus comparable to non-pension assets, and secondly that it accurately reflects the true value of the pension benefits. The reality is that, save for the relatively straightforward personal pension and money-purchase schemes, the CEV rarely accurately reflects the true value of the pension benefits or the cost of buying the equivalent benefits elsewhere. To get that information it is necessary to instruct a pension expert.[283]

The lack of clear valuations and good financial disclosure on pensions was a major obstacle to our analysis of the file survey and the greatest source of concern to the project expert. In only about one third of the cases where one or both parties had relevant pensions were the CEVs for both parties unambiguously clear. Only 12 out of the whole sample of 369 cases mentioned additional state pensions at all and only half of those gave CEVs for them.[284] In only 33 of the 51 cases in which pension sharing orders were made were the CEVs for all pensions owned by both parties clear. Thus, apparently not even the most basic requirement for pension valuation was being complied with in a substantial proportion of cases. We appreciate that there may well have been more disclosure between the parties and their legal representatives than was apparent from the court files, but in the majority of uncontested cases the information which we saw was the same information which the judge would have seen and we found it difficult if not impossible to work out the net effect of all the orders based on the information provided.

It is not that the judges were 'rubber stamping' the draft orders. Our study found that about one quarter of uncontested cases were the subject of judicial interventions, requiring either written responses or attendance in person. Approximately 7% of the uncontested cases gave rise to judicial questions which appeared to relate to pensions, and about half of those stemmed from a lack of clear disclosure and about half from the apparent fairness of the proposals. Relatively few solicitors felt that judges were 'rubber stamping' draft orders in general although few had noted queries specifically in relation to pensions. However, the project expert assessed 130 of the pension cases on the quality and comprehensiveness of the financial disclosure apparent from the court files and assessed fewer than one third as adequate, about two fifths as inadequate and the remainder as unclear. The quality of disclosure was usually better when an expert was involved; in all but one of the cases where it was clear that an expert had been instructed, the project expert assessed the standard of disclosure as adequate.[285]

- **A good working relationship with a divorce pension expert appeared to be key to practitioners' confidence in their financial remedy practices.**

Given that the CEV is not sufficient as a valuation in many cases, we might have expected other evidence to be on the court files about the pension values and benefits, but this was rarely so. For example, we saw no Form Ps, and clear evidence of experts being instructed

[283] See later in this chapter for the extent to which experts appeared to be instructed.
[284] The majority of the working population will, however, have accrued some additional state pension.
[285] The exception was a case in which the husband had instructed an expert and the wife was unrepresented.

in only ten cases. We appreciate that it is not standard practice to file Form P or expert reports with the court in uncontested cases, and that there were almost certainly cases in which one or both had been obtained that we were not aware of. However it was rather surprising that so little reference was made to the reports or to their recommendations, or indeed to other information on the pensions, in the communications with the court.

In talking to the practitioners, we found that the more experienced they were the more they acknowledged their own limitations and the more they appeared to appreciate the input of pension experts, especially where a pension order was being considered. Many of them were clear that once a pension expert had been instructed the pension issues would be resolved. On the whole, the judges that we spoke to also very much approved the instruction of pension experts in proportionate cases and relied heavily on their recommendations. There did not, however, appear to be any clear consensus amongst either practitioners or judges on when cases might be treated as 'proportionate'.

Instructing an expert was a daunting prospect for some practitioners and inevitably added to the length and cost of the case. Decisions had to be made with the clients on the merits, logistics and costs of instructing an expert and then agreed with their spouses or representatives. The spouse who was potentially giving up a share of their pension was often less than enthusiastic about paying for a report. The reports were often difficult to understand. If the expert evidence was to be relied on in court, then the prior permission of the judge had to be sought and practitioners gave a few examples of judges refusing permission for expert reports in cases where they might have been appropriate. This combination of factors suggests a further partial explanation for why we saw so little evidence of expert involvement on the court files.

C: Rationales, objectives and arguments about pensions as matrimonial property

- **Practitioners and judges did not share a consistent or clear view on what the rationale behind pension orders and the treatment of pensions in general should be**

It was very difficult for us to work out from the file survey what the rationales behind the pension settlements had been, and the same was true for the project expert. In nearly two thirds of the pension cases which he assessed, he could not tell what the rationale was, or the rationale appeared to be a combination of needs, compensation and sharing, or something else, Where he felt able to take a view on the rationale behind the pension settlement, his opinion was that the rationale was compensation in only one case, needs in seven and sharing in the remainder (29%). Some practitioners and judges, although familiar with the concepts from case law,[286] did not appear to be comfortable with the framing of the rationales in terms of needs, sharing or compensation and found it difficult to categorise their

[286] See in particular the section **The Current Law,** ***Finance on divorce,*** in Chapter 1, p 1

cases in this way, preferring to stick with terms such as 'fairness', 'entitlement' or 'equality' instead.

So far as their stated approach towards financial remedy cases in general was concerned, practitioners appeared to identify a needs rationale with cases where there was not enough to go round (for most, that meant the bulk of their cases), a sharing rationale where there was enough to go around but no more, and a compensation rationale where there was more than enough to go round (such cases rarely within their experience).

In practice, when it came to pensions and the decision as to whether or not a pension sharing order was to be sought, there was a tendency either to blur the rationales, or to apply a needs rationale to the non-pension assets and a sharing rationale to the pension assets. This was demonstrated by the responses to the vignette.[287] Almost all practitioners described it as a 'needs' case and a majority suggested that the *needs* of the wife and dependent child would be met by a greater share of the equity in the family home in her favour. A majority of practitioners also thought that this was a case in which a pension sharing order would be appropriate, and that there should be an *equal sharing* of the pension mainly because of the length of the marriage.

The question of which rationale was thought most appropriate was linked to the questions of *what* practitioners were trying to achieve by the pension order and *how*, namely sharing the pension capital value or the pension income. The file survey and project expert's assessments indicated that the capital values of the pensions were much more often determinative of the outcomes than the pension income values. Practitioners and judges were far from unanimous on the correct approach, but described an increasing tendency towards an objective of equalising the pension income rather than the pension capital value (compared to, say, ten years ago), depending in part on the ages of the parties, the type and size of the pension and who the practitioners happened to be acting for at the time. Pragmatic as well as normative reasons were given for these contingencies, for example, the further away a party was from retirement, the more difficult it was to predict with any certainty what the pension income would be. But there was a tendency for practitioners to identify a sharing rationale when using the pension *capital* value to determine the pension settlement and a needs rationale when using the pension *income* value.

This blurring of rationales and objectives was again illustrated when practitioners discussed the vignette. Most but not all practitioners favoured equalizing the income in order to determine what the pension share would be, rather than splitting the combined CEVs equally, and this was partly because of the parties' ages and their proximity to retirement. The responses suggested that they were thinking about the income needs of the wife as well as the principle of sharing for both the parties.

The other issue which frequently arose in relation to pensions was whether they should be treated as matrimonial or non-matrimonial assets and the extent to which *equal* sharing of the pensions should be departed from on the basis of their having been acquired outside of

[287] See Chapter 10, p 163 for full details.

the years of the marriage. It was an argument that all practitioners had run at some point and one which lent itself better to pensions than to, say, inheritances or other non-pension contributions, because pension assets are only ever in one person's name and cannot be mingled with other family assets in quite the same way.

In general, the argument that a pension might be ring-fenced to the extent that it had been accrued before the marriage was felt to be more appropriate in short and/or second marriage cases but less so in those perceived to be 'needs' cases. Where ring-fencing was going to be argued, some practitioners favoured applying a simple formula to calculate the portion of the CEV which was in the matrimonial pot, whilst others, including most of the District Judges, heartily disapproved of such a formulaic approach and insisted that it could only be dealt with on a case-by-case basis. When such issues arose and the costs were considered proportionate, it was generally, although not unanimously, agreed that a pension expert should be instructed.

