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*Pensions on divorce:
an empirical study*

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This is the first detailed study into pension sharing on divorce since its introduction in England and Wales in 2000, designed to provide an insight into when and how pensions are included in final divorce financial remedy orders.

Judicial Statistics show that the number of pension orders of any kind is low and remains well below Government predictions. The study included a survey of 369 divorce court files with a final financial remedy order randomly selected from three courts in the North, South and West of England and Wales, interviews with 32 family solicitors and seven district judges, and pension expert assessment of the data from 130 court files.

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Key Findings

- In 20% of the court file cases neither party disclosed any pension other than a basic state pension; in 66% one or both parties disclosed a pension other than basic state ('relevant pensions') but no pension order was made and just 14% (51) included one or more pension orders
- All pension orders were for pension sharing and all but two were in favour of the wife
- Pension orders were more likely to be made between older parties from longer marriages, with more capital and pension wealth than those with no pension orders
- Pension orders were significantly more likely to be made when both parties were legally represented
- Practitioners and judges saw pension sharing as a positive addition to financial remedies on divorce, but offsetting pensions against non-pension assets remains the most common approach to pensions and was said to be popular with the parties themselves, sometimes against legal advice
- Practitioners saw pensions as one of the most complex but not the most contentious issue on divorce. They would have valued more judicial guidance on the law
- Practitioners and judges did not share a clear or consistent view about what the rationale behind pension orders and the treatment of pensions should be
- Practitioners and judges described a strong drive towards clean break settlements, and fewer than 2% of final orders in the court file sample included a periodical payments order to the wife for life for more than a nominal amount
- The lack of pension and spousal maintenance orders, and the fact that husbands on average had higher income and pensions than wives, meant that husbands usually fared better after divorce on income and pensions. The wives fared better on capital
- Only about half of the 293 cases which disclosed any relevant pensions contained unambiguous pension valuations for all pensions; the project expert assessed two thirds as inadequate or unclear
- The project expert questioned, or was unable to assess, the economic rationality of the approach to pensions in over half of the cases and the fairness of the pension settlement quantum in nearly two thirds of the cases which he looked at
- There was little evidence on the court files of pension expert reports. However, when reports were obtained most practitioners and judges were positive about their impact
- The time, cost and fees associated with pension disclosure, expert reports and implementation of pension orders acted as deterrents to the making of pension orders
- Practitioners and judges expressed particular concern about the ability of litigants in person to deal fairly or at all with pensions on divorce and about the increasing number of litigants in person in family cases.

Background

The UK has one of the most complex pension systems in the world, with a wide variety of state, occupational and private pension schemes. Public understanding of pensions in the UK is weak and pension provision is increasingly inadequate and unevenly distributed. Divorced women over 65 are particularly exposed, only a minority having any income other than basic state pension; their numbers are predicted to increase threefold over the next 20 years.

The court has long had wide powers to adjust capital and income between the parties on an application for a financial remedy order on divorce and a wide discretion to take all the circumstances into account, giving first consideration to the welfare of any children of the family. The overall objective is to achieve fairness, and case law states that this to

be determined without discrimination between husband and wife and by reference to the principles of need, compensation and sharing.

Almost all types of pension other than the basic state pension may be the subject of a pension order on divorce. Unlike capital and income, pensions are only ever in one person's name and can only be adjusted on divorce if they are the subject of a pension order made by a court. Despite the extension of the court's powers in 1996 and 2000 through the introduction of pension attachment and pension sharing orders, the incidence of pension orders on divorce has remained low. Judicial Statistics show that decrees absolute of divorce in 2011 numbered around 120,000 but fewer than 10,000 pension orders of any kind were made in the same period.

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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, an 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.

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The Incidence Of Pension Orders

The court file survey revealed that only 17% of the cases which disclosed relevant pension included any pension orders. All pension orders were for pension sharing; attachment orders were highly unpopular with practitioners and judges. All except two of the pension sharing orders were in favour of the wife.

Pension orders were more likely to be made when the parties had relatively high capital and pension wealth and the husband relatively high income when compared to those cases with relevant pensions but no pension order. Pension orders were also more likely to be made when the parties were older, the average (median) age of both wives and husbands in pension order cases being 51, compared to 42 and 45 respectively in cases with

no pension order. The median length of marriage to the date of the final order was also significantly longer in pension order cases at 25 years compared to 11 years.

Pension orders were more likely to be made when both parties were legally represented at the date of the final order: 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. Practitioners said that the majority of their clients had poor knowledge and understanding of pensions on divorce and that it was an issue which would be difficult to deal with fairly or at all in the absence of legal and/or professional advice.

The court file survey revealed that only 17% of cases disclosing relevant pensions included any pension orders

Offsetting, long term spousal maintenance and other alternatives to pension orders

Offsetting the pension assets against non-pension assets was the main way in which pensions were dealt with before the introduction of pension sharing, and appears to have remained the most common way of dealing with pensions. Offsetting usually takes the form of the wife retaining most or all of the value of the family home and the husband retaining his pension. While practitioners and judges had generally welcomed the introduction of pension sharing, practitioner views on the merits of offsetting were very mixed, the one side arguing that pension and non-pension assets were like ‘apples and pears’ and could not be compared, and the other that offsetting was a pragmatic remedy in anything but big money cases. Offsetting was said to be popular with the parties themselves.

Valuing the offset was problematic and gave rise to arguments about how to achieve it. Offsetting and/or how it was to be achieved were rarely explained in

the final order or supporting financial statements. The judges chose not to get involved in arguments about valuing offsets. They were on the whole willing to make orders which included offsetting if these were by consent but said they would not do so if the pension issue was contested at a final hearing.

