A Guide to the Treatment of Pensions on Divorce

The Report of the Pension Advisory Group

July 2019

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Foreword from the President of the Family Division

The publication of this final report from the Pension Advisory Group is an important and very welcome event. The importance of the work is demonstrated by the fact that a good many busy and experienced practitioners have given up valuable time over the course of the past two years to produce this definitive guidance on the approach to the issue of pensions in Financial Remedy cases before the Family Court. For too long the division of pension assets, which may often be of significant value, has been confused by jargon, complicated structure and changing provisions; for too long, also, tales of divergent approaches to pension sharing in different court centres have brought the integrity of the system into question. I am therefore extremely grateful to the Pension Advisory Group who have worked hard to produce guidance which de-mystifies this area and establishes clear ground rules for the proper approach to be taken in every case.

Francis J and HH Judge Hess were appointed as co-chairs by my predecessor Sir James Munby, and convened this multi-disciplinary group of leading experts, practitioners and thinkers in the field to deliberate on these difficult issues. The membership of the Group and the quality of this report establish its authority to pronounce on these matters. I endorse this report and, in doing so, commend it to all judges and practitioners as formal guidance to be applied when any issue regarding a pension falls to be determined in Financial Remedy proceedings.

Finally, although it may go without saying from what I have already said, I wish to record my formal thanks to everyone who has taken part in this important project; I suspect that my gratitude will soon be shared by practitioners and judges up and down the country as they become used to referring to the wisdom within these pages on a day-to-day basis.

Sir Andrew McFarlane
President of the Family Division

1st July 2019

Foreword from the Chairs of the Pension Advisory Group

We are pleased to report that, after two years of intensive hard work, through numerous meetings, a vast amount of email traffic and extensive exchange of track-changed drafts, the Pension Advisory Group has unanimously coalesced around the document which we now present and commend to all those involved in the area of pensions on divorce.

Pensions are often the single largest asset after the family home for divorcing couples, yet there is inconsistency of approach to pensions across England and Wales and a considerable shortfall in understanding. Divorcing spouses are often unaware of their rights and still less aware of how to begin to approach the issue of a fair split of pension assets. The matter is further complicated by repeated changes in the law governing pensions, such as the Lifetime Allowance which has fundamentally altered the landscape in this area. It is our hope that this document will assist and clarify the often difficult process of incorporating pension considerations into financial remedies cases in a way which is procedurally and substantively fair to the parties. Time will tell whether our hope will be realised. This document is longer than we would have wished, but it was simply not possible to say all that needs to be said in a shorter document. Our aim, however, is to produce in due course an abbreviated form of this document for use by couples who are divorcing.

Many people have contributed to this process (a full list can be found in Appendix W) but we want to make the general comment that it has been truly impressive to witness the commitment of time and energy of so many busy professionals – academics, solicitors, barristers, judges, financial experts on pensions on divorce issues (for whom we have invented the possibly unattractive acronym 'PODE') – with so much knowledge about and enthusiasm for this subject.

Finally, we wish to pay tribute to Valentine Le Grice QC, who unexpectedly and tragically died on 23rd December 2018. He had already made and was continuing to make a big contribution to the group and those involved remember with affection the lively and individual contribution to a meeting he made just a few days before his untimely death.

Nicholas   Edward Hess

The Honourable Mr Justice Nicholas Francis and His Honour Judge Edward Hess
Co-Chairs, Pension Advisory Group

1st July 2019

Acknowledgements

The Pension Advisory Group was set up in mutual recognition of the urgent need for interdisciplinary discussion between lawyers, actuaries and financial advisers to achieve better common understanding and consistency in cases involving pensions on divorce.

This resulting report reflects collaboration between a great many people who have given their time willingly and without charge over two years to the Pension Advisory Group, aiming to improve inter-professional working, provide a consensus on the law and improve practice, and, most importantly, improve outcomes for individuals involved in the resolution of pensions issues on divorce. Contributors include the members of the Pension Advisory Group, consultees, focus group and survey participants, and the many people who have fed into this report more informally at events, workshops and conferences. Too numerous to include here, we have listed contributors at Appendix W, with huge gratitude for their commitment to this project.

We are very grateful to the President of the Family Division and the Family Justice Council for their support of this project.

We thank the Nuffield Foundation for their financial support, primarily in covering the time of two of our academic members on this project and financing other general project expenses. The Nuffield Foundation is an independent charitable trust with a mission to advance social well-being. It funds research that informs social policy, primarily in Education, Welfare, and Justice. It also funds student programmes that provide opportunities for young people to develop skills in quantitative and qualitative methods. The Nuffield Foundation is the founder and co-funder of the Nuffield Council on Bioethics and the Ada Lovelace Institute. The Foundation has contributed towards the funding of this project, but the views expressed are those of the authors and not necessarily the Foundation. Visit www.nuffieldfoundation.org.

We are also grateful to the Nuffield Foundation for hosting the project website at: http://www.nuffieldfoundation.org/pensions-divorce-interdisciplinary-working-group.

We gratefully thank Brewin Dolphin PLC, wealth managers, for their support in hosting focus groups and events, David Chaplin and Helen Lacey at Bath Publishing Ltd for their kind assistance with proof-reading the report, and the University of Manchester for funding the publication of the report.

We would also like to thank the Cardiff School of Law and Politics, together with the University of Manchester and Cambridge University, under whose auspices this project has been conducted.

About this report

The Pension Advisory Group (PAG) is a multi-disciplinary group of professionals specialising in the field of financial remedies and pensions on divorce. The group was formed in June 2017 under the joint chairmanship of Mr Justice Francis and His Honour Judge Edward Hess with the aim of improving understanding of the complex area of law relating to pensions on divorce and enabling more consistent and fairer outcomes. This good practice guide is the product of over two years' work and the collaborative efforts of PAG members. It has the support of the President of the Family Division and the Family Justice Council.

PAG has sought to consult widely on the practice of pensions on divorce and has gathered information in various ways. Members have worked on one or more of three working groups, including a legal committee, an experts' committee, and a valuation committee. The working groups held numerous meetings, and there have been three meetings of the whole PAG. In April 2018, two substantive draft interim reports were sent out for consultation, one on legal and practice issues and one on experts and valuation. These are available on the Nuffield Website: http://www.nuffieldfoundation.org/pensions-divorce-interdisciplinary-working-group. This consultation process included our contacting a wide range of over 150 relevant organisations and individuals known to practise in the field, and publication of a covering article and link to the reports in various relevant journals and websites. We received approximately twenty written suggestions of further issues to consider and thirty-three written responses to the detail of the reports, including from institutions and advisory bodies, and individuals; respondents are listed in Appendix W. We conducted focus groups involving 22 family lawyers and pension and financial experts from diverse backgrounds to discuss key issues in depth; and we received 153 valid responses to an in-depth online survey for solicitors and financial advisers practising in this area. PAG members have taken part in numerous conferences and seminars around England and Wales and received very helpful feedback at these events.

Full details of PAG's members, contributors and funders are included in Appendix W to this report.

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Executive Summary

Part 1: Introduction and overview

1. The Pension Advisory Group (PAG) is a multi-disciplinary group of professionals specialising in the field of financial remedies and pensions on divorce. The group was formed in June 2017 under the joint chairmanship of Mr Justice Francis and His Honour Judge Edward Hess with the aim of **improving understanding** of the complex area of law relating to pensions on divorce **and enabling more consistent and fairer outcomes**. This good practice guide results from two years of deliberations and widespread consultation by the PAG and seeks to explain the most critical legal, actuarial and practical issues facing practitioners, the judiciary and couples who are divorcing in the area of pensions on divorce in England & Wales.

2. The guide aims to: help legal practitioners, financial experts, and judges dealing with pensions on divorce to understand issues relating to pensions in divorce cases that they may not have been aware of; provide more detailed information to those who would like to dig deeper and signpost readers on to more detailed, authoritative sources elsewhere; help parties, legal practitioners and judges to decide when 'pensions on divorce expert' (called a PODE in this report) input might be necessary to ensure that legal professionals and the clients involved are as well informed as they can be to make fair and appropriate decisions about the pension component of the overall financial settlement on divorce; draw attention to potential pitfalls that may be encountered in these cases; and provide a good practice guide for legal practitioners and experts involved in these cases. We advise on who can or should act as a PODE, what skills need to be certified, and the content of PODE reports. We also provide a comprehensive glossary of terms that parties and professionals are likely to encounter.

3. **Key recommendations** discussed in the body of this report and appendices **include**: best practice in comprehensively **gathering information** on all client's pensions, including state pensions, and benefits such as death benefits, guarantees, and other potentially complicating features; **how to approach valuations** for divorce purposes in 'needs' based and 'sharing' based cases, including timing and source of pension entitlements, apportionment of pensions, cases involving equalisation of income and equalisation of capital approaches; and cases involving **offsetting**. We discuss cases where there are **large age differences** between divorcing parties with 'income gap' issues. We comprehensively discuss complications in valuations and treatment of pensions on divorce where **Defined Benefit pension schemes** are involved and provide guidance as to when it is likely that expert advice and **expert valuations** will be needed. Lawyers, judges and parties need to be aware of **tax issues** and potential interactions with **means tested benefits**. We also cover complications arising with **post-order implementation** and **underfunding** and insolvency issues.

Part 2: Essential Action Points

4. In summary, the essential stages of a typical case include: gathering information on all of each client's pensions, using Form P for non-State entitlements and completing online requests of the DWP using BR19 and BR20 for State entitlements; comprehensively considering a range of potentially complicating issues (26 such issues are listed); validating the reasonableness of any potential valuations obtained given what is known about employment histories and pension memberships; and serving copies of applications on pension trustees where required. Parties need to evaluate whether a PODE should be instructed, considering these investigations.

A PODE is normally instructed by both parties as a Single Joint Expert (SJE). PODEs need to be able to certify that they have the necessary range of skills; and parties need to ensure compliance with regulations in the instruction of experts. A **template recommended letter of instruction** is provided.

5. Clients will need to be advised about a range of **complicating features**. These include risks relating to types of pension, retirement ages, benefits lost on pension sharing, charges, moving target syndrome, clawbacks, and income gaps. Destination funds for pensions shared need to be considered and IFA advice may need to be sought for the client. Pension annexes and Form D81 must be correctly completed, and it is good practice to set out the pre- and post- pension share financial positions and justification for any offset in or with the D81. Pension administrator approval must be sought prior to submission of paperwork for Pension Attachment Orders and it is good practice to do so for Pension Sharing Orders. Parties need to determine who is going to pay for any pension share. Specific thought needs to be given to the timing of Decree Absolute. Prompt implementation must be ensured, and outcomes reported to any PODE if an order is made following a hearing.

6. Parties need clearly to have understood the **implications of pension freedoms**; complications that arise with **final salary schemes**, unfunded Defined Benefit schemes, closed schemes and AVCs; and the value for divorce purposes of **public sector pensions**.

Part 3: The first stage: computation of pension assets and methods of division

7. Parties need to evaluate whether the Cash Equivalent (CE) represents appropriate value for divorce purposes, whether other complicating features arise, and whether a PODE needs to be instructed. Methods of settlement include a Pension Attachment Order (PAO – now rare), a Pension Sharing Order (PSO), and offsetting (a division of assets and incomes where parties retain some or all of their pensions in lieu of some other distribution). For PSOs and offsetting cases, the most common approaches are 'equalisation of income' and 'equalisation of capital'. In contested cases division is a matter of judicial discretion in the s25 exercise with guiding principles from case law; however, there is little specific case law on pensions for guidance. **Ignoring the pensions or agreeing to ignore the pensions is not an option**.