D: Clarity and fairness of outcome in pension cases

- **The lack of clarity in final orders and supporting documentation in relation to pensions was a constant theme of the study**

Given the complexities of pensions, the unpredictability of their benefits and the number of imponderables compared to other assets, the limitations of the CEV, the time and costs involved in instructing an expert and the lack of clear guidance on comparing pension and non-pension assets, it is not totally surprising that in many cases the practitioners, probably under pressure from their clients to resolve matters as quickly and cheaply as possible, ended up settling for an over-simplification of the pension values and issues or a general fudging of them. This approach may be more easily justified in cases with such small pensions that they are not worth the time and trouble of valuing precisely, and may be acceptable to the judges in such consent order cases, but it inevitably impacts on the outcomes and on the ability to tell whether the outcomes are, on balance, fair or not.

Lack of clarity was a theme repeated in our analysis of the court file pension data and throughout the project expert's assessments, as we have described in Chapter 9 and elsewhere. He was unable to tell how the pensions had been dealt with (or they appeared to have been ignored) in about half of the cases which he assessed. The economic rationality of the approach was unclear in approximately one third of the cases. The rationales were unclear in two fifths. Whether the settlement was determined by pension capital or income values was unclear in 30%. The adequacy and completeness of financial disclosure were also unclear in about 30% of the cases. The fairness of the settlement quantum was unclear in nearly half.[288] It was not always the same cases exhibiting such lack of clarity across the different measures, but unclear or inadequate financial disclosure was the factor most often associated with the lack of clarity elsewhere.

[288] The project expert was assessing the fairness, on balance, of the settlement quantum based in part on whether there was an approximately equal division of pension and non-pension assets between the parties, or a reasonable explanation if there was not.

Pension order cases received more positive assessments from the project expert than other sorts of cases (such as offsets) on the measures of economic rationality, adequate financial disclosure and fairness of settlement quantum. However, even pension order cases demonstrated a lack of clarity to varying degrees across all the different measures.

E: The wider social and economic implications

The question arises how much it mattered that the approach to pensions in most cases did not match up to the high standards of the project expert. It could, after all, be argued that the costs of carrying out investigations were not proportionate to the benefits to be achieved. Our study suggested, however, that the fairness of the pension settlements had been compromised in many cases in favour of what appeared to be simpler, quicker and cheaper options.

- **Wives tended to be disadvantaged by the pension and income provisions in final orders but fared better than husbands on the capital provisions**

All but two of the pension orders in our sample were in favour of the wife. However, looking at the dataset overall, it was clear that it was the wives who were most disadvantaged by the *low incidence* of pension orders. Fewer wives than husbands had their own pension provision other than basic state – 58% compared to 70%. For those that did (and for those that we could calculate), the median value for the wife's total CEVs was approximately half that of the husband's - £36,316 compared to £72,889 and the wife's median net income in the total dataset was much lower too at just over £15,000, compared to the husband's at just under £22,000. Yet 83% of the cases which disclosed anything other than basic state pension had no pension order and less than 2% overall had a substantive joint-lives spousal periodical payments order, so there was little provision for the wife's long term income needs in the vast majority of cases.

If the husband fared better on the pension and income side in the final settlements, then the wife appeared to do better on the property and capital side. Our analysis of the wider financial orders showed that the wife was more likely than the husband to have the family home transferred to her or, if there was to be a sale, to have the larger share of the net proceeds. If there was to be a deferred sale, then it was more likely the wife who was entitled to occupy the family home pending the sale. She was also more likely to be the beneficiary of lump sum orders than the husband. Thus, in line with the findings of previous studies,[289] the wife appeared to be compensated for having a smaller share of the family's income and pension resources by having a greater and more immediate share of the family's capital assets.

[289] See, for example, Arthur, S. and Lewis, J. (2000) *ibid*; and Perry, A., Douglas, G., Murch, M., Bader, K., Borkowski, M. (2000) *Ibid,* pp 30 – 32.

Part of the purpose and justification for the wife having the greater share of the capital resources, however, was to enable her to provide for the children's needs during their minority, in particular for their housing needs; the wife's own longer term income needs were given low priority in comparison. The argument which was presented to us by some of the practitioners and judges was that, once the children had become fully independent, the wife could downsize and invest the surplus funds from the house in a pension for herself. It would be interesting to know how often that in fact happens. It is said that husbands recover financially more quickly than wives on divorce and that wives' partial recovery is usually as a result of re-partnering.[290] It is certainly the case that the number of divorced women over the age of 65 is predicted to increase significantly over the next two decades and it remains a real concern that a high proportion of such women will have an income below the poverty line.[291]

- **Pension orders were significantly more likely to be made if both parties were legally represented**

Although the practitioners did not see pensions as the most contentious area of family law, they did see it as one of the most complicated, and the one on which many of their clients, especially wives, were least informed. Most practitioners said that clients had never heard of a CEV, let alone understood it, and the process of dealing with pensions on divorce in general required more professional input than most other aspects. This was borne out by our court file study,[292] which showed that 23% of cases in which both parties were represented included pension orders compared to 8% of those where one or both parties were unrepresented. Similarly, 21% of cases in which the husband was legally represented included pension orders compared to 9% where he was not.[293] Although the factors of legal representation and pension orders were also associated with higher net capital and income cases, it does seem certain that pension orders would have been much more difficult to achieve without the help of a legal representative.

In addition, and always bearing in mind the relatively small numbers[294] and major difficulties which the project expert had in assessing the fairness of the settlement quantum,[295] of those that he could assess, the settlement quantum was in his view most often *fair* when both parties were represented (40%) and least often fair when the husband only was represented

[290] Fisher, H. and Low, H. (2009) 'Who wins, who loses and who recovers from divorce?' in Miles, J. and Probert, R. *Ibid*, p. 254

[291] Price, D. (2009) 'Pension Accumulation and Gendered Household Structures' in Miles, J. and Probert, R., *Ibid*. p 257

[292] The question of legal representation is not straightforward; for example a person may have legal advice and/or representation throughout the process, or different levels at different points or none at all. Our test was whether they had legal representation at the point of the making of the final order.

[293] 19% of cases in which the wife was represented included pension orders compared to 5% of cases in which she was not represented, but the difference here was not quite significant.

[294] The project expert assessed 119 of the cases with relevant pensions on the question of the fairness of the settlement quantum.

[295] Those cases where the fairness of the quantum settlement was unclear included 50% of the cases where both parties were represented.

and the wife unrepresented (15%). It was least often assessed as *unfair* when both parties were represented (10%) and most often unfair when neither party was represented (one third).

The increase in unrepresented parties in divorce proceedings in general was the subject of widespread concern amongst the practitioners and judges and of particular concern in relation to pension issues. Following the introduction in April 2013 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 there has been a substantial drop in the number of people eligible for public funding for private family law cases. As it was more often wives who were previously eligible because of their lower income, it follows that it is the wives who are most affected by the changes.

Although the parties benefiting from public funding were not necessarily the people most likely to seek a pension order (and so the overall numbers of pension orders may not be greatly affected), it does seem highly likely that the number of people trying to act for themselves on divorce, or relying on informal or mediated agreements rather than final orders, will increase. Given the widespread ignorance of pensions in general, and of their significance on divorce in particular, pensions may either be completely overlooked by those acting without any professional help or subject to an increased number of offsetting arrangements. Moreover, pensions can only be shared between husbands and wives if they are the subject of a final order, and the prospect of a litigant in person successfully managing that process is not a bright one. The findings of this study suggest that many future pension arrangements on divorce will be unfair to one or both parties, and probably more so to the wives than to the husbands.

The courts, too, will have to deal with more litigants in person. The court file survey suggested that approximately half of the queries raised by judges in relation to draft consent orders expressly referred to one or both parties not having legal representation; if judges continue to intervene in such cases these numbers are only likely to increase. Our qualitative study suggested that the judges relied quite heavily on guidance from the practitioners and expert reports when making or approving orders relating to pensions. Such guidance may be rarer in the future, or more one-sided if one party is not represented. Formal judicial training on pensions on divorce appeared to be minimal and/or voluntary and this raises the question of how well equipped the judges will be to deal with such changes.

