

WELFARE REFORM AND PENSIONS ACT 1999

EXPLANATORY NOTES

COMMENTARY

Part IV – Pension Sharing

Chapter I – Sharing of Rights under Pension Arrangements

Section 27: Scope of pension sharing mechanism

This section sets out the scope of the pension sharing mechanism.

Subsections (1) and (3): pension sharing may extend to a “person’s shareable rights” (defined in subsection (2)) in any pension arrangement other than an excepted public service scheme.

We intend to use the power in subsection (3) to except the Great Offices of State.

Subsection (2): most pension rights will be shareable.

We intend to use the regulation-making power to exclude survivors’ benefits payable to a member in his capacity as a survivor (such as, a widow’s or widower’s pension payable in respect of a former marriage), an injury benefit, compensation payment, and incidental benefits such as travel concessions.

Section 28: Activation of pension sharing

Subsection (1) lists the circumstances in which the pension sharing mechanism is triggered, namely, the taking effect of:

- (a) a pension sharing order under the Matrimonial Causes Act 1973;

Note: In England and Wales a pension sharing order will be stayed (and so not take effect) for a period in accordance with the level of the court in which the jurisdiction is exercised. The stay provides time for the parties to appeal. If an appeal is begun during the stay period, the order will be further stayed until the appeal is disposed of.

- (b) a provision which corresponds to the provision made by a pension sharing order, is contained in a qualifying agreement between the parties and takes effect on the dissolution of marriage under the Family Law Act 1996;
- (c) a provision which corresponds to the provision made by a pension sharing order, is contained in a qualifying agreement between the parties and takes effect after the dissolution of marriage under the Family Law Act 1996;

Note: until Part II of the Family Law Act 1996 comes into force it will not be possible under this Act to pension share by agreement in England and Wales.

- (d) an order corresponding to such a pension sharing order made on an application for financial relief in England and Wales under Part III of the Matrimonial and Family Proceedings Act 1984 following an overseas divorce or annulment of marriage;

- (e) a pension sharing order made under the Family Law (Scotland) Act 1985;

Note: In Scotland, a pension sharing order will take effect on the day that the order is made. However, the appeal process must be completed before the extract decree or declarator is issued. If an appeal is marked the parties will not therefore be able to send the relevant documentation to the person responsible for the pension arrangement until the appeal process is complete. The implementation period under section 34(1) does not begin until the person responsible for the pension arrangement receives that documentation.

- (f) a provision to share a pension that is included in a qualifying agreement negotiated between the parties that takes effect on divorce or nullity in Scotland. The Secretary of State is given a regulation-making power to prescribe the form in which the pension sharing provision must be made;

Note: there is no provision for pension sharing under Northern Ireland legislation at present.

- (g) an order corresponding to a pension sharing order in paragraph (e) made on an application for financial relief in Scotland under Part IV of the Matrimonial and Family Proceedings Act 1984 following an overseas divorce or annulment of marriage;

Note: Pension sharing is not at present an option on such an application for financial relief.

- (h) a pension sharing order under Northern Ireland legislation;

- (i) an order corresponding to such an order made on an application for financial relief in Northern Ireland under Part IV of the Matrimonial and Family Proceedings (Northern Ireland) Order 1989 following an overseas divorce or annulment of marriage.

Subsection (2) defines the type of agreement in England and Wales that qualifies under subsections (1)(b) and (c). Such an agreement is one that:

- (a) has been entered into in such circumstances as the Lord Chancellor may prescribe by regulations;

We propose to use the regulations to ensure that the parties have given prior notice of their intention to pension share and not received any notice of objection from the person responsible for the pension arrangement of their intention to pension share and that their agreement has been reached following mediation or some other form of negotiation involving a third party;

- (b) satisfies requirements prescribed by the Lord Chancellor;

We intend to provide that agreements must meet requirements as to form, contain prescribed information and must have been produced to the court before being passed to the pension arrangement concerned.