8. Whichever approach is taken, the **limitations of CE figures** need to be clearly understood, and where these are a poor reflection of value for the purposes of divorce it is likely that expert valuation and advice will be needed. This applies as a general rule to Defined Benefit (DB) schemes, and to some Defined Contribution (DC) schemes. CEs of DC and DB schemes are not usually comparable, nor are CEs from different DB schemes. Significant complications can also arise with SIPPs (Self-Invested Pension Plans) and SSASs (Small Self-Administered Schemes).

9. The **role of the PODE** is to provide valuations and expert opinion that will assist the parties and the court in the discretionary exercise, not to determine which approach or apportionment is appropriate in the case.

Part 4: Treatment of pensions in 'needs-based and 'sharing' (non-needs) cases contrasted

10. **The vast majority of divorces are needs-based cases** where broadly speaking the assets do not exceed the parties' needs, rather than being governed by the 'sharing' principle, where broadly speaking assets do exceed needs. Note though that the discretionary approach means that these are two strands of the overall search for fairness and are not necessarily always mutually exclusive. In needs-based cases the timing and source of pension assets is not generally a relevant consideration as the court can have resort to any assets, whenever acquired, to ensure the parties' needs are met. In sharing cases the issue of timing, source and apportionment remains live. In needs cases issues of potential for income streams, tax consequences, loss of value on pension sharing, and the detailed consequences of orders may be more important, and often require expert pension evidence.

Part 5: Pensions: deferred income or capital?

11. Whether a pension should be viewed as deferred income or capital depends on the case, rather than the type of pension. There is no difference in approach between Defined Contribution and Defined Benefit pensions for this purpose. Generally speaking, if it is likely that parties will withdraw **tax free lump sums**, these are seen as **capital**; the **balance of the fund** is viewed as **deferred income**; **pensions in payment** are viewed as an **income** stream. 'Pension freedoms' may affect this analysis, and the ability to withdraw a whole pension subject to tax rules may become pertinent in a particular case.

Part 6: Dealing with pensions fairly on divorce

12. The overall aim in divorce financial remedy cases is to achieve **fairness between the parties**. This applies to pensions as much as to other assets and income. But **pensions are difficult to value and difficult to divide**, and the assistance of a PODE may be needed whether the case is contested or not. It will often be fair to aim to provide the parties with similar incomes in retirement, but equality may not be the fair result depending on needs, contributions, health, ages, the length of the marriage, or, in non-needs cases, the non-matrimonial nature of the asset.

13. There are **cases where it may be appropriate to share pensions according to their CE and without the assistance of a PODE.** These might include where all pensions are Defined Contribution with no guarantees and the parties are of a similar age; both parties are under 40 and neither is in the uniformed services nor has a significant Defined Benefit scheme; where the governing principle is sharing not needs and pensions are modest in the context of other assets; where combined pension assets by CE are below £100,000; or where the only pension is a non-uniformed service public sector scheme offering internal transfer only and the remedy is pension sharing (rather than offsetting), there are no special complicating features, and there is no significant age difference between the parties.

14. However even with these examples **there may be complicating features that may necessitate PODE input**. These include where guidance is needed as to the level of income likely to be generated by a pension share; where there is a uniformed-service public sector scheme; where the pension assets are likely to exceed the Lifetime Allowance after or as a consequence of a Pension Sharing Order; where there are implicit guarantees for example

Retirement Annuity Contracts or Section 32 Buy-Out policies; where there are older occupational pension schemes with high tax-free allowances; where there is a significant disparity in State Pension entitlement (e.g. £20+ a week); where there is a choice of schemes to be transferred; where combined Defined Benefit pension CEs exceed £100,000; where there are public sector pensions and the parties are considering offsetting, there are complicating features, there is a significant age difference between the parties, or a uniformed service pension is involved; or where one of the parties has a serious medical condition.

15. Where pensions need to be expertly valued, valuations may be undertaken according to potential income value, whether the outcome is determined by sharing or needs principles. It is usual for reports to contain an equalisation of income analysis, which will pick up the quirks of the pension and is usually consistent between experts. There may be cases where the parties or court requests a capital valuation, notably in offsetting cases. There is more scope for variation between experts in these cases. In either case, it is important for **all pensions in the same case** to be valued on a **consistent basis**.

16. In some cases, an equal division is not appropriate for example in a short marriage with no children. Where the parties have worked throughout the marriage and each have their own pensions, no adjustment may be needed. On the other hand, an unequal adjustment might be appropriate in favour of a primary carer whose earning and pension accumulation capacity has been significantly impacted by looking after children.

17. A number of issues arise when considering the correct calculation approach whether for equalisation of incomes or equalisation of capital. The difficult issue is usually to consider how the pension asset can realistically meet financial needs in the future.

Part 7: The dominant practice: Pension Offsetting

18. **Offsetting** is the process by which the r**ight to receive a present or future pension is traded for present capital.** Offsetting may be desired by parties and in some circumstances may be the only feasible option. The result, however, needs to be considered and fair, and it is important that people engaged in the process know the value that they might be losing, retaining, or acquiring. It is possible to use a mixture of offsetting and pension sharing to resolve a case fairly. So far, **negligence claims** against family lawyers in cases involving pensions **overwhelmingly relate to ill-considered offsetting agreements.**

19. As noted already, the CE is often not considered an appropriate value for offsetting purposes in divorce cases, for example for DC funds with guarantees, or for public or private sector DB funds. Parties, advisers and judges also need to understand the interactions with the tax and benefit systems in considering how to value pensions for offsetting agreements. Expert valuations for the purposes of offsetting have historically shown great variation between experts using different methods. We suggest ways of narrowing these differences.

20. Where a PSO is evaluated as either bad value for money or destructive of value such that offsetting should be considered, or offsetting is being considered for some other reason, thought needs to be given to whether the pension value for offset purposes is the value of pension that could have been surrendered, or the loss of value of pension that could have been acquired. These lead to different valuations. The usual approach is to evaluate the value to the pension holder; valuing the loss

of pension that could have been acquired is especially complex. PODEs may be required to present the figures for competing approaches where the circumstances of the case suggest this.

21. There are three **options for considering the value of pensions for offsetting purposes**: the CE (often not appropriate); a figure based on calculations for equality of income or capital; a figure based on the value of the pension holder's retained present or future benefits in the absence of a pension share. The third option is likely to be the fairest in most cases. There are a few ways of approaching this valuation: (a) the Defined Contribution Fund Equivalent (DCFE); (b) the realisable value; (c) the fund account value or cashflow modelling (making assumptions about risk); (d) an actuarial value; (e) a value based on amortising the fund down to a zero balance at median life expectancy. Options (a), (b) and (d) are likely to be the most appropriate in most cases. PODEs need to state the range of acceptable opinions.

22. Adjustments to values based on the likely tax that the pension holder would pay **might be between 15% and 30%** depending on circumstances.

23. So-called **adjustments for 'utility' will often not be appropriate**; where justified in a particular case, a range of 0% - 25% might be considered. This is a matter for the parties to decide, or for judicial discretion in contested cases, and not for PODEs to decide.

24. Good practice requires that the pre- and post-implementation income, capital and pension positions of the parties be stated on or with **Form D81**, together with the nature of any expert advice taken in assessing pension value and an explanation of how the offset was arrived at. The judge will need to be satisfied that the settlement arrived at is fair.

Part 8: The impact of pension freedoms

25. Since 2015, **pension freedoms have enabled people to access their pension funds**, subject to tax, from age 55, and this increased freedom also applies to recipients of PSOs. Pension freedom flexibility might also be realised by a spouse younger than 55 sharing a pension with a spouse older than 55 to create liquidity. However, there are many issues to be aware of. Flexi-access drawdown has become an option, but, while flexible, requires the holder to accept investment return risk, interest rate risk, sequencing risk, mortality drag, longevity risk, and the inability to provide secure spousal pensions. Uncrystallised funds pension lump sums might be an option for relatively small funds, or where cashing in the whole or a series of lump sums with limited flexibility is appropriate. Advisers need to be aware of the **Money Purchase Annual Allowance** so as not to inadvertently prejudice the parties if further contributions are to be made. This is a mechanism to prevent people cashing in their pension and reinvesting in a pension to gain tax advantages. The MPAA is triggered by taking any income under flexi-access drawdown, taking an uncrystallised funds pension lump sum, or taking income from capped drawdown in excess of the cap and triggering flexi-access drawdown.

Part 9: Taxation of pension benefits on divorce

26. This complex subject is beyond the scope of this report. However, practitioners are here alerted to the potential to trigger the Money Purchase Annual Allowance which could significantly impact on the ability to rebuild a pension pot and issues with the **Lifetime Allowance**. The Lifetime Allowance is designed to restrict the maximum amount that people can accrue in pensions but people with prior accrued pensions might have protected their privileged status through allowed mechanisms. There are many issues to be aware of with the Lifetime Allowance, including that a pension share might lead to loss of protected status and tax charges; but on the other hand, a PSO might enable the parties to utilise two sets of Lifetime Allowances instead of one. The value of pension benefits for testing against the Lifetime Allowance is *not always the same* as the CE value.

Part 10: Age differential and 'income gap' syndrome

27. An **'income gap'** results when there is an **age differential** such that after a pension share, **one person is in receipt of their pension and the other is not**, possibly for many years; or where one spouse being in a short-service pension scheme such as the police or military, or for reasons of ill-health, can access their pension early whereas the other can not. The pension holder's income will be reduced during those years by the pension share with no immediate benefit for the pension claimant, while the pension claimant (and any dependent children) may need financial support during those years. Further, if the pension claimant begins to draw the pension early under pension freedom rules, they may not have sufficient income later in life. If the claimant spouse becomes a 'shadow member' in the same DB scheme as the pension holder, the benefits to each may not be the same; if the spouse was required to take a pension credit to another scheme from a DB scheme, then the new scheme is likely to be substantially less certain in providing a future income stream. Lifetime Allowance protection may be needed for the claimant spouse.

28. There are six ways that some of these **problems might be mitigated**, some of which require a high level of co-operation between the parties: a return to work by one or both parties; reverse pension sharing to create liquidity (though with tax consequences); maximising pension benefits by supplemental payments (including to State Pensions); deferring divorce; adjourning the application for a PSO (with concomitant risks); a deferred PSO (arguably technically possible but not necessarily advisable).

Part 11: State pensions on divorce

29. **State Pensions are valuable assets in divorce and must not be ignored.** Both parties need to obtain full State Pension information. Components may include Old State Pension, Basic State Pension, Additional State Pension (which can be shared by a PSO and could be valued in excess of £100k), Graduated Retirement Benefit, New State Pension, and protected payments under transitional arrangements. Protected payments can also be shared under a PSO.

30. In lower and some middle income cases, interaction of a PSO with means tested benefits in retirement may be an issue, and if potentially material, specialist advice may be required.

Part 12: Some issues arising in valuing pensions for the purposes of divorce

31. Whether pensions should be apportioned for the period of the relationship is a matter for judicial discretion in contested cases; as a general rule **in 'needs cases' apportionment is rarely appropriate.** There are three potential methods – the deferred pension method, the CE method, and the straight-line method. Sufficient data is not always available for the first two; in some cases the straight-line method is the only practical approach.