One solicitor predicted that on pension issues there would be a *'black hole'* appearing between the smaller and the bigger money cases. Our study suggests that that has already to some extent happened. At the one end, there are the couples with little or no pension provision other than their state pensions, and for those couples pension orders probably seem like an irrelevance. At the other end there are the relatively wealthy couples who engage legal representatives and pension experts, probably issue proceedings, spend a lot of money and one way or another end up with a reasonably fair pension settlement. For the vast majority in between with some, but not vast, pension and non-pension assets, their prospects of reaching a fair pension settlement will depend on whether they have legal

representation, engage an expert, how much time and money they are prepared to invest and how well versed in pension issues they or their representatives happen to be.

F: Policy and practice considerations

We hope that this study has helped to raise awareness of some of the more difficult issues facing the legal profession in relation to pensions on divorce, and drawn attention to the existing and potential inequalities of pension provision amongst the divorced population. The findings imply that if there is to be any improvement in the outcome of cases involving pensions, more public education on pensions is required, more training for the divorce lawyers, including on their qualifying courses, and some compulsory pensions training with options for more specialised training for the judiciary.

Other practice steps which emerged from the study and which might help improve the efficacy and fairness of financial remedy orders include the following:

- **More guidance and clarification from case law on those arguments which repeatedly arose in relation to pension issues and cost the parties money**, such as when it is appropriate to focus on capital or income, when equal sharing of either or any form of ring-fencing is appropriate, how the principles of need, sharing and compensation translate into decisions relating to pensions and pension orders and some basic guidelines on valuing offsets and discounts;

- **Better working relationships between practitioners, pension experts and financial advisors**, so that they can turn to them more often for informal advice, get a better idea of when they need to formally instruct them and what questions to ask. The average fees for a pension report according to the practitioners was about £1,000 plus VAT, usually shared between the parties, and in the context of pensions worth several tens or hundreds of thousands of pounds could be money well spent; once a pension report was obtained most practitioners said that the cases settled quickly;

- **Improved practice in relation to draft orders and a standard requirement to spell out the reasoning and objectives behind any proposed order**, to include the basis of any pension share, whether a pension offset is proposed and if so how it has been calculated, and what the overall net effects are. This might add a little time to each case, but would help concentrate minds and result in greater understanding, clarification and longer term benefits for parties, practitioners and judges.

- **Improved standards for financial disclosure**, including specifying the type of pension and itemisation of CEVs for all relevant pensions, additional state pensions and pensions in payment.

Some of these suggestions would need legal and policy changes if they are to be at all realistic. Our study confirmed that the time and costs associated with the process of valuing pensions and implementing pension orders acted as deterrents to the adequate investigation and making of pension orders or fair alternatives. Consideration could be given to: reducing the time allowed for production of pension information and CEVs; allowing one free CEV per year for pensions in payment (to align with others); reducing the four month window currently allowed to the pension administrators for implementing a pension order; allowing the spouse who is to benefit from the pension sharing order to obtain an estimate of the potential pension benefits; and, last but not least, introducing regulation of the fees for implementation.[296]

FINAL CONCLUSIONS

This study has provided extensive data from 369 randomly selected divorce court files within three different locations in England and Wales. We have explored the perspectives of practising family lawyers and members of the judiciary on the issue of pensions on divorce in the same three locations. It was not within the scope of this study to find out the perspective of the divorcing parties themselves, either whilst they were going through the process of separation and divorce, or some years later or in retirement when they have been able to register the effects of their decisions. It would be interesting to know if, with hindsight, they would have done anything differently. That could perhaps be the subject of a future study.

The context within which the divorcing public and professionals are operating is already radically changing, with a steady increase in the proportion of older people within the population and particularly of divorced women over 65, fundamental reforms of the state pension system and public sector pensions, the limitation of public funding for legal costs, and wider changes to the public and private sector employment and housing markets. All these will have an impact on the way that pensions are distributed within the UK as a whole. Pensions are not seen as a particularly sexy subject, and the public do not appear to be turned on by them, if they understand them at all, in the way that they are, for example, about house prices; the British are known for being much less ready to talk about their income than they are, say, about the value of their homes. But unless the issue of pensions is addressed more openly and proactively, including on divorce, the risk is that existing inequalities in this society will only become more entrenched.

[296] See also Salter, D. (2010) 'A Decade of Pension Sharing', *Family Law* 296, where he suggests some of these and other changes which could greatly enhance divorce pension practice.

Appendix 1: Methodology

The research design comprised four different components. The first, quantitative, limb consisted of a survey of 369 divorce court files randomly selected from three county courts. The second, qualitative, limb consisted of one-to-one interviews with 32 family lawyers spread fairly evenly across the catchment areas for the three courts where we had conducted the file survey. The third, also qualitative limb consisted of four meetings with a total of seven District Judges in the three same courts. Last but not least, the project expert assessed anonymised case data from a total of 130 court files on six main issues. At each key stage of the project we met with and drew on the knowledge and skills of our advisory group, who included variously Professors Gillian Douglas and Richard Moorhead, the project expert, George Mathieson, and the honorary expert, David Salter. We describe the methodological components in turn and in more detail below.

The court file survey

The sampling frame for the court file survey consisted of all divorce cases in three county courts in England and Wales in which:

a) a divorce petition had been issued on or after 1 April 2009, and

b) a final financial remedy order had been made no later than 31 December 2010.

These two criteria were chosen in order to provide a target sample of 400 cases which were completed as recently as possible when we conducted the data collection. We also had to choose criteria by which cases could be reasonably easily identified from the divorce court case management system, FamilyMan. The time frame of 20 months from 1 April 2009 to 31 December 2010 allowed for an adequate number of cases to be settled financially, bearing in mind the statutory time limits and other reasons for time intervals between the issue of the divorce petition and the sealing of the final financial order. We excluded judicial separation, nullity and civil partnership cases on the basis that such cases would be very limited in number and would throw up different sets of considerations to those arising from divorce.

It was not feasible to conduct a nationally representative survey given our available resources. With help from the Her Majesty's Courts and Tribunals Service (HMCTS) Operations Division, we therefore selected three courts from the North, South and West of England and Wales, to provide a reasonable mix of geographical, urban, rural, ethnic and socio-economic populations, and to allow for possible differences in court culture. We made sure that the courts had a sufficient number of cases fitting the two criteria during the proposed timeframe, that they were reasonably geographically accessible and willing and able to accommodate us for the purposes of the field work.

HMCTS identified eligible cases for each court and sorted them into random order. The total number of apparently eligible cases was 788 and in order to allow some leeway, case numbers for the first 140 cases for each court were supplied, making a total of 420 cases (representing 53% of the total pool). The FamilyMan software used by family courts identifies

cases in which a final financial remedy order (then known as an 'ancillary relief' order) has been made as those in which the event code ARORD or CON appear, along with being noted as the final order. The event code ARORD is used if a final financial remedy order is made at a hearing, whether or not by consent. The event code CON is used when a consent order is filed either within a contested case but not at a hearing, or without proceedings being issued. For the purposes of our project, the eligible cases for each court were then randomised by listing both sets of cases in Excel and using the randomising formula "=RAND()" to sort them into a random order.

Out of the total of 420 listed, 51 cases were excluded. 36 were excluded because they were ineligible, for example they concerned civil partnerships rather than divorce; either the divorce petition had been issued or the final order had been made outside our reference period; or they did not in fact contain a final order which disposed of the finances. The other 15 cases were ones in which the final order was missing, the court file was missing, or the cases were duplicates.

Our sample was drawn in roughly equal numbers from each of the three courts, although we were able to collect data on slightly fewer cases in the North, where there were a greater number of missing or ineligible files. The breakdown of cases for each court is shown in Table A1.1 below.

