



After the family home, a pension is often the next significant asset from a marriage or civil partnership. There are 3 options when considering what to do when either party to a marriage or civil partnership has pension provision.

What are the options?

Offsetting

The value of the member's pension rights are offset against other assets (e.g. the family home). The person with the pension rights can continue their pension fund in the future. The ex spouse/civil partner will receive other assets in lieu of a pension share.

Advantages

- The separating couple are relatively young, both of them are at work, there are no children involved and there are sufficient non-pension assets to allow the offset.
- The couple's assets are such that even after a split they are still large enough to provide each of them with sufficient resources to carry on with their lives.
- The ex spouse/civil partner has sufficient retirement income which would normally make pension sharing less appropriate.

Disadvantages

- The member's pension rights are of high value compared to the other assets, which may make offsetting very difficult.
- A replacement pension will be needed for the ex spouse/civil partner which may be difficult to provide if the time to his or her retirement date and funds are short, or if he or she is not working.
- If the ex spouse/civil partner receives non-pension assets, the tax position of these may not be as favourable as assets held within a pension fund.

- The ex spouse/civil partner receiving non-pension assets may have a very low tolerance to investment risk, if the other party was a member of a defined benefit occupation pension scheme (such as any one of the public sector schemes). This would imply a much lower degree of investment risk, which could be suitable to the ex spouse/civil partner, but

Attachment Order

This enables the Court to make an Order directing the Pension Trustees to make payments to an ex spouse/civil partner from the date the member draws on the pension benefits.

Advantages

- Where the separating couple are in their 50's (or later) and other forms of maintenance provision are inappropriate. This will particularly apply where the ex spouse/civil partner cannot work (because of age or qualifications/ experience).
- Where the pension scheme does not have any readily realisable assets, for example, in a small self administered scheme (SSAS) or self invested personal pension (SIPP), which almost wholly invested in property. This would make sharing extremely difficult.
- Where the lump sum death in service benefit is to be provided to the ex spouse/civil partner.
- Where the member is already in receipt of annuity or pension income from the scheme. Although it is possible to affect a Pension Sharing Order on annuity, an Attachment Order may be appropriate in some circumstances; e.g., if an annuity is shared it will be achieved by creating a new pension or deferred pension with the existing provider, any new annuity will need to take into account the state of health and relative ages of the annuitants at the time.



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This would often mean that the pension available to the ex spouse would be lower than expected as a wife divorcing a husband of the same age could not expect to receive half of his pension income due to her longer life expectancy.

- Where an annuity is subject to an Attachment Order, the need to set up a new annuity for the ex spouse/civil partner will be avoided as s/he will be receiving a maintenance payment of the member's annuity. However, there remains the risk that the member will pre-decease the ex spouse/civil partner resulting in the benefits ceasing or reducing depending on the annuity structure selected at outset.
- The ability to vary the order in the future may be attractive to both parties.
- Where the member's pension arrangement is a defined benefit scheme, the retention of this may be attractive to the ex spouse if s/he has a low tolerance to investment risk. This needs to be discussed and considered in the context of the employer and the funding position of the scheme.
- If the pension is defined benefits occupational scheme, tax-free cash may be available by communication and this may be more suitable than where it is expressed as a percentage of a fund.
- Death in service benefits may remain subject to nomination in favour of the ex spouse. Of course this may cause problems in so far as if the member remarries and the new spouse argues over the use of the Trustees discretionary powers.

Disadvantages

- The ex spouse/civil partner can receive no benefit until the member decides to, or is forced to retire. Effectively, the ex spouse/civil partner has no control over the benefits unless the wording of the Attachment Order is correct. Without a correctly worded Order, the member can control when the benefits come into payment.
- The member may be able to deliberately reduce the benefits subject to the Attachment Order. For example, the member could, subsequent to the implementation of the Order, opt out of an employer's pension

scheme and make alternative provisions by means of ISA or personal pension scheme. In doing so, this would not be subject to the Attachment Order and so would not benefit the ex spouse/civil partner.