32. Where there is a clearly diagnosed medical condition with a substantial probability of impaired life expectancy, this should be reflected in the calculations; more minor or less obvious conditions where there is the possibility of change (smoking, drinking, weight) should not normally be reflected in the calculations. PODEs should clearly state assumptions about health and the effect of any assumptions on calculations.

33. Which pensions to share first may make a material difference to outcomes, and this is often not straightforward. **Where there is a choice of pensions, expert advice is likely to be needed.**

34. Lifetime Allowance issues are likely to affect more cases in future given reductions in allowances.

Part 13: Pensions where an application has been made to vary the original order

35. The breadth of judicial discretion is such that it is difficult to advise clients with any certainty of the outcome of variation applications. For petitions issued after 1 December 2000, for example, a clean break could be achieved by substituting a pension share for a periodical payments order. As a general rule**, a PSO cannot be made against the same pension from the same marriage**, but can be made against another pension from the same marriage. However, upon a capitalisation application a PSO might arguably be made against the same pension from the same marriage which has previously been subject to a PSO. It is possible to discharge a PAO and substitute a PSO on a variation application. **Pensions must not be viewed in isolation** on variation applications but must be considered alongside all other factors that the court is required to consider.

Part 14: Pensions and international issues

36. The location of a pension may be important in deciding the most appropriate jurisdiction for proceedings.

37. Anti-alienation laws in the UK preventing transfers out of a pension do not exist in all jurisdictions, and the law and possibilities in each relevant jurisdiction will need to be investigated. It is **not possible** to make a PAO or PSO against **a foreign pension**. Various complex strategies may be required to effect any division. With collaboration between the parties, it may be possible to transfer a foreign pension to England to effect a PSO.

38. English pension providers **neither recognise nor implement** PSOs made in **foreign courts**. Orders can only be made in English courts if jurisdiction exists to make these. At the time of writing this report, it is possible to found jurisdiction if conditions are met under s15(1A) of the Matrimonial and Family Proceedings Act 1984 and the EU Maintenance Regulation, Article 7. The future of this jurisdictional pathway is uncertain with the UK's withdrawal from the EU.

Appendices

39. This report contains **22 Appendices** where issues are expanded and technical details explored. These include a **comprehensive glossary**, appendices concerned with procedures and practice, issues with implementation, complexities of certain types of pension and where insolvency is an issue, data and content of PODE reports, assumptions behind PODE reports and seeking a consistent basis of valuation, the range of agreed acceptable methods for calculations, apportionment of final salary schemes, and issues relating to fees and costs. We also set out a possible future approach to pension valuation based on *Ogden*- style tables, and then detail a range of issues beyond our remit for the attention of responsible bodies. We hope that our remarks and recommendations will be helpful in reforming the law and practice in this area. Appendix W contains our detailed acknowledgements to the numerous people and bodies who have contributed to this report, and Appendix X a range of other useful resources.

Conclusion

40. This report has been written with the aim of improving knowledge, understanding, and good practice in the area of pensions on divorce. The PAG has deliberated at length and consulted widely to provide a consensus view across the disciplines involved in this field as to best practice in valuing and treating pensions on divorce. **We hope to make outcomes more predictable and consistent** for divorcing couples, their advisers, and judges across England and Wales who deal with these issues daily.

Part 1
Introduction and overview of key recommendations

1.1 This Guide seeks to explain the most critical legal, actuarial and practical issues facing practitioners, the judiciary and people getting divorced in the area of pensions on divorce[1] in England & Wales.[2]

1.2 It comes as no surprise to anyone experienced in this field that, even some two decades after the introduction of pension sharing, the professionals involved (lawyers, pensions experts and the judiciary) are still not comfortable with the issues that confront them. This may be due to the diverse nature of pensions, their complexity, and the myriad regulations that govern them. It may also be because there is very little in the way of guidance from the higher courts. Where such guidance exists, there is no clear consistency of judicial thinking and the decisions relate, in the main, to bigger money cases that are not the mainstream work of family practice. Indeed, in many high-value cases, the pension fund may simply be treated as being convertible into cash and mixed in with all the other (far more extensive) assets, without the need for specific analysis or pension-related expert input. By contrast, in more modest, small or medium money cases, the pension assets may represent a far more significant portion of the assets at stake and thus justify a greater degree of specific analysis and expert input.

1.3 This discomfort with pensions and lack of appellate guidance may in part explain the fact that **offsetting remains the most commonly adopted remedy** for dealing with pensions. Whilst academic research suggests reasons to be cautious about the fairness of divorce settlements reached by that route,[3] it is an anecdotal perception of many involved in this area of law that divorcing wives often understandably wish to concentrate on the present need to house themselves and their dependent children, even if that involves the compromise of their claims in a manner which undervalues the pension entitlements of their husbands. The treatment of pensions on divorce might be seen as the last area of unintended discrimination against wives on divorce. In so far as such decisions are being made it is important that they are made with appropriate knowledge and legal advice.[4]

1.4 Pensions are not alone in being an area where family law overlaps with other areas of law: trusts and company law are other examples. However, it remains the fact that for many

1 All references in this Guide to spouses/divorce and related terms should be taken also to refer to civil partnership and its dissolution, the law relating to which is in substance identical (though contained in different legislation).

2 Northern Ireland has separate legislation broadly comparable to that of England and Wales. Scotland has a completely different legal structure; notably, Pension Sharing Orders may be made for a cash amount rather than a percentage of the CE. Other international issues are included in Part 14.

3 Woodward with Sefton, Pensions on Divorce: an empirical study (Nuffield Foundation/Cardiff University, 2014): www.nuffieldfoundation.org/pensions-divorce. This seminal report laid the ground for understanding the scale and extent of these problems in law and practice. The issues were then exposed in further research conducted by Woodward and Taylor, and reported at Woodward and Taylor (2015) 'Apples or Pears: Pension Offsetting on Divorce' Family Law 1485 – 1497, available at https://www.familylaw.co.uk/docs/pdf-files/Apples_or_pears_-_Pension_offsetting_on_divorce.pdf . The authors there concluded:

'To date, it has not been possible to arrive at a working formula which might be applied in the valuation of pension offsets. Further interdisciplinary discussion between lawyers, actuaries and IFAs of the above key factors is needed, to achieve better mutual understanding and consistency, and grasp of the interrelationship between pension offsetting assumptions and Duxbury calculations. Interdisciplinary forums, so successful in the child law context, are a model which financial remedy lawyers could consider.'

4 It has emerged in the PAG consultation exercise that in recent years there have been a large number of negligence claims brought against lawyers in this area, the vast majority of which have involved wives accepting disadvantageous compromises involving offsetting, sometimes by failing to obtain any expert input or, where expert input has been obtained, by the lawyer ignoring or failing to understand the expert input.

family lawyers, pensions law (and the associated tax implications) remain foreign territory. This guide attempts to explain some of the matters which family lawyers dealing with pensions on divorce really need to know, for example when and how to instruct an expert, how to approach cases involving pensions, and the operation of tax regimes such as Lifetime and Annual Allowances.

1.5 The **key question** for lawyers and judges of **whether and when to instruct a 'pensions on divorce expert'** (referred to in this Guide as a **PODE**) is discussed in Part 6; a PODE is normally instructed by both parties as a Single Joint Expert (SJE)[5] and several further sections of the Guide are directed specifically to PODEs with a view to **improving the quality and consistency of PODE reports**. Appendix C and Appendix D explore who that person might be, in terms of professional qualifications and competencies. It is recognised that some of the material directed at PODEs is highly technical and may not be penetrable by those who are not PODEs.

1.6 There are many situations in which a PODE report is clearly not necessary. But in many other circumstances, such reports can add enormous value, often enabling earlier settlement to be reached by giving all parties a clearer understanding of how the pensions element of the financial settlement may most fairly be dealt with.[6] Persuading the parties of the value of such a report can be challenging, especially where costs are escalating. However, Defined Benefit pensions schemes (in particular) will often involve £100,000s or even £millions: **the financial cost of making an uneducated guess** about the pensions with a view to avoiding the relatively modest cost of a PODE report and so getting it wrong **can be immense for *either* party** (pension-holder or pension-claimant). And that, in turn, can expose one or both sets of lawyers in the case to the **risk of a negligence action** from their dissatisfied client.

1.7 It is hoped that **this Guide will**:

- help legal practitioners, financial experts, and judges dealing with pensions on divorce to understand **issues** relating to pensions in divorce cases **that they may not have been aware of**
- provide more **detailed information** to those who would like to dig deeper and signpost readers on to more detailed, authoritative sources elsewhere
- help legal practitioners and judges to **decide when PODE input might be necessary** to ensure that legal professionals and the clients involved are as well informed as they can be to make fair and appropriate decisions about the pension component of the overall financial settlement on divorce
- draw attention to potential **pitfalls** that may be encountered in these cases, and
- provide a **good practice guide** for legal practitioners and experts involved in these cases.

1.8 Our recommendations, made throughout the body of this document and with key points collated on the following page, include suggested guidance aimed at achieving consistency of approach.

1.9 In various places, we refer to the exercise of judicial discretion – we do so mindful of the fact that the vast majority of cases are, of course, not adjudicated at the end of contested

5 See PD25D para 2.1

6 Woodward with Sefton, *Pensions on Divorce: an empirical study* 5.2.9 and 5.3.2 (Nuffield Foundation/Cardiff University, 2014): www.nuffieldfoundation.org/pensions-divorce

proceedings, but are settled with or more commonly, without, contested proceedings being initiated.

1.10 Pensions law – and pensions on divorce law – has a lot of its own jargon, which can itself serve to make the subject matter difficult to comprehend. Readers will find a comprehensive **glossary of terms used in this Guide in Appendix A**.

1.11 We very much hope that you find this guidance helpful.

Overview of Key Recommendations

1.12 A brief summary of the main conclusions in the Guide is set out below.

1.13 A comprehensive **gathering of information regarding the parties' pension assets is vital**. State Pensions should not be overlooked. Care should be taken to ensure that aspects of pension entitlements which may not be immediately obvious are identified, for example death benefits and guaranteed annuities and various other potentially complicating features [Paragraph 2.5].

Gathering of information about all state and private pensions is vital

1.14 The normal approach of the court will be to have regard to pension rights accrued to the date of hearing in terms of the valuation exercise. It would rarely be justified to seek to value purported rights to be accrued in the future [Paragraphs 4.3 and 6.13].

1.15 It is important to **identify cases which are needs-based** as opposed to those which are of a sharing nature. In a big money case, where pensions are a relatively small portion of the total assets, it is unlikely that the court will be concerned to investigate the income-producing qualities of the pension assets and they will often be dealt with alongside the other realisable assets. However, given the limitations on the size of most pension funds, cases where the pension assets form a substantial part of the total assets are quite likely to be needs-based cases. Just as is the case with non-pension assets, **in needs-based cases the timing and source of the accrual of pension entitlement is unlikely to be relevant** since the court can have resort to any assets, whenever acquired, in order to ensure that the parties' needs are appropriately met [Part 4]. In those cases where some apportionment is necessary, the Guide sets out some ways in which this could be analysed [Appendix S].

1.16 In a needs-based case, in particular **where there is a significant Defined Benefit pension** involved, for the parties or court seeking to identify a fair outcome the appropriate analysis will often be to **divide the pensions separately from the other assets**, based on an **equalisation of incomes approach**, such approach often requiring **expert evidence from a PODE.** However, the question of whether equalisation of income is appropriate will be fact-specific and, if contested, a matter for judicial discretion. The Guide identifies a number of scenarios when an equalisation of incomes approach is not appropriate and/or a PODE report is unlikely to be required [paragraphs 6.10 to 6.21].