Table A1.1 Final court file sample by location

Court location	N	%
North	111	30.1
South	128	34.7
West	130	35.2
Total	369	100.0

We drew up a data collection form to collect information anonymously from all relevant forms and documents on the court file, giving each file a research case number and noting the location, fieldworker and date of collection. We piloted the form on paper on a total of 22 files spread across the three locations and finalised the form after consultation with our advisory group. Data collection from the remaining files was then entered directly onto our laptops and carried out between March and July 2011 by the authors.

The data was drawn from all relevant documents on the court file, including: the petition for divorce, the decrees, the statement of arrangements for the children, the final financial remedy order and any annexes, the statement of information supporting a draft consent order (D81), the application for financial remedy (Form A), the full financial statements (Form E), details about the pension (Form P), statements of costs (Form H), chronologies,

statements of issues, skeleton arguments and case summaries, financial questionnaires and responses, expert reports, correspondence and supporting documents. We also noted whether the parties were legally represented at the time of the final financial order, and/ or publicly funded, whether the cases were uncontested, initially contested or fully contested and the level of judge dealing with the case; if uncontested we recorded what if any judicial interventions took place before the order was approved. Finally we noted whether there were any other associated proceedings, for example, Family Law Act or Children Act proceedings, and any other key information not already included.

The data was then processed on a case by case basis and entered onto an SPSS database, containing approximately 320 variables per case, including recoded and derived variables. We also constructed a smaller database in which each party was treated as a separate case to facilitate analysis comparing wives' and husbands' situations. Our analysis was largely descriptive (frequencies) and bi-variate using non-parametric tests (cross-tabulations with Chi-squared) to identify significant differences between groups. We attempted some multi-variate analysis (logistic regression) to try to identify which factors might have had an independent effect on whether a pension order was made but encountered difficulties of co-linearity, factors such as the parties' ages, length of marriage and whether there were children under the age of 18 being too closely related to reach any clear conclusions.

The divorce petition had been issued during 2009 in approximately three quarters of cases (78%), and during 2010 in just under a quarter (23%). We categorised cases into three main groups, to take account of whether either or both of the parties disclosed any pensions. In a few instances, it appeared that disclosure in respect of pensions was referring purely to the basic state pension.[297] This applied to the wife's disclosure in seven cases, and to the husband's in one case. As virtually everyone in England and Wales is entitled to a basic state pension but it cannot be the subject of a pension order, the party in question in these cases was treated as not having any relevant pensions. Applying this criterion, relevant pensions were disclosed in 293 cases (80%).

The groups which formed the basis for much of the analysis on which our findings are based, were: Group A, where neither party had any relevant pensions; Group B, where one or both parties had relevant pensions but no pension order was made; and Group C, where the final financial remedy order included one or more pension orders. As indicated in Table A1.2, 20% of cases fell into Group A, 66% into Group B and 14% into Group C.[298]

[297] Based on a combination of: disclosure referring to pensions only in the context of income, the pension being described as 'state pension', the amounts involved being below the maximum for the basic state pension, and/or there being no indication that additional state pension was involved.

[298] The figures exclude one case which could not be categorised in this way; it was clear that a statement of information for a consent order had been filed but it was missing, and there was no other information on the court file to indicate whether or not any pensions had been disclosed.

Table A1.2 Court file sample according to whether pensions disclosed and pension orders made

Category	N	%
A No relevant pensions disclosed	75	20.4
B Relevant pensions disclosed but no pension order	242	65.8
C Pension order	51	13.9
Total	368	100.1

Socio-economic classification based on occupation

The National Statistics Socio-economic Classification (NS-SEC) provides a measure of socio-economic status based on employment relations and conditions. It is derived from the Standard Occupational Classification (SOC2010), which allocates occupations to groups, together with data on employment status (i.e. whether somebody is an employer, self-employed without employees, or an employee). There are eight, five and three class versions of the NS-SEC, which may be derived using full, reduced and simplified methods.[299]

The full method of derivation requires information on both employment status and size of organisation involved, and the reduced method requires information on employment status. The simplified method does not require either of these. However, in common with the full and reduced methods, it does require a good description of the industry and type of work involved, to code to the relevant occupation group under the SOC2010.

Very often, information on divorce petitions and Form Es gave good indications as to occupation (and employment status) of the parties, and in the majority of cases it was possible to follow the simplified method, by using the index for the SOC2010 and derivation tables for the NS-SEC, to allocate parties to one of the main classes in the three class version of the NS-SEC. However, available descriptions were invariably very brief, and were

[299] See Office for National Statistics (2010) *Standard Occupational Classification 2010 Volume 3, The National Statistics Socio-economic Classification: (Rebased on the SOC2010) User Manual* and *Volume 2 The coding index* (Basingstoke: Palgrave Macmillan) available at http://www.ons.gov.uk/ons/guide-method/classifications/current-standard-classifications/soc2010/soc2010-volume-3-ns-sec--rebased-on-soc2010--user-manual/index.html and http://www.ons.gov.uk/ons/guide-method/classifications/current-standard-classifications/soc2010/soc2010-volume-2-the-structure-and-index/index.html

sometimes vague. In addition, a number of parties were simply described as 'unemployed' or 'retired', and in several cases the wife was described only as a 'homemaker' or similar.

Ideally, people in such situations would be classified according to their last occupation (unless students, or known to be long-term unemployed or never to have worked) but in most of these cases, we did not have enough information to attempt this. We therefore allocated parties who were described as unemployed, homemakers, full time mothers, students and retired, and for whom information on last occupation was lacking, to a residual category of 'Not classified'. This category also included those whose occupation was too vaguely described on the divorce petition or Form E to allocate them to a main class. Overall, it was necessary to treat 21% of wives and 17% of husbands as 'Not classified'.

All this meant that we were not able to apply the simplified method of derivation (which is described by ONS as providing 'a last resort solution') in full. Our measure of socio-economic status is therefore described as an approximation of the NS-SEC, and findings based on it should therefore be treated with some caution.

Reporting

Percentages reported in the text are rounded up or down to the nearest whole number. Those in tables are reported to one decimal place. Due to rounding, percentages may not sum to 100% in some instances.

In line with convention, testing for statistically significant differences was at the 5% level. That is, results are reported as statistically significant if testing indicated that the probability of a difference being due to chance was less than 5%.This is reported as p (probability) = less than 0.05.

Unless otherwise noted, reporting excludes cases in which data was unclear or missing.

Practitioners

The qualitative stage of the project was designed to complement the court file survey, to enable us to explore the reasons behind some of the findings of the file survey and to gain a picture of solicitors' experience of, and approach towards, the issue of pensions on divorce.

Sample selection

We selected a total of 81 family solicitors on a 'purposive' basis, using the Resolution[300] and Law Society websites to check for panel memberships, specialist accreditations, years since qualification and size of the family team within their office. These were the factors which we thought most likely to be relevant in shaping their experience of, and approach towards, the issue of pensions on divorce, our aim being to secure as broad a range of experience as possible. We also monitored for practitioner gender and as part of the interview checked on

[300] Resolution is the main association of family lawyers and other family law professionals in England and Wales with over 6,500 members, www.resolution.org.uk

the type of clientele the practitioners worked with, for example, high net worth, mixed and/or publicly funded.

We approached each solicitor by letter telling them about the project and inviting them to participate on a voluntary basis. We then followed the letters up with one or more telephone calls. 32 agreed to be interviewed, a 40% positive response rate. The main reasons which practitioners gave for not participating were: that they were not currently doing any financial remedy work, they had not had any pension cases, they were too busy or a few were just not interested.

Thirteen of the practitioners who participated were located in the North, eight in the South and 11 in the West. Just over half (18) were female and 14 were male. Just over half (17) had qualified ten or more years previously and the remainder within the last ten years, of whom none were less than two years. Approximately two thirds (21) either had a Resolution accreditation in financial matters or had a caseload of at least 50% financial remedy work (described occasionally as 'specialists' in the main body of the report); the others (11) had a greater proportion of children, domestic violence or other family work and/or, in two cases, some civil and probate.