Subsection (3) defines the type of agreement in Scotland that qualifies under subsection (1)(f). It requires an agreement to be entered into in such circumstances as the Secretary of State may prescribe and also registered in the Books of Council and Session before it can trigger the pension sharing mechanism.

Note: In Scotland, parties who divorce commonly make *Minutes of Agreement* to settle as many issues as possible before going to court. This allows parties to reach their own decisions (with legal advice) about the division of assets. A *Minute of Agreement* is conventionally registered in the Books of Council and Session (a public register kept in Edinburgh by the Keeper of the Registers of Scotland in which a variety of deeds may be registered). Deeds are usually registered for preservation and execution. This allows either party to compel the defaulting party to fulfil his or her obligations under the deed without returning to court.

Subsection (4) prevents an agreement that falls within subsection (1)(b) triggering the pension sharing mechanism in circumstances where:

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(c.30) which received Royal Assent on 11 November 1999*

- (a) the sharing of rights under the pension arrangement concerned is dealt with under a pension sharing order, or
- (b) the transferor's rights under the pension arrangement concerned are subject to an earmarking/attachment provision under section 25B or 25C of the Matrimonial Causes Act 1973.

Subsection (5) prevents an agreement that falls within subsection (1)(c) triggering the pension sharing mechanism in circumstances where—

- (a) the couple were divorced under section 3 of the Family Law Act 1996 and, prior to divorce, had demonstrated that they had settled their future financial arrangements in one of the ways mentioned in section 9(2) of the Act;

i.e. pension sharing by agreement after a divorce will only be available (other than on conversion from a separation to a divorce order under section 4 of the Family Law Act 1996) if the parties did not have to demonstrate that they had settled their financial arrangements – see section 9(7) of the Family Law Act 1996.
- (b) there is a pension sharing order, made in relation to the marriage, which relates to the same pension arrangement or the pension arrangement to which the agreement relates has already been the subject of pension sharing by the couple;
- (c) the transferor's rights under the pension arrangement concerned are subject to an earmarking/attachment provision under section 25B or 25C of the Matrimonial Causes Act 1973.

Subsection (6) provides that subsection (1)(f) does not apply if there is in force an order under section 12A(2) or (3) of the Family Law Scotland Act 1985 relating to the rights of the transferor under the pension arrangement to which the provision relates.

Subsection (7) to (9): the effect of these provisions is that a pension sharing order or agreement in Scotland will be treated as ineffective if the person responsible for a pension arrangement to which the order or agreement relates does not receive copies of:

the pension sharing order or agreement, and

the relevant decree of divorce or declarator (as well as the information referred to in section 34(1)(b)(i) & (ii))

within two months of the date of the extract of the decree or declarator.

In the case of overseas divorces, the relevant documents should be provided within two months of the date of disposal under section 28 of the Matrimonial and Family Proceedings Act 1984. The procedure will be that the burden of sending the relevant documents to the person responsible for the pension arrangement will rest with the parties to the divorce (or annulment). This would normally be the person who would benefit from the pension sharing.

Subsection (10) makes provision for the court in Scotland to extend the two month period in exceptional cases.

Subsection (11) provides that, in subsections (4)(b), 5(c) and (6), the reference to the party who is the transferor is to the party whose rights the pension sharing provision relates.

Section 29: Creation of pension debits and credits

This important section provides for the member's pension rights to be subject to a debit and for his former spouse to become entitled to a pension credit equal to the amount of the debit.

In England and Wales, the amount of the debit will be a percentage of the current cash equivalent of the member's pension rights in the scheme or arrangement. The percentage will be that stated in the pension sharing order or agreement.

In Scotland, the pension sharing order or agreement may specify that the pension sharing legislation is to apply in relation to a specified amount, rather than a percentage, of the member's pension rights (see section 20) and in that case the amount of the debit will be that specified amount or, if less, the current cash equivalent of the member's rights.

The method for calculating the cash equivalent for these purposes (see section 27) will be similar to the well-established method used for calculating cash equivalents of the pension rights of members who wish to transfer those rights.