1.17 Lawyers need to have firmly in mind **the inherent limitations in the use of Cash Equivalent (CE) figures**. Even where a Defined Contribution scheme (e.g. a money purchase scheme) and a Defined Benefit scheme (e.g. a final salary scheme) have a similar CE value, their value for the purposes of divorce (e.g. in terms of what the benefits are worth to the parties or might cost to replace) can be very different indeed. A PODE should be able to identify whether this issue arises, and, if so, may play an important role in identifying how this difference may be handled to produce a fair result [paragraphs 3.7 to 3.8 and Part 6].

> There are inherent limitations in the use of Cash Equivalent figures

1.18 Where the approach of the court is to provide the parties with pension funds of an equal capital value, and in particular where a significant Defined Benefit scheme is involved, the court may be assisted by receiving expert evidence from a PODE on the value of a pension fund for divorce purposes, as opposed to the CE which may be unreliable in this context [paragraphs 6.12 to 6.21].

1.19 Consciously or otherwise, offsetting is more commonly adopted in financial remedies cases on divorce than any other solution, although not always with full and proper evaluation of the pension asset being given up. The Guide suggests some **methodologies for evaluating a fair offsetting figure** and contemplates the development of some Ogden style tables targeted specifically towards this issue [Part 7 and Appendix U].

1.20 Lawyers advising on pension on divorce issues need to be keenly aware of **taxation issues**, including Lifetime Allowance and Annual Allowance issues where they are in play. Save in the most complex of cases where specialist tax advice might be needed, PODEs should be aware of and able to comment on these issues [Part 9].

1.21 Practitioners need to be aware of the way in which **State Pension entitlements** arise and sometimes complicate pensions in divorce cases. In lower income cases it may be important to understand the potential interaction between a pension share or offset and means-tested benefit entitlements [Part 11].

1.22 Pensions on divorce cases often involve complexities of a technical, procedural and practical nature, for example **age differential** and **income gap** issues [Part 10], **public sector scheme complexities** [Appendix I], **valuation issues** [Part 6 and Part 7, and Appendix O, Appendix P and Appendix Q], **post-order implementation** issues [Appendix F], international issues [Part 14], SSAS issues [Appendix H] and underfunding and insolvency issues [Appendix K]. Practitioners need to be alert to them and how to deal with them when they arise, including whether PODE input might be required.

1.23 Recommendations are made on who should or could act as a PODE [Appendix C and Appendix D], what the **PODE should self-certify as her or his skills** [Appendix C], what format a PODE report should take [Appendix M] and what it should contain [Appendix N], how the fees of the PODE should be calculated and identified [Appendix T] and some other technical issues.

Part 2
Essential action points

Key Points

- Gather information on all client's pensions, using Form P for non-State entitlements, and Forms BR19 and BR20 online to DWP for State Pension entitlements
- Assess whether there are any potentially complicating features and whether the services of a suitably qualified financial adviser are necessary or desirable; do not as a lawyer purport to give financial advice
- Evaluate whether a PODE/Single Joint Expert should be instructed and if so, ensure compliance with FPR Part 25
- Before agreeing the wording of either a pension sharing or attachment order and an annex, in most cases it will be prudent to take financial as well as legal advice. Implementation will not start until the destination scheme details have been provided so it is best practice to obtain this before or at latest immediately after settlement
- If a Pension Sharing Order is to be made, agree who is to pay the charges; ensure that the pension claimant chooses a destination scheme (which may necessitate independent financial advice); consider whether to postpone the application for decree absolute until the order has taken effect
- Before a Pension Attachment Order is made, whether or not by consent, secure the approval of the pension provider to the wording of the order and to the annex. It is also best practice to do this with a Pension Sharing Order
- In consent order cases, make sure the D81 is completed fully and correctly for each pension; it is good practice to set out the pre- and post-implementation positions and, where pensions are being offset, the basis of the agreement
- Ensure prompt implementation of a pension sharing or attachment order, whether acting for the pension holder or claimant

Essential action points

2.1 This summary provides an account of the essential stages in a typical case. Appendix B of this document provides more detailed procedural guidance on applications to court for pensions orders, by consent and otherwise. The Appendices deal in more detail with questions around implementation and enforcement.

Gathering information and disclosure

2.2 Take comprehensive instructions at the outset about the pensions available and the client's understanding of them.

2.3 Apart from the Basic State Pension (see paragraph 11.7), **most UK pension rights are shareable**, including **uncrystallised** and crystallised pension benefits (DC **drawdown**, DB **pensions in payment** and **annuities**), as well as **unfunded pension scheme benefits**. Exceptions are made only in rare cases, including pension benefits paid on death to a surviving spouse, dependent or nominee. Pension rights paid in respect of disablement or death following an accident suffered during pensionable service are also excluded[7].

2.4 **Use Form P to gather information re non-State Pension entitlements**: The Court can direct this at FDA, but it is better to **complete Form P at an early stage**. There is a government service to help find contact details for workplace and personal pension schemes, and lost pensions, which you may find useful: see https://www.gov.uk/find-pension-contact-details

7 The Pension Sharing (Valuation) Regulations 2000 (SI 2000/1052) reg. 2

2.5 In all cases, the **minimum data** needed is:

Minimum data needs to be gathered about pensions and complicating features

- **State Pension** entitlements including State Pension, Additional State Pension, and CE valuation of Additional State Pension or Protected Payment, by client completing online requests of the DWP in Form BR19 and Form BR20 (see Part 11); and request that the other party does the same;
- an up-to-date benefit statement of anticipated pensions for **each Defined Benefit and each Hybrid pension** that any party has, including current, paid up and deferred pensions;
- the current CE value of each pension **(Defined Benefit, Hybrid, Defined Contribution[8])** as given by the pension trustees together with a full transfer pack for divorce purposes;
- confirmation as to whether any of the following **potentially complicating features** apply to each pension in the case (noting that this list is intended to cover most complications likely to be encountered but should not necessarily be treated as an exhaustive list of potential complications):
  - Are there Additional Voluntary Contributions (AVCs), and are they part of the main scheme or separate? (see paragraph 2.25) .... ☐
  - Are there death-in-service benefits, and are they part of the main scheme or separate? (see Appendix G) .... ☐
- Is it a Defined Benefit Scheme? (see paragraphs 3.6, 3.7 and 7.9)....................... ☐
- Is the scheme in transition from one kind of Defined Benefit scheme to another (such as from final salary to career average), or from a Defined Benefit to a Defined Contribution scheme? .... ☐
- For Defined Benefit schemes:
  - Is it a public sector scheme? .... ☐
  - Are there Guaranteed Minimum Pension (GMP) benefits? .... ☐
  - Is it an unfunded scheme? .... ☐
  - Is it a short-service scheme such as the police or uniformed services? .... ☐
  - Are there deferred rights? .... ☐
  - Is the scheme reduced due to underfunding?.. ☐
  - Are any material changes to the CE anticipated? .... ☐
  - If a private sector Defined Benefit scheme, are there any underfunding issues, i.e. is the scheme being assessed by or subject to FAS (Financial Assistance Scheme) or PPF (Pension Protection Fund) assessment? (see Appendix J and Appendix K) .... ☐
  - Do *any* of the complications set out in Appendix I or Appendix S apply? .... ☐
- For Defined Contribution schemes, does the policy contain any form of guarantee (for example, a guaranteed annuity rate)? ☐

8 See Glossary for definitions of terms

- Is the pension a Self-invested Pension Plan (SIPP) or a Small Self-Administered Pension Scheme (SASS)? (see paragraph 6.11 Case 11 and Appendix H) .... ☐
- Is the pension a Retirement Annuity Contract? (see paragraph 6.11, Case 8) ..... ☐
- Is the pension a s32 Buy-Out Policy? (see paragraph 6.11, Case 9) .... ☐
- Is the pension an occupational scheme set up before 2006 with entitlement to a higher than usual tax free lump sum? (See paragraph 6.11, Case 10) .... ☐
- Has any of the pension been taken as a lump sum? .... ☐
- Is the pension in payment or drawdown? ☐
- Is there a choice of schemes against which an order might be made? (see paragraphs 6.7 and 12.7)... ☐
- Is the Lifetime Allowance likely to be an issue? (see paragraph 9.5 et seq and paragraph 12.10) .... ☐
- Is there likely to be a substantial gap between the parties taking their respective pensions, e.g. because of age, ill health, or a short-service pension scheme? (see Part 10)... ☐
- Does either party have a serious medical or health condition? .... ☐
- Are there significant disparities between the parties' State Pension entitlements e.g. £20+ per week?.. ☐

2.6 In all cases, **the following validation checks** are advised:

- Disclosure of pension arrangements by considering employment history and membership of pension arrangements
- For Defined Benefit Schemes:
    - The seeming reasonableness of CE based on the accrued pension information and CE calculation basis;
    - The seeming reasonableness of accrued pension versus membership dates, salary history and scheme benefits;

  Someone who is not an expert and/or not familiar or confident with pension values may not be able to undertake these two sense-checking exercises; in which case they should consider whether a PODE ought to be instructed in the case.
- Ask the client to sign Form P in respect of each of the client's pensions;
- Request that the other party completes Form P in respect of each of their pensions.

Remember, Form P provides:

- the information required by the Pensions on Divorce etc. (Provision of Information) Regulations 2000, reg. 4;
- information about pension sharing charges.

2.7 **If contested proceedings have been initiated: serve a copy of the application** (Form A) on the **pension trustees** (as the person responsible for the pension arrangement).

Instructing a Single Joint Pension on Divorce Expert (SJE/PODE)

2.8 **Evaluate at an early stage whether a PODE should be instructed** to provide a pension report, jointly as a Single Joint Expert (SJE) or unilaterally (see Part 6 and Part 7 for discussion of cases in which this may be necessary, and paragraph 2.5 above for potentially complicating features which signal a higher risk that expert advice is needed). Appendix C and Appendix D explore who that person might be, in terms of professional qualifications and competencies. In some cases, it might be desirable to bring in at the outset a suitably qualified Independent Financial Adviser (IFA) and/or a shadow expert (i.e. an expert appointed by one party to provide pensions advice as distinct from any SJE appointed by the court) to help the client identify what they are trying to achieve financially, to give advice as to whether a report is necessary, and if so, what questions to ask. They may also be able to advise on the contents of any report, on implementation and a destination scheme where appropriate.

2.9 **A PODE will need to be able to certify** with a statement of truth that they have the necessary skills to advise in the case as set out and in accordance with Appendix D, and this should be confirmed at the outset.

2.10 **Ensure compliance with FPR Part 25 and PD 25D** (see Resolution Guidance Note on Instructing Experts for additional guidance[9]) and find out in advance how long the SJE will need to obtain the relevant information and provide the report.

2.11 **Letter of instruction** – use the template letter of instruction provided in Appendix E below; seek shadow expert advice if unsure what to ask – asking unnecessary questions can incur unnecessary costs.

Advising the client and proceeding to negotiation

2.12 **Basic issues to consider** when deciding how to approach the pensions issues in the case: **type of pension, benefits and risk, retirement age, any benefits lost on sharing, charges**.

2.13 **Advise the client on issues such as**: **moving target syndrome** (i.e. the problem that implementation will operate against a different CE from that used in negotiations or by the court, simply because of values changing over time); **clawback** in the case of sharing pensions in payment (see Appendix F, paragraph F.14); **income gap** (see Part 10).