The practitioners advised a variety of clientele, eight describing theirs as predominantly high net worth, 15 as mixed, five with over 50% publicly funded clients and four acting for members of specific groups such as the police or unions. Eight of our interviewees were part of a large team of family lawyers within their office (team of eight or more), 13 were in a medium size team (four to seven) and 11 were in a smaller team (one to three).

In summary, although the practitioner group was partially self-selected and could not be described as representative of all family lawyers, it did include the diverse range of experience and clientele that we had hoped to achieve, as shown in Table A1.3 below:

Table A1.3 Final achieved sample including primary and secondary criteria

Primary criteria		**Secondary criteria**	
Location		*Gender*	
North	13	Male	14
South	8	Female	18
West	11		
Divorce finance specialisation		*Type of clientele*	
Specialist (accredited or 50% or more of caseload)	21	High net worth	8
		Mixed	15
Non-specialist	11	Public funded	5
		Specific	4
Years admitted			
10 years or more	17		
Less than 10 years	15		
Size of family team			
Large (8 or more)	8		
Medium (4 – 7)	13		
Small (1 – 3)	11		

Form, timing and content of interview

The authors interviewed all but one of the practitioners on a one to one, face to face basis at their own offices between December 2011 and February 2012 and the other was interviewed over the telephone. We used a semi-structured topic guide to ensure that we covered certain key topics but also allowed some flexibility for practitioners to expand on points of particular interest to them. The topic guide had been drafted and then discussed at some length with the project advisory group. With the permission of the practitioners we digitally recorded and transcribed verbatim 29 of the interviews. Three recordings failed for technical reasons and for those we made detailed notes immediately after, or within a day of, the conclusion of the interview. Interviews averaged one to one and a half hours each.

A day or two before the interview was due we emailed a copy of a vignette and invited the practitioners to discuss their approach to this for a few minutes at the end of the interview. Using the same relatively simple, fabricated set of facts for all practitioners helped us to understand their approach and the variations from one practitioner to another.[301]

The interview started with a brief check of the practitioner and firm background, and then moved onto their general experience of and approach towards cases involving pensions, the circumstances in which they thought pension orders might or might not be appropriate, the alternatives adopted, client understanding, financial disclosure issues, pension experts, the court approach and any other points of interest or difficulty they considered relevant, with individual but anonymised case examples. The transcripts of the interviews were double-checked to ensure that no participant, individual or body could be identified.

The topic guide is shown in full in Appendix 3 (p 198) and the vignette in Chapter 10, p 163.

Analysis of interviews

The data were coded and analysed with the help of AtlasTi software. This enabled us to search for and identify key themes, and to organise and retrieve relevant quotations.

The District Judges

We met with a total of seven District Judges from the three courts where we had conducted the court file survey. We saw two separately in the South court, two together in the West and three together in the North. Five were male and two were female. They were all very experienced and all either full time or 80% full time. Three of the District Judges had been appointed for at least 18 years, including one who was nearing retirement. Two had been appointed either as deputies or as full DJs between 12 and 15 years previously and both had had extensive family law practices before that. One had had a commercial background and been appointed about eight years previously. The most recently appointed was in 2008, but had practised for many years as a family solicitor. Most had been sitting in their present

[301] We describe the responses at various points in the report but mainly in Chapter 10, p 163.

courts for some years but had experience in other courts as well.We were able to feed back to the judges a few of the very preliminary findings from the file survey and practitioner interviews and explore their experience of, and approach towards, the issue of pensions on divorce. The meetings took between 1 and 1½ hours each and were based on a topic guide similar to that used in the practitioner interviews but adapted to reflect the judicial perspective. All the meetings were digitally recorded, anonymised and transcribed, and then analysed with the help of Atlas Ti software.

Expert assessments

The project expert was George Mathieson, a financial advisor who for many years has specialised in providing expert witness reports relating to pensions on divorce. We provided him with full, anonymised case data from the 22 pilot court files and then, following his feedback, we made some minor adjustments to the data collection form. He assessed a total of 130 (44% including the pilot cases) out of the 293 court file cases which had disclosed one or more relevant pensions. These cases were broadly representative of the wider sample in terms of the location, whether they included a pension order or not and whether proceedings had been issued.

The project expert gave his opinion with reasons on six main points: how the pensions were dealt with (e.g. by pension order, offset or other); the economic rationality of the approach to the pensions; the fairness on balance of the settlement quantum; whether the pension settlement was based on capital or income; the apparent rationale behind the order (e.g. needs, sharing, compensation); and the adequacy of the financial disclosure in each case, taking into account all relevant factors. A copy of the form which he used is shown in Appendix 3.

The project expert did not assess all 130 cases on all six points, mainly because of minor adjustments following the pilot cases. He assessed all 130 cases on the adequacy of disclosure, and between 118 and 122 cases on the other points. We state in the main body of this report exactly how many cases he assessed when we discuss the results of his assessments on each point. We coded his responses on all points and entered them onto the SPSS database, later analysing them with SPSS and also by thorough reading of all the individual assessments to understand his reasoning and find relevant examples.

Summary

The analysis of the quantitative and qualitative limbs of the study has been an iterative process; the preliminary results of the court file survey informed the content of the interview topic guides, and analysis of the responses of the practitioners and judges led to further analysis of the file survey data and of the project expert's assessments. In this way we hoped to give a richness of perspective and depth of understanding to the issues surrounding pensions on divorce.

Appendix 2: Tables

Table A2.1: Length of marriage to decree absolute, survey and ONS comparison[302]

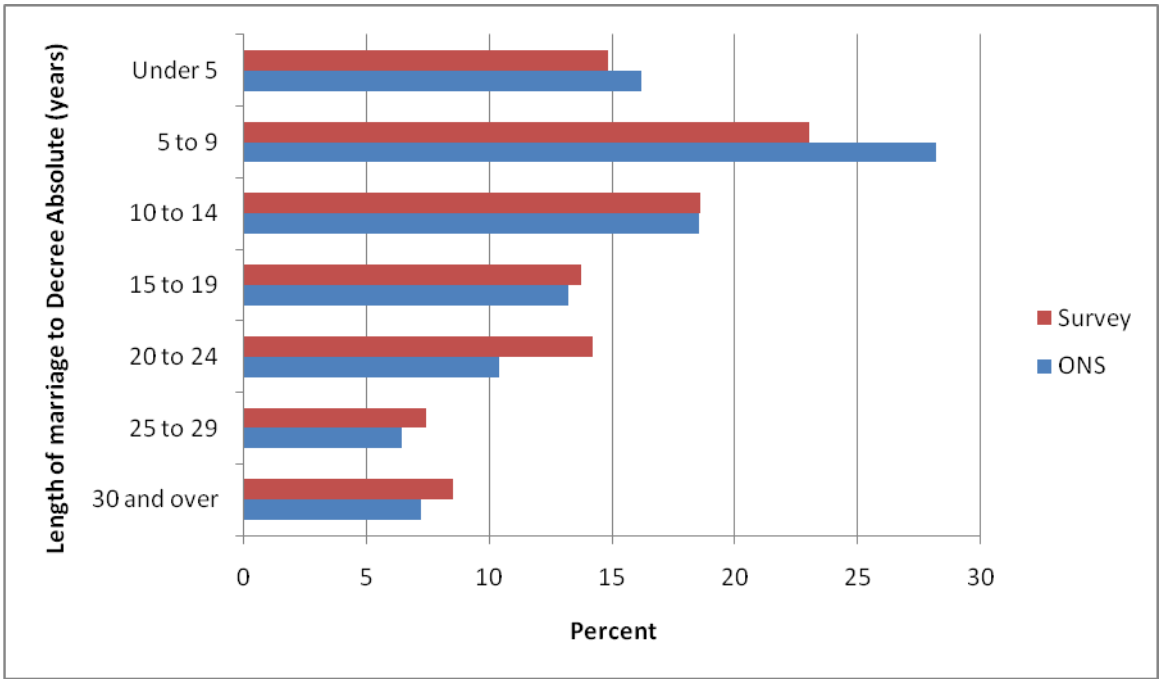

Table A2.2: Wife's and husband's age at date of final order (survey) compared to ages at date of decree absolute (ONS)[303]