- An Attachment Order will end and the ex spouse/civil partner will lose all benefits if he or she pre-deceases the member. The benefits will also cease if the ex spouse remarries/enters a new civil partnership.
- The basis of the benefits under the scheme may change between the time that the attachment order is made and when the member retires. For example a defined benefit occupational pension scheme may be wound up and future provision may be made through a money purchase or personal pension scheme. If the final salary scheme was in deficit at the time of winding up taking place this could result in reduced benefits
- The ex spouse/civil partner will need to keep pension scheme trustees and administrators (or product provider in the case of an insured arrangement) informed of any changes in his/ her circumstances e.g. change of address, remarriage etc. failure to do so could jeopardise payment of benefits in the future and entail the ex spouse seeking payment of the benefits from the member.
- Both parties have the ability to seek variation in the order in the future.
- If the pension member is made bankrupt during the existence of an Attachment Order, the Order can be ignored by a Trustee in Bankruptcy which could jeopardise the ex spouse's/civil partner's benefits.
- As the pension benefits still legally remain with the member the pension income is taxed at his or her marginal rate.

Pension Sharing Orders ("PSO")

A PSO creates a separate fund and the recipient receives a pension in his or her own right. The recipient may be able to remain a member of the



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pension member's fund depending on the rules of the scheme and the financial advice obtained) or may transfer to a new fund. A Court Order within Divorce proceedings is necessary to implement a PSO; it cannot be done by agreement alone. The Order only takes effect once the final decree ending the marriage or civil partnership has been pronounced.

Advantages

- One party has high pension assets relative to any other assets.
- The ex spouse/civil partner is close to retirement. S/he may find it difficult to build up comparable pension benefits over a relatively short period of time.
- The divorcing couple is older. Here the ex spouse/civil partner may be able to take benefits from the age of 50 (under current legislation) in respect of the pension credit rather than have to wait until the member retires (as would apply with Attachment Order).
- Where the ex spouse/civil partner receiving the pension share will be able to nominate potential beneficiaries of any death benefits in the event of his/ hers subsequent death prior to retirement benefits being taken.
- A PSO allows greater flexibility and choice to the separating couple and allows pension rights to assist in providing a fairer overall settlement of marital assets.
- It is possible to apply for a PSO subsequent to an Attachment Order having been made.

Disadvantages

- If keeping the family home is a priority for the ex spouse/civil partner, the sharing of the member's pension may require the sharing of other assets (i.e. the family home) and could result in the sale of the property.
- Where the ex spouse/civil partner already has adequate pension provision.
- A survivor's benefits (i.e. pension benefits paid following the death of a former spouse) are not shareable.

- It is vitally important that both parties bear in mind that the value of the pension share transferred to the non pension member will be based on the value of the fund at the time the pension trustees implement the PSO and on any historical valuation that may have been disclosed when negotiating the terms of an overall settlement. The Pension Trustees have up to 4 months to implement the Pension Sharing Order from the date of the Decree Absolute or when they are served with the Order whichever is the latest. During that time the value of the pension fund could go up or down.
- Implementing a PSO is not cheap. The Trustees of the fund can charge in excess of £1,000 plus VAT in some cases.
- A PSO cannot be made on a pension which is already subject to an Attachment Order.

If you are trying to negotiate an agreement where pensions are involved it is important that you take the following factors into account:

1. The starting point is for the member of the pension scheme to obtain a CETV (cash equivalent transfer value) of the pension fund. This is an assessment of what the pension is worth on the open market.
2. Pension assets are not viewed in the same way as other assets. It is not realisable cash although some courts may attribute a certain value to the CETV (e.g. a third or quarter and the total assets available for distribution are calculated accordingly).
3. The larger the fund, the more important it is to ensure that the CETV is accurate. In these cases, expert advice should be taken from an Actuary, provided the cost of such advice is proportionate to the value of the fund in question.
4. Where there are complex pension arrangements it is worthwhile obtaining an Actuary's report which the Court will take into consideration.
5. It is important that anyone benefitting from a PSO takes independent financial advice about where to invest the fund.



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