2.14 Where the client might be receiving a pension share, you need to **consider the destination fund** – **where is the pension credit going to go**? This is essential for prompt implementation of the order. Is advice from an Independent Financial Adviser (IFA) required on this issue? Some schemes only offer internal or external transfers, while some may offer both. Where schemes offer only an external transfer, regulated financial advice will likely be needed. However, note that where schemes offer both internal and external transfers, regulated transfer advice will be needed from a *pension transfer specialist*. Note that pension sharing transfers from pensions already crystallised or in payment will provide no further tax free lump sum for the pension claimant.

9 The latest version is at: http://www.resolution.org.uk/site_content_files/files/guidance_note_instructing_experts_applications_financial_orders.pdf (but note that this is in the process of being updated) and see for the instruction of an accountant to assist with tax and company valuations: http://www.resolution.org.uk/site_content_files/files/30_instruction_of_accountants_at_first_appointment.pdf

2.15 Remember **lawyers are not regulated, qualified or insured to give financial advice**: ticking the box for an external or internal transfer where there is an option **would amount to financial advice** – independent regulated financial advice must be obtained by the client.

Lawyers need to take care not to stray into giving financial advice

Reaching agreement and obtaining a pension order by consent

2.16 Take care with the pension annex:

- ensure the **annex is completed properly** (take special care with scheme name **and** destination fund);
- any Pension Sharing Order must provide for **sharing of a percentage of the pension**, not a fixed amount. Any ambiguity could result in problems with implementation. Therefore, only a percentage Pension Sharing Order should be specified without additional wording.

2.17 **Ensure the D81 is completed fully and correctly** and the boxes dealing with pensions are accurate – remember, the Regulation 4[10] information is required for Pension Sharing Orders.

2.18 **Where pensions are being offset, it is good practice to set out an explanation for that offset in the D81:** this is not a legal requirement, but as a matter of good practice, it enables the parties, lawyers and judge better to understand the basis of a settlement involving offsetting. See paragraph 7.10.

2.19 Seeking **pension administrators' approval** ahead of submitting the paperwork to court: note the difference here depending on the type of order:

- **Pension sharing:** whilst not a requirement of the rules, it is best practice to ask the pension administrators to approve the terms of the order and the annex before they are submitted to court;
- **Pension attachment:** the rules here require administrator approval of the order and annex before they are submitted to court.

2.20 Don't forget about the **charges** for any pension sharing: who is going to pay?

The timing of Decree Absolute, and implementation issues

2.21 See Appendix F for a fuller discussion.

2.22 **Timing the Decree Absolute (DA) application**: if a Pension Sharing Order has been made, consider carefully with the client whether to delay applying for DA until 28 days after the pension order has been made. If the DA application is made earlier, the client may lose out in pension terms if their spouse dies before the Pension Sharing Order can take effect. This cannot normally be less than 28 days from its being made, although a Part 18 application may be made to the court to shorten (or increase) the 21-day appeal period.[11] But other considerations (e.g. early enforcement of a lump sum order) may favour an earlier application for DA (see Appendix F, paragraph F.7).

2.23 **Ensure prompt implementation:** The pension holder may be concerned to ensure timely implementation not least because the value of the pension may be growing. The pension

10 Pensions on Divorce etc (Provision of Information) Regulations 2000/1048

11 FPR 30.4(2)(a). In which case, potentially, the period before the Pension Sharing Order takes effect might be reduced to only 7 days.

claimant should be eager to ensure that his or her share of the pension is invested as he or she would wish it to be as soon as possible after the order has been made. The implementation period does not start until

- the order and the DA have been provided: has the court served them, as required by the Rule 9.36, Family Procedure Rules, and Practice Direction 9A? Given delays in court, consider whether, in order to achieve certainty, it would be **better for the solicitor of the pension-claimant** to serve them;
- the charges have been paid; and
- destination fund details have been provided.

2.24 **When can I close the file?** Do not close the file until you are certain that the order has been implemented or the client has given clear instructions to retain responsibility for implementation. If the Order results from a financial hearing, FPR 25.18 requires **reporting the outcome to the PODE** within 10 days of judgment.

2.25 Remember: there are a lot of **'elephant traps'** in pensions practice into which you and your client might fall if you do not investigate the pensions issues carefully and take appropriate expert advice. Many of them are explored in this guidance. Here are just a few:

- **The impact of pension freedoms** on personal pensions: can the pension-holder withdraw the whole pension to frustrate pension sharing? Possible safeguard: get an undertaking, or provide back-up lump sum?
- **Final salary schemes:** can the pension be transferred out to a personal pension and then taken in cash? Possible safeguard: seek an undertaking/injunction?
- **Value of public sector pensions:** CEs are often not representative of the value for divorce purposes and the scheme may have different tiers of membership. This is discussed below in paragraphs 3.6, 3.7, 7.9 and Part 6. Safeguard: seek advice from a PODE.
- **Unfunded public sector pensions:** unfunded public sector pensions offer an internal transfer option only for pension claimants, and no longer offer a transfer option for pension holders under pension freedoms.
- **Closed Defined Benefit schemes** with new Defined Contribution schemes. Safeguard: check how the scheme expects pension sharing annexes to be drafted - one or two? It could make a huge difference to the outcome of implementation!
- **AVCs:** check if under a separate pension scheme, or, whether included in benefits under the main scheme and therefore included in the pension sharing annex for that.

Part 3
The first stage: computation of pension assets and methods of division

Key Points

- Obtain full information on all the client's State and non-State pension entitlements as a first step; disclose this information to the other party as soon as reasonably practicable
- Assess whether the CE represents an appropriate value of the pensions for divorce purposes
- Evaluate whether a PODE is required to make an independent assessment of the appropriateness of the CE for divorce purposes and on the range of options available for pension settlements
- Consider whether to divide the pensions based on equalisation of income or equalisation of capital (see also Part 6)
- Consider the pensions in the context of all the parties' assets and income and s25 factors
- Ignoring the pensions or stating on the D81 that 'the clients have agreed to ignore the pensions' is not an option

The first stage: computation of pension assets

3.1 The 'computation stage' is the first step in the resolution of any financial matter on divorce, and pensions will normally form a key element of that process.

3.2 Pensions can only be satisfactorily addressed on divorce when a number of **evidence-gathering processes** have been undertaken, including:

- First, each party must gather information as to their various pension rights including under the state scheme, from former employments and personal pension savings schemes (see Part 2 above).
  - Check each pension for potentially complicating features (see paragraph 2.5 above)
  - Include all pension rights whether in payment or not
  - Check whether the scheme offers an internal only transfer option, external only, or both
- Second, full disclosure of the gathered information to the other party will be essential to reaching an agreement or forming the basis of a court order.
- Third, when the gathered information has been exchanged, it needs to be evaluated to ensure that the Cash Equivalent (CE) values disclosed represent appropriate value for divorce purposes and whether a PODE valuation is required (see 2.8 above, and Part 6 and Part 7).

3.3 In the course of the exercise of evaluation, **a decision will need to be made as to whether a PODE report is necessary,** to make an independent assessment of the appropriateness of any of the CE values disclosed for the purposes of divorce and the range of options available for pension settlements. This is discussed further in paragraphs 3.6 and 3.7 below, and in Part 6 and Part 7. See paragraph 2.5 above for a check-list of potentially complicating features that increase the risk that expert advice is needed.

Methods of division

3.4 There are essentially **three methods** of settlement which arise for consideration: a Pension Attachment Order (**PAO**), a Pension Sharing Order (**PSO**), and **offsetting** (i.e. deciding on a division of assets and income that reflects that one or both parties will retain some or all their pensions in lieu of some other redistribution). Almost all types of pension can be the subject of a pension sharing order, including pensions in payment. Where there is a substantial enough pension or there are multiple pensions one or more of these methods may be adopted. Which method is appropriate will depend upon the circumstances of the case. Pension Attachment Orders are now rarely made although they can be very useful in exceptional circumstances. They are not considered in this Guide save in relation to death in service pension benefits, procedural matters and the potential for variation applications as a result of the dangers which Pension Freedoms have created for pre-existing Pension Attachment Orders.[12]

3.5 For both a PSO and an offsetting settlement there are many ways of thinking about how to divide the pensions. However, the two most common are equalisation of income and equalisation of capital. The appropriate way to proceed in an adjudicated case is a matter for judicial discretion, and there is relatively little case law on the matter. Which of these two approaches is adopted may affect the approach to the computation exercise. This issue is discussed further in detail in Part 6 below.

3.6 In some cases, several of which we identify in Part 6, it may be acceptable to use an equalisation of capital approach based on the value of the CE. However, as the Family Justice Council has cautioned:[13]

> *Whatever the size of the case, any legal practitioner or judge dealing with this area needs to have firmly in mind the inherent limitations in the use of CE figures. Even where a Defined Contribution scheme (e.g. a money purchase scheme) and a defined benefit scheme (e.g. a final salary scheme) have a similar CE value, their real value (e.g. in terms of what the benefits might cost to replace) can be very different indeed. Where this issue arises, expert evidence is likely to play an important role in identifying how this difference needs to be handled to produce a fair result.*

3.7 As we discuss further in Part 6, **the CE of a simple Defined Contribution scheme with no in-built guarantees** may often be a reliable basis for valuing a pension; however practitioners need to be **more wary when considering Defined Benefit pensions**. The CE of a Defined Benefit scheme will be calculated according to the Occupational Pension Schemes (Transfer Values) (Amendment) Regulations 2008. The underlying assumptions will be decided by the trustees in consultation with the scheme actuary. The trustees can therefore decide to take into account expected mortality which may reflect the occupation and location of the majority of the workforce. More importantly, depending on the ages of the members and possibly the state of the sponsoring employer, the trustees will make assumptions of the mix of assets in the scheme which will impact on the expected investment return and differ noticeably between different schemes. **CEs of Defined Contribution and Defined Benefit schemes are very often not comparable.** Another way of looking at this is that the income produced by an equivalent CE can be significantly different between a Defined Benefit and Defined Contribution scheme and **even between different Defined Benefit schemes**. For example, suppose:

- W aged 55 has an NHS pension (Defined Benefit), CE £156,300, preserved pension of £7,500 p.a. and lump sum of £22,500, payable at age 60.
- H aged 58 has a SIPP (Defined Contribution), CE £200,000.
- If CEs are used as basis for offsetting H has a CE some £43,700 more valuable than W. Therefore, it seems some adjustment should be made for pensions by PSO or offsetting.

12 See Part 8 below

13 www.judiciary.uk/wp-content/uploads/2018/04/guidance-on-financial-needs-divorce-2nd-edition-april-2018.pdf, Annex 3

- But if H takes a lump sum of £22,500 from his pension to match that of W, H's index-linked pension at age 60 will be £5,200 pa compared with W's £7,500 pa.
    - ➔ In this case, the CE has provided a misleading basis of valuation, as it will in many Defined Benefit cases. The use of CEs can not only lead to a wrong quantum of settlement, but also on occasions the wrong direction for a settlement.

The CEs of a Defined Benefit and a Defined Contribution Scheme are not comparable

3.8 As discussed in Part 6 and Part 7 below, in those cases where it is appropriate to **go beyond the CE** it will usually be necessary to **instruct a PODE**. A PODE's valuations based on equalisation of income or equalisation of capital may be sought to assist the parties to settle and/or the court in making a PSO or an offsetting settlement.