	Survey sample		ONS sample	
	Wife's age at date of final financial remedy order	Husband's age at date of final financial remedy order	Wife's age at date of Decree Absolute	Husband's age at date of Decree Absolute
Mean	43.3	46.0	41.7	44.2
Median	43.0	45.0	41.1	43.4

[302] ONS Statistical Bulletin 8 December 2011, *Divorces in England and Wales in 2010,*
[303] Ibid

Table A2.3 Occupations of parties based on approximation of 3-class version of NS-SEC[304]

	Wife		Husband	
Occupational class	N	%	N	%
Managerial and professional	127	34.4	175	47.4
Intermediate	98	26.6	71	19.2
Routine and manual[305]	66	17.9	60	16.3
Not classified	78	21.1	63	17.1
Total	369	100.0	369	100.0

Table A2.4 Whether wife and husband economically active

	Wife		Husband	
Whether economically active	N	%	N	%
Economically active	293	79.4	316	85.9
Retired	7	1.9	18	4.9
Otherwise not economically active	69	18.7	34	9.2
Total	369	100.0	368	100.0

[304] NS-SEC Socio-economic Classification (rebased on the Soc2010)

[305] ONS note that 'Although the name of the third class in the three-class version of NS-SEC is 'routine and manual occupations', NS-SEC does not perpetuate the manual/non-manual divide. Changes in the nature and structure of both industry and occupations have rendered the distinction outmoded and misleading.' NS-SEC Health Stats Q no 42 2009 p7

Table A2.5 Children and whether under 18 at time of final order

Children under 18	N	% of cases with children under 18	% of total sample
Any children under 18	*183*	100.0	*49.6*
1	72	39.3	19.5
2	88	48.1	23.8
3	21	11.5	5.7
4	2	1.1	0.5
Children but none under 18	74		20.1
Any children	*257*		*69.6*
No children	110		
Unclear/missing	2		
Total	369		

Table A2.6 Age youngest child under 18, at AR order

Age	N	%	Cumulative %
Under 5	34	18.6	18.6
5 to 10	77	42.1	60.7
11 to 15	52	28.4	89.1
16 to 17	20	10.9	100.0
Total	183	100.0	

Appendix 3: Data Collection Tools

A: Summary of data collected from court files

Petition and divorce itself
Date of marriage
Date of petition
Petitioner is H/W
Party occupation
Children of family / dates of birth
Basis of divorce
    If behaviour, domestic abuse allegation?
Date decree nisi
Date divorce absolute
Additional notes

Statement of Arrangements
How many children and whose
Who children live with
Home tenure
Home owned by whom
Day to day child carer
Any SEN, fee paying education, serious disabilities, care needed
Additional notes

Final financial remedy order
Date of order
How concluded: by consent/adjudicated/other
    If by consent: consent order only/after issue of proceedings
Level Judge
Party representation
If no pension assets, then just details costs
If any pension assets, then addressed by: no order/dismissal only/pension order
Former matrimonial home property adjustment order, type and terms
Lump sum order terms
Other specific assets, type and terms
Spousal periodical payments terms
Children periodical payments terms/CSA
Unsecured liabilities terms
Costs terms
Additional notes

Statement of information for consent order D81
Ages of parties and children
Net capital of parties and children
Net income of parties and children
Pensions of parties
Accommodation proposals parties and children
Future intentions
Other information

Date and filed by whom
How treated by judges/responses of parties/representation

Form E
Applicant is H/W
Form filed by H/W/solicitors
Date of birth
Occupation
Date of separation
Health
Children of family health, current and proposed education, CSA calculations
Other court cases
Residence occupants and tenure
Former matrimonial home ownership, value, mortgage
Other property ownership, value, mortgage
Bank accounts value
Investments value
Policies value
Personal possessions etc value
Liabilities value
CGT estimate
Business assets value
Pensions: number, type, date CEVs, in payment/drawdown, CEVs, total of all CEVs
Other assets type and value
Income type and amount
Income and capital needs
Significant other information
New partner income, assets

General
Date Form A
Form P details
Pension expert type, summary report conclusions
Other expert type, summary conclusions
Main issues raised by parties (statement of issues, case summaries, skeleton arguments etc)
Summary of written judgment
Cost estimates
Category of case: A. No pension assets; B. Pension assets, no pension order; C. Pension order

Additional
Defended divorce / Cross petition details
Other proceedings type, brief details and outcome

B: Practitioner Interview Topic Guide

1. Introduction

1.1 Outline of project
1.2 Outline of interview
1.3 Permission to record

2. Practitioner Background

2.1 Size of firm
2.2 Size of family team
2.3 Usual divorce county court
2.4 Proportion of family to other work
2.5 Proportion of publicly funded work
2.6 Specialisations/accreditations
2.7 Divorce pensions training, when, what
2.8 Dispute resolution training/practice

3. Practitioner's approach to/experience of pensions and financial remedy

3.1 What factors in any particular financial remedy case help you to decide whether pensions are significant? (probe party ages, length of marriage, health/life expectancy, type or value of pension, nature/value of other assets e.g. family home, other)
3.2 Approximately how many/what proportion of your divorce financial cases over past 12 months have included pensions which you regarded as significant?
3.3 Approximately how many of your cases over the past 12 months have included pension orders?
3.4 What sort of orders have these been? Please give examples.
3.5 [if sharing] What was the objective? (probe equality of income/CEV, other)
3.6 If there is more than one pension scheme, how do you decide which to share?
3.7 [if attachment] Were the orders for income, lump sum or death benefits?
3.8 In what circumstances might you consider an attachment order? And what sort of attachment? (probe income, lump sum, death benefits)
3.9 In your cases involving a pension order, what have you seen as the main rationale? (probe needs, compensation, sharing, other)
3.10 Where pensions are in issue, how do they tend to affect the prospects for settlement?
3.11 And how in your experience do they affect the length and cost of the proceedings?
3.12 When do you think it is appropriate, if ever, to run an argument that pensions accrued pre-marriage should be excluded from settlement? Or post-separation?
3.13 What do you see as the main *alternatives* to a pension order in cases where there are significant pension assets? Examples, please.
3.14 What factors contribute to decisions *not* to go for a pension order?
3.15 Is the main rationale in non-pension order cases any different from those with pension orders (e.g. needs, compensation, sharing)?
3.16 If offsetting, how would you normally achieve this? How would you calculate the offset? What about cases where there are different sorts of pension schemes (e.g. final salary and personal)?
3.17 How confident are you of your knowledge/understanding of pensions in financial remedy? (probe law, practice, procedure, other)

3.18 Do you encounter any common or recurring problems when structuring settlements re pensions? (probe wide differences in age, other)
3.19 Is there any one type of pension which regularly causes problems? (probe public sector, private sector final salary, ASP, SIPPs)
3.20 How often have you engaged counsel over the past 12 months because of pensions? Was this for advice or for advocacy? What prompted (would prompt) you to do so?
3.21 How often have you engaged a pension expert over the past 12 months? What prompted (would prompt) you to do so?
3.22 What sort of expert?