In determining the cash equivalent of pension rights available for pension sharing, only those rights accrued up to the day immediately before the day on which the pension sharing order or agreement takes effect are included in the calculation.

Subsection (1) provides for the shareable rights of a scheme member (the transferor) to become subject to a debit of an appropriate amount, and the former spouse (the transferee) to become entitled as against the person responsible for the pension arrangement to a credit of the same amount.

Subsection (2) provides that where the pension sharing order or agreement expresses the value to be transferred as a percentage, the appropriate amount will be that percentage of the cash equivalent of the transferor's rights.

Subsection (3) provides that where the pension sharing order or agreement expresses the value to be transferred as a specific amount (as may be the case in Scotland) rather than as percentage, that amount is the appropriate amount. But, if that amount is greater than the cash equivalent of the transferor's rights, the amount of the cash equivalent is the appropriate amount.

Subsection (4) provides a special rule for determining the benefits by reference to which the cash equivalent is to be calculated where the transferor is currently accruing rights in an occupational scheme (that is, he is an "active" member). In that case, the calculation is to be based on the hypothetical benefits to which he would have been entitled by virtue of his shareable rights under the pension arrangement had he ceased to be an active member immediately before the day on which the pension sharing order or agreement takes effect.

Subsection (5) provides that in all other cases the benefits by reference to which the cash equivalent is to be calculated are those to which the transferor is entitled by virtue of his shareable rights under the pension arrangement at that time.

Subsection (6) provides a regulation-making power to enable any description of benefit to be disregarded for the purposes of subsections (4) and (5) above.

Subsection (7) defines the valuation date for the purpose of calculating the cash equivalent of the relevant benefits. It provides scope for the person responsible for the pension arrangement to choose the day that the valuation will be made, provided that the day chosen falls within the period allowed for implementing the order or agreement. This flexibility broadly follows the existing provisions for the calculation of cash equivalent values for early leavers.

Section 30: Calculation of cash equivalents

There is already a well-established method for valuing the pension rights of early leavers from occupational pension schemes or members of personal pension schemes who wish to transfer their accrued rights to another pension scheme or arrangement. The regulations for the calculation of the cash equivalent in pension sharing cases will broadly reflect the principles set out for calculating cash equivalents for early leavers.

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These provisions are in regulation 7 of the Occupational Pension Schemes (Transfer Values) Regulations 1996, and regulation 3 of the Personal Pension Schemes (Transfer Values) Regulations 1987.

In particular, in the case of salary related schemes we intend that cash equivalents for pension sharing, including cash equivalents of pensions in payment, will have to be calculated in a manner approved by a qualified actuary (for example, a Fellow of the Institute of Actuaries or a Fellow of the Faculty of Actuaries). In cases where members have accrued rights in public service schemes, the manner of calculation will be approved by the Government Actuary. The actuary will be bound by professional guidance (see subsection (2)).

Where a salary related occupational scheme is subject to the “minimum funding requirement (MFR)” introduced by the Pensions Act 1995, there will also be a requirement that the cash equivalent must be of at least a minimum amount, consistent with the methods and assumptions used for calculating the MFR, adjusted, where appropriate, to take account of the fact that a cash equivalent calculation for pension sharing is made on an individual, and not a collective basis. The requirements in relation to discretionary benefits will be the same as for ordinary transfer values (see regulation 8(2) and (3) of The Occupational Pension Schemes (Transfer Values) Regulations 1996).

Subsection (2). We intend to use this subsection to prescribe that where the cash equivalent relates to salary-related benefits, then it should normally be calculated and verified in a manner approved by the scheme actuary; and in accordance with guidance published by the Institute of Actuaries and the Faculty of Actuaries.

The Department of Social Security will be in discussion with the Institute of Actuaries and the Faculty of Actuaries about whether the material needed to accommodate the introduction of pension sharing should be in a new stand alone note or an amendment to the actuarial profession’s guidance note on Transfer Values (GN11).