3.9 With some pension arrangements, significant complications potentially arise. For example, a SIPP may own the commercial premises from which the pension holder conducts his or her business making a PSO very difficult (or even impossible) to implement. Specialist financial advice may be helpful in such circumstances.

3.10 The role of the **PODE is to provide valuations and expert opinion** that will assist the parties and the court in making these decisions. It is **not the PODE's role to determine which method or what apportionment is appropriate** in the case. We discuss the issue of choosing between these methods, and whether/when PODE instruction may be necessary, in greater detail in Part 6 and Part 7 below.

3.11 It is vital to note that **ignoring the pensions** or simply stating on the D81 that "the parties have agreed to ignore the pensions" **is <u>not</u> an option**.

3.12 Pensions are, of course, just one class of asset to be brought into account in the wider s 25 exercise, which is aimed at achieving a fair outcome in light of the s 25 checklist factors and the governing principles derived from case law. It would be wrong to suggest that **PODE evidence** concerning the pension assets gives greater mathematical guidance to determine the *overall* outcome of any application than is the case with other resources. But such evidence will often be important to **ensure that the nature and extent of the pension assets are properly understood**, as part of the s 25 determination.

3.13 The situation where an advising lawyer sees the need for a PODE report, but the **client chooses not to follow that advice** is a common but difficult one. A prudent lawyer should keep a clear record on the file of the advice given with reasons, signed by the client. Beyond that, how to proceed in these situations is a matter for the **advising firm's internal compliance and risk management procedures.**

3.14 We provide an overview of the evidence-gathering and disclosure process in paragraphs 2.4 to 2.6 above, with further detail in Appendix G.

Part 4
Treatment of pensions in 'needs-based' and 'sharing' (non-needs) cases contrasted

Key Points

- Identify whether the case is, broadly speaking, a 'needs' or a 'sharing' case; the vast majority will be 'needs'
- In a 'needs' case, the court can have resort to any assets to meet the parties' needs; in such cases it is rarely appropriate to apportion the pension based on the length of the marriage and existence of the pension
- By contrast, in a 'sharing' case, where the assets exceed the parties' needs, such apportionment may be appropriate

Treatment of pensions in 'needs-based' and 'sharing' (non-needs) cases contrasted

4.1 The evidence about the parties' pensions duly collated, an important initial question is whether pensions should be handled any differently according to whether the case is governed by the needs principle (where, broadly speaking, the assets do not exceed the parties' needs), or the sharing principle (where, broadly speaking, the assets do exceed needs).

4.2 The **vast majority of cases** – including cases involving low £millions - will be **needs-based**. Given the Lifetime Allowance (see Part 9), even a 'big' pension case will usually be a needs-case – it is non-pension assets that will generally take a case out of the needs bracket. However, it is essential to bear in mind that 'needs' and 'sharing' are but two strands of the **overall search for fairness**; they are not mutually exclusive.

4.3 One central issue is when regard may be had to the timing and source of pension savings:

- It is important to appreciate that in **needs-based cases**, just as is the case with non-pension assets, the **timing and source of the pension saving is not necessarily relevant** – that is to say, a pension-holder cannot necessarily ring-fence pension assets if, and to the extent that, those assets were accrued prior to the marriage or following the parties' separation. It is clear from authority that in a needs case, the court can have resort to any assets, whenever acquired, in order to ensure that the parties' needs are appropriately met.[14]

Apportionment is not usually relevant in a 'needs' case

- By contrast, in a **'sharing'** case, the question of whether all or some of the pension assets are to be treated as 'non-matrimonial property' and so not ordinarily to be distributed pursuant to the sharing principle[15] is a **live** one. The valuation of apportioned pre- and/or post-marital accrual of pension assets in these cases is discussed in Part 12 and Appendix S.

4.4 The Family Justice Council has provided the following **useful guidance** on the different significance of and approach to pension assets in needs and sharing cases:[16]

14 See *White v White* [2001] 1 AC 596, at 610, *Vaughan v Vaughan* [2010] EWCA Civ 349, [42].

15 See generally *Miller, McFarlane* [2006] UKHL 24; *Charman v Charman (no 4)* [2007] EWCA Civ 503; *Scatliffe v Scatliffe* [2016] UKPC 36, [25](v)-(x).

16 www.judiciary.uk/wp-content/uploads/2018/04/guidance-on-financial-needs-divorce-2nd-edition-april-2018.pdf, Annex 3.

In bigger money cases, where needs are comfortably met, the courts are now likely to be less interested in drawing a distinction between pension and non-pension assets than hitherto. This is partly because other assets will also be deployed for income production so the distinction is less obvious, but more because the "pension freedoms" introduced by Taxation of Pensions Act 2014 [discussed in Part 8 below], as a result of which those aged 55 or above have the option of cashing in some categories of pension scheme, have blurred the dividing line between cash and pensions and in such cases the trend is now to treat pensions as disposable cash assets, thus disregarding their income producing qualities: see SJ v RA [2014] EWHC 4054 (Fam) and JL v SL [2015] EWHC 555.

In small to medium money cases, however, where needs are very much an issue, a more careful examination of the income producing qualities of a pension may well be required in the context of assessing how a particular order can meet need. The need to avoid the possibly punitive tax consequences of cashing in a pension may be more important in these cases and the mathematical consequences of making a Pension Sharing Order (for example because of an external transfer from a defined benefit scheme to a Defined Contribution scheme or the loss of a guaranteed annuity rate) can be unexpected and often justify expert actuarial assistance: see B v B [2012] 2 FLR 22. In cases where state pension income is an important component of meeting need, the complicated changes introduced in April 2016 provide additional justification for expert pension evidence."

Part 5
Pensions: deferred income or capital?

Key Points

- The question of whether a pension should be treated as deferred income or capital is case specific and depends on the use to which the pension is to be put; it does not depend on the type of pension.

Pensions: deferred income or capital?

5.1 An important question, often raised by family lawyers, is how pension assets should be treated: as (deferred) income or as capital? Does the answer to that question vary according to the circumstances and/or type of pension? If so, when is one approach more appropriate than the other?

5.2 The answers to these questions are **case-specific rather than pension-specific** and where a PODE is instructed, he or she will suggest how best the issue might be approached in the particular case (for guidance on how the PODE may address this, see Part 6 below). There is no difference in approach between Defined Benefit and Defined Contribution cases. The treatment of the asset depends on **the use to which the pension asset is to be put**.

5.3 Three basic points can be simply stated here by way of introduction (see further from paragraph 5.4 below):

- If it is likely that either or both parties will draw a **tax-free lump sum** (whether commuted or not), this should be treated as **capital**.
- The **balance of the pension fund**, or all of it if no lump sum is to be drawn, should usually be treated as **deferred income**.
- A **pension in payment** should be treated as a **current income** stream.

5.4 **Death in service benefits** may, according to their form, take the form of either capital or income, and may be subject to pension attachment: see further Appendix G below.

5.5 The pension 'freedoms' created by the Taxation of Pensions Act 2014 (discussed in Part 8 below) do not necessarily impact on this analysis, save in cases where some or all of a pension may be drawn to meet the particular circumstances of a case. However, tax will usually be paid on such a withdrawal and the *net* sum made available should be treated as capital.

5.6 Nothing in what has just been said implies that a precise line between capital and income is always required: the court will wish to ensure that the *overall* provision of money, or money's worth, is fair, whatever form it takes.

Part 6
Dealing with pensions fairly on divorce

Key points

- The overall aim in divorce financial remedy cases is to achieve fairness between the parties. This applies to pensions as much as other assets and income. But pensions are difficult to value and difficult to divide, and the assistance of a PODE may be needed whether the case is contested or not
- It will often be fair to aim to provide the parties with similar incomes in retirement, but equality may not be the fair result depending on needs, contributions, health, ages, the length of the marriage, or, *in non-needs cases*, the non-matrimonial nature of the asset
- There are cases where it may be appropriate to share pensions according to their CE and without the assistance of a PODE. However even with these examples there may be complicating features that may necessitate PODE input
- Where pensions need to be expertly valued, valuations may be undertaken according to potential income value, whether the outcome is determined by sharing or needs principles. It is usual for reports to contain an equalisation of income analysis, which will pick up the quirks of the pension and is usually consistent between experts
- There may be cases where the parties or court requests a capital valuation, notably in offsetting cases. There is more scope for variation between experts in these cases
- Regardless of whether pensions are to be valued according to their income or capital value, it is important for all pensions in the same case to be valued on a consistent basis
- In some cases, an equal division is not appropriate; for example, in a short marriage with no children. Where the parties have worked throughout the marriage and each have their own pensions, no adjustment may be needed. On the other hand, an unequal adjustment might be appropriate in favour of a primary carer whose earning and pension accumulation capacity has been significantly impacted by looking after children.

Dealing with pensions fairly on divorce

6.1 In this Part we consider: What does a fair treatment of pension assets in each case entail? When might it be necessary to instruct a Pensions on Divorce Expert (PODE)? Should the pensions be divided between the parties according to their Cash Equivalent (CE) value, some other capital valuation or their potential income value? And when should the aim, in principle, be to equalise the spouses' pensions? The answer to these questions varies according to the circumstances. Before exploring the basic questions further, we first issue an important reminder: **never lose sight of the overall aim of fairness**.

6.2 Readers should **review this entire Part carefully**, before deciding how best to approach their current case, as there are several variables that will potentially determine which approach is the fairer one and whether PODE advice is required to help identify this.

The nature of pension assets and orders

6.3 Pension orders (other than certain Pension Attachment Orders) are 'capital' awards in the sense that the case law applicable to pensions is that applied to capital (rather than income). This is because they have an accrued value at the point of separation/trial.

6.4 However, **pensions are different from non-pension capital** in that:

- Their purpose is usually to make retirement provision and it is sometimes not possible to access them now.
- Different tax considerations apply and, bar a very small number of cases, only 25% can be taken tax free, meaning that the remaining 75% is taxable and the greater the amount drawn down in a particular tax year, the greater the tax burden.
- By their nature they are difficult to divide 'equally'. This is true both as a matter of approach (income or capital) and as a matter of practicality (complexities associated with pension funds).

The role of the PODE

6.5 Pension sharing can only be achieved by court order. Information as to the amount of income that any pension or pension share will generate can be obtained by commissioning a PODE's report. In **every case**, the parties and those assisting them (whether lawyers, mediators or any other adviser) will need to consider whether **commissioning a report** is appropriate. The test for the instruction of a PODE in contested applications is that the instruction must be 'necessary' to assist the court to resolve the proceedings.[17] A PODE should normally be instructed by both parties as a Single Joint Expert (SJE).[18] But of course, the instruction of a PODE is not restricted solely to contested cases, and in many cases where there are no financial remedy proceedings, the input of a PODE can still be most useful. Cases in which a report may be considered necessary are described in paragraphs 6.11 to 6.16 below, while the text in paragraph 6.10 below provides guidance on situations where the commissioning of a PODE's report may not be considered necessary. In some of these cases it will be helpful to take **preliminary advice from a suitably qualified financial adviser** on whether a PODE report may be **necessary or of value**; early advice on issues such as this may save time and costs later.