4. Client understanding and response

4.1 How well do your clients understand pensions when they first consult you on divorce and financial issues? Are there particular things they tend to know/not know?
4.2 How does this compare to their understanding of other aspects of financial remedy?
4.3 In what ways, if any, are pensions important to clients?
4.4 Does this vary between clients? (probe gender, age, socio-economic status, sector)
4.5 Do you see any 'typical' responses where there are big differences in pension values between the parties? (e.g. H resistant to pension order/preferring offset/W seeking pension order/offset)
4.6 How do you explain to your clients a) the relevance of pensions and b) their options?
4.7 How well do your clients understand this advice compared to other financial advice?
4.8 How do your clients respond to requests for financial disclosure on pensions?
4.9 Do you meet any resistance to advice to appoint an expert? Reasons/examples?

5. Financial disclosure in cases settled by consent without the issue of proceedings

5.1 What information/documentation would you ask for on pensions from your client and from his/her spouse/former spouse?
5.2 When might you ask for additional state pension information? What factors would prompt you to ask/not ask?
5.3 Has this changed?
5.4 How recent would you expect the documentation to be? (Months)
5.5 Does the disclosure you ask for differ in any way if the other party is unrepresented?
5.6 Who usually fills out the statement of information D81? (Practitioner, client?)
5.7 How closely does the information on the statement of information match the disclosure that has taken place between you and the other party/solicitor? (Mention sparseness etc of some D81s on court file survey)
5.8 What is your view of the new statement of information D81 on pensions?
5.9 **Practitioners in the South only: [excluded here for reasons of confidentiality]**
5.10 Have you ever used Form P? Examples?
5.11 What is your preferred method of valuation? (probe income or capital)
5.12 Does your practice differ in cases where proceedings have been issued? [If yes], how? (probe information, documentation, Form P, stage pensions considered)

6. Judicial approach

6.1 What is your experience of the judicial approach towards pensions on divorce?
6.2 What factors determine whether the judge regards the pensions as significant?
6.3 Does this vary between judges? Or courts?

6.4 How do the courts/judges respond to proposals for the appointment of an expert?
6.5 Have you ever argued, or been presented with the argument that pensions pre-marriage or post-separation should be excluded from the settlement? If so, what was the judge's reaction?
6.6 Does the judicial approach to pensions differ according to whether the case is by consent or not?
6.7 Have you had any experience of judicial interventions in consent order cases? Examples?
6.8 Are their interventions any different in cases where there are no pensions?

7. Any other comments on the law, practice or procedure re pensions on divorce?
7.1 Why do you think pension orders are relatively rarely used?
7.2 Are there any issues you suggest we raise in the DJ focus groups?
7.3 Other?

8. Vignette

Thanks and offer to send summary of findings

C: District Judge Focus Group Topic Schedule

Brief **background** for each: How long sitting as a DJ/full timer, how long in this court, approximate proportion of working week typically taken up with family matters/financial remedy cases, main area(s) of law when in practice.

1. Cases generally, substantive issues including where proceedings issued

- What are the **key factors** in any divorce financial remedy case which might suggest that pensions are a potentially significant issue? (Probe: minimum cash equivalent, minimum age, minimum duration of marriage, health/life expectancy, pension type, nature/value non-pension assets)
- **How often** deal with cases in which pensions are of **significance**/ approx proportion/ numbers in last 12 months/ any change over say last 10 years? (or length of their experience if less) (Emphasise not seeking precise figures; main aim is to see if the DJs have a feel for numbers/proportions. Emphasise interested in all cases here, not just ones in which they are asked to determine issues)
- How often deal with cases involving **pension sharing orders**/ approx proportion/ numbers in last 12 months/ any change?
- In what circumstances are pension sharing orders most/ least likely to be appropriate?
- View of main **alternatives** to pension orders where significant pension assets
- When might **attachment** orders be appropriate? (Probe circumstances, frequency)
- Any **recurring problems** involving pensions? (probe pensions in payment, gap in party ages)
- How often give or asked to give guidance on pensions at **FDR?** (examples)
- Where cases are adjudicated, how often do the issues that remain to be decided include pension issues?
- Does the **rationale** (needs, sharing, compensation) on pension issues tend to be any different from the rationale on capital and/or income issues?
- Is it ever appropriate to exclude **pre-marriage/ post-separation** acquired pension assets from settlement? (Probe: How would they calculate this? Do they think it is possible to have certainty regards when such contributions should and should not be excluded? Or does it always have to be on a case by case basis? Might an expert report be appropriate? To what extent might they adjust apportionment according to uneven contributions over time? Further probe if need be: to what extent will needs influence approaches here – are there cases in which needs will require pension values to be taken into account, notwithstanding that they may be deemed non-matrimonial property because they were built up pre-marriage/post-separation?)
- If **more than one pension scheme**, guidance/ decisions on which to share/ how much rely on representatives/ expert reports?
- Preferred approach adopted to **pension equalisation**: capital or income? (Probe: how much does this depend on party ages/ how close to retirement)
- Address pension assets any differently to non-pension assets? (Probe: How appropriate is it to add pension assets to non-pension assets when determining the total pot available for division per Form E totals/ any preference to treat pensions as distinct element or as part of whole pot)
- On the whole are the **prospects of settlement** where proceedings are issued any better or worse where there are significant pensions?

- How has the recession/ **economic climate** affected pension issues? (Probe: views on future v immediate benefits, changes in housing market, reform of public sector pensions)
- Generally how well informed are **practitioners** on pension issues? (Probe: any change in approach to pension issues over last few years)
- Any particular issues well understood, or not so well? Might they ever offer any guidance/ training/seminars?

2. <u>Disclosure, valuation and procedural issues</u>

- What **information and documentation** on pensions expect /how recent?
- Any rules of thumb re **off-setting and discounting?**
- Any **types of pension** requiring more investigation than others? (Probe: public sector/ final salary/ SIPPs/ SSASs)
- How important is **ASP?** (Probe: How often see ASP values/ when might press for this/ how often know whether ASP included in figures given)
- Circumstances in which see **CEV** as sufficient evidence of pension value? (Probe final salary/ public sector schemes)
- Can CEVs for final salary schemes be equated with those of personal pensions?
- Are they aware of any logistical problems in securing CEVs?
- How often give/asked to give directions on pension issues at **FDA?** (e.g. re disclosure, Form P, expert report)
- In what circumstances approve/not approve the appointment of **pension expert**/make direction for pension expert report when not requested? (Probe: Does the desire to maintain proportionality here affect how they deal with such issues)
- How often see full pension expert reports/hear pension experts last 12 months/any change? (Probe: do they ever see just conclusions?)
- Quality of pension reports/ evidence? Have they ever ruled against expert recommendations?
- Are they aware of any problems around implementation?

3. <u>Applications by consent</u>

Draft orders

- **How satisfactory** is drafting of pension orders/annex ?(Probe: cf other draft terms)
- Any common errors/ omissions?
- How much need to know about **reasoning** behind draft pension sharing order where both parties are represented? (Probe: Do they assume that the two lawyers have worked out the percentage, and it's fine, or do they check/ expect them to have had expert report?)
- How often **intervene** in relation to substantive issues re draft pension sharing orders compared to interventions on other terms? (numbers, examples etc)
- Any examples or circumstances in which have refused/might refuse proposed pension order?
- View on/experience of draft ***deferred*** pension sharing orders?

- Where **off-setting** appears to be the objective in what circumstances intervene/make further enquiry/numbers examples? (Probe: If e.g. there is an NHS pension with a declared CETV of, say, £300,000, do they check/expect solicitors to have had report on appropriate offsetting sum?)
- Any particular pension issues with **litigants in person?**

D81 and financial disclosure, pre-April 2011

- Old statement of information, generally how well completed? (Probe: Did it tend to be clear or not whether information related to pre/post settlement?)
- **How satisfactory** was pension information?
- What information expected? (probe CEV, projected benefits)
- How often saw/expected ASP details?
- **How far enquired into/ investigated** pension information? What would prompt them to investigate further? (probe pension type, whether CETV or lump sum, vague details) (Pre-April, if they just saw a figure without a label, did they make any assumptions regarding whether or not it was the CEV or something else)
- How much further enquiry varied according to firm/ practitioner?
- ***S only***: *[Excluded for reasons of confidentiality]*

D81 and financial disclosure post-April 2011

- **Opinion** of new form D81 in general?
- Opinion of new form on pension information in particular?
- Any more explicit reference to ASP than previously?
- Expert reports, ever see them/wish to see them?
- Has (judge's) approach to disclosure changed at all since introduction of new form?