Fewer than 2% of the 369 final orders contained a substantive spousal joint lives periodical payments order. Judges and practitioners described a strong drive by the parties to cut all financial ties between them and achieve a clean break. This appeared to be a factor in the low incidence of both pension and spousal maintenance orders: a pension order in favour of the wife sometimes meant that the husband retained an interest in the family home, thus perpetuating an unwelcome financial tie. There was little evidence of any alternatives to pension orders (such as insurance or nomination of death benefits) apart from offsetting.

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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.

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The contentiousness of pension issues and the process of settlement

Just over three quarters of the 369 final orders made were uncontested, 21% were initially contested but settled and just 2% were fully contested. Most draft consent orders were approved as drawn; 17% were only approved following written queries and 6% following attendance at court. Approximately one third of judicial queries included an issue which related to pensions, in which judges were either seeking further financial information or questioning the fairness of the proposed order.

Cases with pension orders were more likely to involve the issue of proceedings (ie not purely by consent), but this was more related to the general nature of the cases than to the pension issue itself. Practitioners did not see pensions as an especially contentious issue on divorce although they did see it as one of the most complex.

In contested and initially contested but settled cases judges relied heavily on the practitioners to alert them to the pension issues and on expert recommendations.

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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...

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The economic rationality of the approach to pensions and the fairness of the settlement quantum

The project expert's view was that it was unclear how the pensions had been dealt with, or they had been ignored, in approximately half of the cases which he assessed. Practitioners insisted that they always took pensions into account unless the parties were very young and/or the pensions were of low value. However, statistical analysis of the court file data supported the project expert's view that it was unclear how the pensions had been taken into account in a large proportion of cases.

In the majority of cases which he assessed, the pension expert called into question both the economic rationality of

the approach towards pensions and the fairness of the settlement quantum. Cases with pension orders were more likely to be assessed as having an economically rational approach and fair settlement quantum than cases involving offsets. However, the expert was unable to assess a substantial number of cases on either measure, mainly because of the poor quality of disclosure. The quantum was more likely to be assessed as fair when both parties were represented.

The objective of the pension order and how it was to be achieved

Practitioners described repeated arguments over whether pensions should be adjusted by reference to their capital value or to their projected income. The wife was usually better off with a settlement based on income projection and the husband on the capital value. Statistical analysis of the court file data and the project expert both suggested that capital values were more often determinative of the outcome than the projected income.

Arguments also often arose over whether a pension should be ring-fenced for any period that it had been acquired outside of the marriage, and if so, whether a formula could be applied to determine the respective shares. The length of the marriage was an important factor in the argument as well as whether the practitioner happened to be acting for

the pension member or spouse. Judges said they might consider ‘ring-fencing’ in bigger money/short marriage cases but generally disapproved of a formulaic approach.

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... 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.

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The rationales behind pension orders and pensions in general

It was difficult to ascertain the rationales behind the treatment of pension issues from the court files. The judges and practitioners shared no clear or consistent view on whether needs, compensation or sharing should determine the pension outcome. The rationale of compensation was hardly ever seen as relevant and in practice needs and sharing rationales, if framed in those terms, often became blurred. Some of the solicitors acting for higher net worth clients saw sharing as more applicable to the pension assets and needs to the non-pension assets.

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We don't tend to see compensation actually work that much 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.

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Pensions and financial disclosure

Only about half of the 293 court file cases which disclosed one or more relevant pensions contained unambiguous cash equivalent values ('CEVs', the prescribed pension valuation on divorce) for all pensions. Only 12 cases expressly referred to additional state pensions, 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 relied 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.

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...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. [District Judge]

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Methodology

The research design included four components, both quantitative and qualitative. The first 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 a petition for divorce had been issued on or after 1 April 2009 and a final financial remedy order had been made on or before 31 December 2010. The second 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 third consisted of four meetings with a total of seven district judges from the three courts in which we had conducted the file survey. 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 relevant pensions. The fieldwork was conducted between March 2011 and September 2012. The quantitative data were analysed with the help of SPSS software and the qualitative with Atlas Ti.

Pension experts

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 project expert assessed the quality of financial disclosure and the economic rationality of the approach to pensions as better when pension experts had been involved.

A good working relationship between pension experts and practitioners was a key factor in practitioners' confidence in their own financial remedy practices. Although expert reports added to the length and cost of cases, both practitioners and judges suggested that pension issues would usually be resolved quickly once they were received.

Conclusion

Pension sharing is a positive but rarely used addition to financial remedy orders. Although practitioners insisted that they were taking pensions into account in the majority of cases, how they were doing so, even in pension order cases, was often unclear from the final orders or supporting documents in the court files. The complexity of pensions and the lack of a requirement to spell out the rationales or intended net effects of final orders have masked a continuing imbalance in outcomes which the introduction of pension sharing was intended to help address, resulting in wives losing out on the pension and

income terms of the final orders and husbands on the capital terms. In addition, pension orders appear to have remained the prerogative of a relatively privileged minority. This situation is likely to worsen with the reduction in the scope of public funding for family proceedings and an increase in litigants in person. Public understanding and interest in pensions is generally weak and pension orders are hard to achieve fairly or at all without legal and/or expert advice. Even family lawyers and judges benefit from expert help on pensions except in the simplest of cases.

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I think 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.

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Policy implications

- Greater transparency and rigour in relation to pension disclosure, together with a requirement to spell out the intended effect of final orders, might reveal, and thus help to redress, some of the gender imbalance.
- Tighter regulation of fees and time limits 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.
- More training for practitioners and judges on financial remedies and pensions, and better working relationships between practitioners and pension experts, would improve understanding and the quality of outcomes.
- More judicial guidance on pension issues would undoubtedly assist all concerned.

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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.

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The full report and further information

The full report of this study is available online at:
orca.cf.ac.uk/56700

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