Important early considerations in every case are whether reports from a pension on divorce expert and advice from a regulated financial adviser are needed

6.6 There are many cases in which the parties will not be considering pension sharing at all: they will prefer to offset the pension assets. This alternate approach is dealt with at Part 7. However, PODE advice may also be necessary and/or of value **where offsetting is being considered,** particularly where the pension to be offset is a Defined Benefit pension. In many such cases, the CE, for divorce purposes, will be an undervaluation (see paragraph 3.7 above). The PODE can assist in the first stage of the offsetting process by ascribing to the pension a 'true', 'fair' or 'consistent' value to be applied when comparing the pension assets with current assets.

6.7 A further consideration is that **pension sharing may entail a significant diminution of the pension assets.** This may be the case with some Defined Benefit schemes and with Defined Contribution pensions where there is a Guaranteed Annuity Rate or any other type of guarantee. If this is the case, then the risk

17 FPR 2010 Part 25.4 (3).

18 PD25D, para 2.1

should be identified by the PODE report and the parties will need to consider possible alternative approaches to arrive at a fair outcome.

Should the aim, in principle, be to equalise the spouses' pensions?

6.8 Whilst fairness and equality will often run hand in hand, particular circumstances will often justify unequal division.[19] Leading case law is clear that **the aim is to achieve an outcome that is fair overall to both parties** and, in particular, **avoids discrimination** between the parties based on the **division of paid and unpaid work during the marriage**. Equality should be departed from only if, and to the extent that, there is good reason for doing so.

6.9 Equally, however, there is **no reason why pensions should be equalised to a greater or lesser extent than other resources**. As Lord Nicholls noted in *White,* while judges would always be well advised to check their tentative views against the yardstick of equality of division, more often than not, a fair outcome will be one that – for good reason – produces an overall division of assets that is *unequal*.[20] So just as with non-pension assets, there will be many cases in which equality (whether of CE, other pension capital valuation or income) will not be the fair result, whether because of the parties' respective needs, contributions, health, ages, the length of the marriage, or – in non-needs cases – the non-matrimonial nature of the pension assets. Paragraph 6.22 below identifies *some* types of case in which equal division may not be the appropriate approach.

Cases where PODE input may not be required and division by reference to the CE may be sufficient

6.10 In the **situations described below**, pension **CEs can usually be divided equally or in some other percentage** without the need for a PODE's report. These examples are not exhaustive. There may be other scenarios in which, after due consideration, the parties, their advisers and /or the court will conclude that division by reference to the CE will do justice. In each of the scenarios below, it is assumed that the fair outcome is equal division of CE. However, as noted at paragraphs 6.8 to 6.9 above, equality does not always equate to fairness. Further, as always, **there are traps** which could affect even the examples below and so this section should be read **in conjunction with the following paragraph 6.11** below.

Case 1 – All Defined Contribution pensions and parties of a similar age

The parties are the same (or almost the same) age and they have a Defined Contribution scheme or schemes with no implicit guarantees.

Case 2 – Younger parties

The parties are young (approximately under age 40). In this case, the potential minor departure from equality of income through the sharing of CEs would be justified by the number of variables that may occur over the intervening years between division and retirement – essentially, it is not proportionate to strive to create perfect 'equality' other than by reference to the CE. But see 6.11 Case 2 below for cases involving uniformed service pensions.

19 *White v White* [2001] 1 AC 596, 605-6.

20 Ibid.

Case 3 – Sharing cases where pensions relatively modest in value

In sharing cases (where assets exceed needs) and the pensions constitute only a small proportion of the total assets, there is a level of assets beyond which the analysis by a PODE is not proportionate or necessary. For example: *SJ v RA* [2014] EWHC 4054: assets £28,000,000, of which pensions c. £2,500,000:

> *"In cases where distribution is being made on a basis which is not guided by need it is, in my judgment, incorrect to distribute a pension fund on the basis of equality of income and there is no need for actuarial reports in the overwhelming majority of such cases."*[21]

Case 4 – Where pensions are de minimis

The pension assets are *de minimis*. Where combined pension assets are below £100,000 (measured by CE) a PODE report will rarely be justified.

Case 5 – Public sector pension only

The sole pension in issue is a single non-uniformed-service public sector Defined Benefit scheme offering an internal transfer only and:

- Settlement is by a Pension Sharing Order and not offsetting; and
- None of the complexities in Appendix I applies;
- There is no significant age difference between the parties; and
- The benefits to the pension claimant are the same as those to the pension holder.

Cases where PODE input may be required and division by reference to the CE may not be sufficient

6.11 In paragraph 6.10 above, we considered situations in which a PODE need not be instructed. However, as always, there are traps which could affect even the guidance given there. A PODE's report **might still be of value** – and information might only be revealed when the right questions are asked of the pension company – **in the following situations.**

Case 1– All Defined Contribution pensions and parties of a similar age

Where the parties are of similar age and have only Defined Contribution schemes with no implicit guarantees, guidance from a PODE may exceptionally be needed as to the level of income likely to be generated by a pension share (see paragraph 6.13 below). This is because, if the likely income is to too low to provide sufficient income in due course in the context of the case, this may influence what housing provision, capital, and/or periodical payments should be ordered now.

Case 2 – Uniformed service public sector Defined Benefit schemes

Whatever their ages, where one of the parties has a pension with a uniformed service public sector scheme (such as the Armed Forces or the Police), equal division of CE can lead to very unexpected outcomes and such cases will require PODE input.

21 *SJ v RA* [2014] EWHC 4054, [83].

Case 3 – Sharing cases where pensions are relatively modest in value in the context of overall assets

In sharing cases (where assets exceed the parties' needs) it is important to note whether pension assets are likely to exceed the Lifetime Allowance (£1,055,000 in 2019/20) after or as a consequence of the implementation of any Pension Sharing Order; then Lifetime Allowance (LTA) tax advice may be required (on the LTA, see Part 9 below).

Case 4 – Where pensions are de minimis

Care should be exercised in some cases even with pensions worth less than £100,000:

- Implicit guarantees, such as a guaranteed annuity rate, may make a pension with a CE worth less than £100,000 yield benefits as if it is worth much more (see Case 8 below); or
- If there is a significant disparity in the parties' respective entitlements under the New State Pension, more than, say, a £20 per week differential, a PODE report may be required as this differential will have a very significant capital value over the course of the parties' respective retirements[22] and a PSO may be required against even a modest private pension as the only means of alleviating this differential (note also comments on possible interactions with means-testing at paragraph 11.19 below); or
- If there is a choice of schemes to be transferred, PODE advice may be required in case the 'wrong one' is transferred and unnecessarily destroys value – see paragraph 6.7 above and Case 9 below.

Case 5 - Cases where combined Defined Benefit pension CEs exceed £100,000

Whatever their ages, where one of the parties has a significant public or private sector Defined Benefit scheme CE, equal division of CE can lead to very unexpected outcomes and such cases will require PODE input. When considering Defined Benefit pensions in a needs case, above £200,000 (measured by CE), it would usually be the case that a PODE report will be necessary. Where the combined CEs are between £100,000 and £200,000 the need for a PODE report will depend upon the facts of the case and the nature and the complexity of pension arrangements (see paragraph 2.5 for potentially complicating features). In the range between £100,000 and £200,000 the practitioner will want to bear in mind that for the purposes of divorce Defined Benefit CEs often undervalue the actual benefits which the pension holder will receive.

Even in seemingly simple pension cases, there are traps for the unwary

Case 6 – Public sector pension only

Even where the sole pension in issue is a single public sector Defined Benefit scheme offering an internal transfer only, PODE input may still be required if:

- the parties are considering offsetting; or
- any of the complexities in Appendix I apply; or
- there is a significant age difference between the parties; or

22 Substitution is not permitted in the New State Pension. See 11.6 and 11.13 below.

- the benefits to the pension claimant on internal transfer differ from those of the pension holder; or
- a uniformed service pension is involved.

Case 7 – Serious medical condition

If one of the parties has a serious medical condition, an enhanced pension may be available from the pension provider. PODE input can assist here.

Case 8 – Individual pensions with implicit guarantees

PODE input may be required in some cases with individual pensions, typically Retirement Annuity Contracts (or s226 policies) where the policy included implicit guarantees, including guaranteed annuity rates, guaranteed pensions and guaranteed lump sums. No new s226 policies were written after July 1988, but some very early personal pensions (typically those that commenced between 1988 and 1990) also had these guarantees. Where CEs are small, the value of the guarantees is often relatively small too; but, if the implicit guarantee adds a 30% increase in value to the CE, it can quickly be deduced at what level the cost of an expert's report becomes justified. Normally, this information will only be revealed by asking the right questions of the pension company as to whether any of these guarantees exist.

Case 9 – Section 32 Buy-Out policies

Section 32 Buy-Out policies (also known by a variety of similar names) are individual pension plans designed to receive an occupational pension benefit and preserve it in its original form. These plans can often include Guaranteed Minimum Pensions (GMPs) for which the receiving scheme has taken on the liability to pay the GMP benefit, irrespective of the cost to them in doing so. The value of the GMP is rarely reflected in the value of the CE until the individual reaches their relevant pension age. CEs can, therefore, often significantly undervalue the true value of the GMP. Bear in mind also that it could be extremely damaging to the owner of the s32 policy to transfer this type of arrangement under a Pension Sharing Order when other more suitable Defined Contribution schemes could be transferred instead.

Case 10 – Older occupational pension schemes

Some older occupational pension schemes set up before April 2006 can have a significantly higher tax free cash entitlement than the standard 25% - even up to 100% in certain cases. PODE input may be required.

Case 11 – Cases where assets of the pension fund are difficult to liquidate

Cases may be assisted by PODE input where the assets of the pension fund are difficult to value or liquidate, especially (for example) where there is a SIPP or SSAS (see Appendix H below).

Dividing pensions according to either their potential income value or a capital value other than the CE

6.12 In many of the cases described in paragraph 6.10 above, fair treatment of the pensions may be as simple as adding the CEs together and dividing by two. However, as outlined in paragraph 6.11, a number of factors may make this simple approach inequitable. Where the **CE is considered to be an inappropriate valuation for divorce purposes**, the question then arises as to whether the pensions should be shared according to their **potential income value** or a **capital value other than their CE.** In either of these situations, it is likely that a **PODE report will be required**.

If the CE figures are not appropriate valuations for divorce purposes PODe input is likely to be required

Dividing pensions according to their potential income value

6.13 There are two main reasons for dividing pensions according to their income value: equality and needs.

Equality: Given that the object of the pension fund is usually to provide income in retirement, **it will often be fair** (where the pension asset is accrued during the marriage) to implement a **pension share that provides equal incomes** from that pension asset. This is particularly the case where the parties are closer to retirement. Where they are further from retirement, it is arguable that the number of assumptions made in an 'equal income' calculation will render a calculation less reliable

Equality of income will often be a fair result

Needs: In many cases the parties will be dividing modest pension funds. It follows that, in order to determine whether the **parties' needs are met in retirement**, they will need to know **what their respective incomes are likely to be** following any pension sharing order. A division that pays little or no attention to income-yield may have the effect of reducing the standard of living of the less well-off party significantly. In a case **driven by needs**, any pension asset acquired pre-marriage or post-separation is (just like any other class of asset) **likely to be relevant notwithstanding its 'non-matrimonial' nature**. The normal approach of the court will be to have regard to pension rights accrued to the date of hearing in terms of the valuation exercise. It would rarely be justified to seek to value purported rights to be accrued in the future. However, it is important – as s25(2)(a) requires – to look at parties' future income needs, including their likely ability to meet their own retirement needs, whether by pension or otherwise. This is part of the discretionary distributive exercise (see paragraphs 6.8 to 6.9 above).