4. <u>General</u>

- What kind of DJ **training** on pensions is available taken up e.g. last 12 months? Any change? (Probe: training provider, compulsory or voluntary, nature and usefulness of training, alternative resources such as journals, bulletins, informal arrangements with IFAs etc)
- Generally, **how well equipped** to deal with significant pension cases cf other aspects of divorce financial remedy cases?
- Theories on why pension orders still relatively rare?
- Would they like to see more/fewer/same number of pension orders? (Probe: awareness of research/effects on divorced women in particular)
- Awareness of any differences in **court culture** re pensions/pension orders?
- Any **recommendations**/improvements law, practice, procedure/ other comments?

And if time permits:

- Any experience of making orders re PPF?
- View on/ experience of draft ***deferred*** pension sharing orders?

- View on **ADR** as means of dealing with significant pension cases? (Probe: collaborative, mediation)

5. <u>Feedback key study findings</u>

- File survey
- Solicitor interviews

Thanks and offer summary later in year

D: Individual case assessment by project pensions expert

Please enter response in right hand column against relevant option for 'tick-box' answers, and use space below the questions for more open-ended answers.

Case number	

Based on the available data for this case 1) How have the pensions been dealt with?	
a) pension sharing order	
b) pension attachment order	
c) offsetting	
d) other	
e) unclear	

2) Does this approach appear to be	
a) economically rational	
b) problematic	
c) unable to say?	

3) What factors point to the treatment being a) economically rational or b) problematic? If c) unable to say, why?

4) On balance, how fair does the quantum of the solution appear to be?	
a) fair	
b) unfair	
c) unable to say	

5) What factors are relevant to this assessment of fairness?

6) What appears to be the method of pension valuation adopted?	
a) capital	
b) income	
c) other (please clarify)	
d) unable to say	

7) Please give your views on the apparent consistency, accuracy and comprehensiveness of the financial disclosure provided.

8) If possible: any comments on the apparent rationale behind the outcome, such as needs, sharing or compensation, and data pointing to one or other rationale.

List of cases

B v B [2002] 1 FLR 555

B v B (Assessment of Assets: Pre-marital Property) [2012] 2 FLR 22
B v B [2012] EWHC [2012] EWHC 314 (Fam) 23

Burrow v Burrow [1999] 1 FLR 508

Hanlon v Hanlon [1978] 2 All ER 889 at 892-3, CA, per Ormrod LJ

Martin v Martin [1978] Fam 12; [1977] EWCA Civ 7

Martin-Dye v Martin-Dye [2006] 2 FLR 901

Maskell v Maskell [2003] 1 FLR 1138

Mesher v Mesher and Hall [1980] 1 All ER 126

Miller v Miller; McFarlane v McFarlane [2006] UKHL 24, [2006] 1 FLR 1186

Minton v Minton [1979] AC 593, 608

Mortimer v Mortimer-Griffin [1986] 2 FLR 315

R (Smith) v Secretary of State for Defence and Secretary of State for Work and Pensions [2004] EWHC 1797 (Admin) [2005] 1 FLR 97 at [15]

T v T (Financial Relief: Pensions) [1998] 1 FLR 1072

*White v Whit*e [2001] 1 AC 596, [2000] 2 FLR 981)

Bibliography

Altmann R, (2006) www.rosaltmann.com/womenPensionsWorld.htm

Arber, S. and Ginn, J. (2004) 'Ageing and Gender: Diversity and Change' in *Social Trends 34 TSO*

Arthur, S. and Lewis, J. (2000) *Pensions and Divorce: Exploring financial settlements*, Department of Social Security Research Report No.118, Crown Copyright, HMSO.

Clery, E., McKay, S., Phillips, M. and Robinson, C. (2006) *Attitudes to Pensions: the 2006 Survey*, DWP Research Report No 434, National Centre for Social Research and School for Social Sciences, Birmingham

Davis, G. et al (2000) 'Ancillary Relief Outcomes' *CFLQ* Vol 12, No 1

Dnes, A. (1997) *The Division of Marital Assets Following Divorce with Particular Reference to Pensions,* Lord Chancellor's Research Series 7/97, LCD

Dnes, A. (2009) 'Rational Decision Making and Intimate Cohabitation' in Miles, J. and Probert, R. (eds), *Sharing Lives, Dividing Assets,* Hart Publishing

DSS, (Department of Social Security) (1998) *Pension Sharing on Divorce: Reforming Pensions for a Fairer Future, Part 1: Consultation* (London, DSS)

DWP (2013) '*The single-tier pension: a simple foundation for saving'*

Eighth Annual Scottish Widows Women and Pensions Report 2012, www.scottishwidows.co.uk ; the Phoenix Group Press Release 25 June 2013 *Divorced Women and Pensions*

Fisher, H. and Low, H. (2009) 'Who wins, who loses and who recovers from divorce?' in Miles, J. and Probert, R. (eds) *Sharing Lives, Dividing Assets,* Hart Publishing

Hess, E. and Hay, F. (2008) *Pensions on Divorce: A Practitioner's Handbook*, Hammicks

Hitchings, E. (2009) 'Chaos or Consistency: Ancillary Relief in the 'Everyday' Case' in Miles, J. and Probert, R. (eds) *Sharing Lives, Dividing Assets,* Hart Publishing

Hitchings, E., Miles, J. and Woodward, H. *Assembling the Jigsaw Puzzle: Financial Settlement on Divorce,* [2013] www.bristol.ac.uk/law/research/researchpublications/2013/assemblingthejigsawpuzzle.pdf

Miles, J. and Probert, R. (eds) (2009) *Sharing Lives, Dividing Assets,* Hart Publishing

Moorhead, R. And Sefton, M. (2005) *Litigants in person: Unrepresented litigants in first instance proceedings.* Department for Constitutional Affairs Research Series 2/05, p.26

Muirhead, I. (2008) *Pensions on Divorce, The Role of the Financial Advisor,* SIFA

ONS Statistical Bulletin 6 September 2013, *What does the 2011 Census tell us about older people?*

ONS (2008) *Pension Trends,* Ch 5, www.statistics.gov.uk/cci/nugget.asp?id=2239

ONS Statistical Bulletin, Divorces in England and Wales 2010. http://www.ons.gov.uk/ons/dcp171778_246403.pdf

Pension: Challenges and Choices, First Report, Pensions Commission, 2004, www.pensionscommission.org.uk

Perry, A., Douglas, G., Murch, M., Bader, K., Borkowski, M. (2000) *How Parents Cope Financially on Marriage Breakdown* Joseph Rowntree Foundation and Family Policy Studies Centre

Price D, (2009) 'Pension Accumulation and Gendered Household Structures: What are the Implications of Changes in Family Formation for Future Financial Inequality?' in Miles, J. and Probert, R. (eds) *Sharing Lives, Dividing Assets* Hart Publishing

Salter, D., Rae, M. and Ellison R. (2009) *Pensions on Divorce: Law, Practice and Precedents*, Lime Legal

Salter, D. (2010) 'Pension Sharing and Public Sector Pensions' *Family Law* 482.

Salter, D. (2010) 'Moving target syndrome: A New Twist'*, Family Law* 296

Salter, D. (2010) 'A Decade of Pension Sharing'*, Family Law* 296

Sheehan. G., Chrzanowski, A. and Dewar, J. (2008) 'Superannuation and Divorce in Australia: an evaluation of post-reform practice and settlement outcomes', *International Journal of Law, Policy and the Family* 206

Trinder, E. et al, *Litigants in person in private family law cases,* for Ministry of Justice (2013 forthcoming)