6.14 In general, **an income calculation requires the input of a PODE.** An important practical point is that the exercise undertaken to arrive at the figures needed to divide pensions according to their likely income value in retirement will ensure that any valuation quirks inherent in the pension are properly understood and factored into the calculations. The question of how to create equality of income – assumptions, methods, annuities etc. – is discussed in Appendix O.

Dividing pensions based on a capital value other than their CE

6.15 Dividing pensions according to their capital value other than according to the CE may be appropriate in some circumstances. Where the parties, their advisers and/or the court take the view that such division by capital is or is likely to be appropriate, the parties and the court may be assisted by a PODE report.

6.16 It is common, where a PODE report is commissioned, for an equalisation of income analysis to be undertaken as in paragraphs 6.13 to 6.14 above. This flushes out valuation issues and suggests a rationale for how the pension may be divided, if adopted by the court or the parties in negotiation. It is usually undertaken by reference to the cost of annuities, which is objectively discernible. However, in some cases the court or parties may ask for a division of an actuarially calculated capital value, instead of relying on the CE or the equalisation of income approach. A bespoke capital value, calculated by a PODE, is to some extent a subjective judgment, and different experts may reasonably arrive at different values.

6.17 PAG members were **not able to reach a full consensus** on the respective merits of **capital and income valuation** where the **CE is not thought to be a fair value** for the purposes of divorce. Most members take the view that save for the purposes of offsetting (as to which see Part 7 below) an income valuation provides all necessary information, while a capital valuation adds nothing meaningful to this and is less consistent between experts. A small but important minority however either prefer to see both calculations or would wish this to be a choice for the parties or, in contested cases, judicial determination.

6.18 Where a comprehensive equality of income calculation is appropriate and effective (see paragraph 6.14 above) and the parties are the same age, when all the valuation quirks inherent in a pension scheme are factored into the calculation, the equality of capital and equality of income calculations should result in broadly similar outcomes. In practice, therefore there may be little point in asking for both.

6.19 It is at the **discretion of the instructing parties and the court** as to which to request but it should be remembered that **only the CE can be shared**, not a higher bespoke value that may result from an equality of capital calculation. If an equality of capital report is requested and a pension benefit with a CE of, say £500k is estimated to be worth £800k on a bespoke value basis, the higher figure is unrealisable – it is a notional figure only. This point needs to be **emphasised to clients** as it is often misunderstood.

6.20 Whichever basis is chosen, **all valuations should be consistent across all pensions in that particular case,** and the usual basis, if there is a mixture of Defined Benefit and Defined Contribution pensions, would be to value all Defined Benefit pensions on a basis which provides a consistent basis of valuation with the Defined Contribution funds.

Valuations should be consistent across all pensions in the same case

6.21 Cases in which a PODE report may assist in a capital division case are:

- **Offsetting** Where offsetting is being considered (see Part 7) and either the pension CE being offset is significant or Defined Benefit schemes are involved (where in many such cases, the CE, for divorce purposes, will be an undervaluation), the PODE can assist by ascribing to the pension a bespoke 'true', 'fair' or 'consistent' value to be applied when comparing the pension assets with current assets. Two separate Defined Benefit schemes could have identical pension benefits but completely different CEs, or very similar CEs but completely different pension benefits, so they are not readily comparable. Moreover, neither might be a fair reflection of a comparative value for offsetting purposes.

- **Substantial disparity in parties' ages** Where one or both parties has significant Defined Benefit scheme CEs, typically over £100,000, the CE might not be a reliable indication of pension rights for the purposes of divorce, primarily because the cost of securing similar benefits on the open market may be far higher than the provided CE. Whilst it is common for a PODE 'equalisation of income' analysis to flush out these valuation issues, there may be some cases where this approach is not appropriate, for instance, where there is a substantial disparity in the parties' ages with a younger spouse having many years until retirement with capital remaining invested, and an older spouse needing income now.

Note however that where parties are of differing ages, an equality of capital calculation can result in unintended consequences, with each party having differing incomes in retirement. Which party has the higher income will turn on the facts of the case. The greater the age difference, the greater the disparity of incomes under the equalisation of capital method.

Some cases for unequal division

6.22 Whilst equal division of pension income or capital is often appropriate, there are some cases in which s25 factors will point to a different approach. Two such cases – very different from each other – are as follows:

Case 1: no pension-related adjustment at all?

In the case of a short marriage with no children, it may be appropriate to make only a limited adjustment, perhaps by way of offsetting. But in some such cases, no pension-related adjustment may be necessary at all, by offsetting or otherwise – for example, if both parties worked throughout the marriage and have their own pension arrangements. See for example the case study in the Advice Now / Family Justice Council guide for lay readers, *sorting out finance on divorce*, involving Sally and Raj.[23]

Case 2: needs-based adjustment

Following a short marriage with children whose presence has disrupted – and will or may continue to disrupt – earning by one spouse, the primary emphasis will ordinarily be on ensuring that the needs of the primary carer and children are met, rather than attempting (as a matter of principle) to equalise pension resources (either by reference to capital or income). The court might, however, bear in mind both: (i) the primary earner's ability to rebuild pension and other capital resources following any division required by the financial orders and (ii) whether the primary carer has ability to recover her position and so to establish/ rebuild a pension by returning to / increasing hours of paid employment at an appropriate point (given the needs of the children). **If the primary carer is simply unable to recover an income and pension contributing position** this may be a factor which would persuade a court to make an **unequal division of pension capital in favour of the carer.**

Pension Sharing Orders - Issues for PODE reports

6.23 Appendix O addresses the issues arising with the different calculation approaches when a pension share might be an option. Some issues affect equalisation of income calculations only, some affect equalisation of capital calculations only and some affect both equalisation of income and equalisation of capital. If the case is **litigated**, the question of whether an **equalisation of incomes approach** is appropriate is a matter for **judicial discretion** having regard to the circumstances of each case. The difficult issue will usually be to consider how the pension asset can realistically meet financial needs in the future.

23 www.advicenow.org.uk/guides/survival-guide-sorting-out-your-finances-when-you-get-divorced_

Part 7
The dominant practice: Pension Offsetting

Key Points

- Offsetting is the process by which the right to receive a present or future pension benefit is traded for capital or money now. There are many circumstances in which offsetting may be the only or most appropriate remedy. The difficulty lies in comparing very different types of asset, for example a pension as a future whole-of-life income stream, against cash, housing, or other non-pension assets
- The first stage of offsetting is to value the pension which is to be offset; the CE is often not a reliable comparator for divorce purposes and may not even be comparable between different Defined Benefit pension schemes; PODE input will often be required
- The main option when a PODE is valuing a pension for divorce offset purposes is to look at the value of the pension holder's retained present or future benefits assuming no pension share has been implemented
- There are various methodologies which a PODE may adopt when applying investment assumptions to discount the flow of future benefits back to a present lump sum; the three most appropriate are likely to be the Defined Contribution Fund Equivalent, the realisable value, and the actuarial value. The PODE should state the methodologies adopted and the advantages or disadvantages of each
- Adjustments to values based on the likely tax that the pension holder would pay might be between 15% and 30% depending on circumstances
- So-called adjustments for 'utility' will often not be appropriate; where justified in a particular case, a range of 0% - 25% might be considered. This is a matter of judicial discretion and not for PODEs to decide
- Good practice requires that the pre- and post-implementation income, capital and pension positions of the parties be stated on or with Form D81, together with the nature of any expert advice taken in assessing pension value and an explanation of how the offset was arrived at. The judge will need to be satisfied that the settlement arrived at is fair
- Offsetting pensions without properly considering their value is a growing source of negligence claims.

The dominant practice: pension offsetting

What is offsetting?

7.1 Offsetting, although legally defined nowhere and referred to in no statute, is by far the most frequently used approach to accommodate pensions in the overall settlement. It is the **process by which the right to receive a present or future pension benefit is traded for present capital or 'money now'**. In other words, offsetting allows one party to retain their pension rights, and in lieu, the other party has a disproportionate amount of non-pension assets, e.g. property or cash, achieved by a lump sum or property adjustment order.

> Offsetting means pension assets in the future are traded for money or capital now

7.2 Offsetting is often **viewed as an appealing outcome for primary carers** who wish to retain the family home and are prepared to give up some or all of a claim to the future benefit of the pension in order to secure it. Offsetting **may also be the only feasible option**, for example, if:

a. one party wishes to retain a capital asset (such as the matrimonial home) the value of which exceeds half the non-pension capital assets;

b. the value of the pension is disproportionately reduced by a Pension Sharing Order;

c. one party wishes to retain their pension, perhaps because it is invested in commercial property or because that party is close to retirement while the other party is not, or for some other reason;

d. the cost of pension sharing is excessive given the value of the pensions;

e. the relevant pensions are overseas pensions or are not capable of being shared for other reasons; or

f. the divorce petition was issued before 1st December 2000.

7.3 Offsetting is popular partly because it is often seen as a quick, simple and/or cheap way of dealing with pensions in financial settlements. But appearances can be deceptive, and **offsetting can be a complex process**. The **results achieved** by offsetting that has not been carefully considered **can be potentially irrational or unfair**, depending in part on the nature of the pensions involved. It is important that **people engaged in the process** know **the value that they might be losing, retaining or acquiring** in order to ensure that the **offset is fair**.

7.4 Where there have been claims of **negligence** made against family lawyers in the field of pensions, it has **overwhelmingly been in cases where offsetting has been the chosen remedy**, not pension sharing.

People must be clear about what they are losing, retaining or acquiring in offsetting cases - negligence claims overwhelmingly relate to ill-considered offsetting arrangements

7.5 It is worth noting that when pension sharing is based on equal incomes, the differences between experts in their methodologies and assumptions usually do not generate significantly different outcomes. However, when offsetting, the value placed on one pension by an expert can be significantly different from the value placed by another expert on that same pension; we suggest ways of narrowing these differences (see paragraphs 7.8, 7.18 to 7.30 and Appendix O).

7.6 The main problem with offsetting is that one is invariably **trying to compare two very different asset classes.** On the one hand, we have a pension which is a future whole-of-life income stream, and on the other we have an asset, perhaps cash, which may be immediately accessible as a lump sum. The analogy of comparing 'Apples or Pears' is often referred to here.

7.7 The obvious solution is to try, if possible, to **deal with each asset class in isolation and avoid offsetting** – a discrete solution which equalises pensions by Pension Sharing Orders and a discrete solution which equalises non-pension assets by lump sum or property adjustment orders. However, it is not always possible or desirable on the facts of a case to avoid an offsetting solution.

Offsetting and the search for fairness – key points to note

7.8 Some key points to consider are:

- Offsetting can only be used if there are sufficient 'other assets' against which the pension asset(s) can be offset.
- Offsetting is sometimes the only possible remedy if one party needs to remain in the former family home or if the pension cannot be shared (perhaps an overseas pension or an illiquid SSAS).
- It is possible to use a mixture of offsetting and pension sharing if the circumstances of particular cases dictate that this would lead to the fairest settlement.
- The **value of the pension assets** (and indeed all assets) is very important. The CE is a **starting point**. However, the CE provided is **not always considered to be an appropriate value of the pension asset for divorce purposes**. If the case solely involves Defined Contribution funds, which have no guarantees, then the CE may be a good starting point for valuation for offsetting. However, in cases involving Defined Benefit schemes, as discussed above at paragraph 3.7 and Part 6, relying on CEs can be dangerous as the case studies below demonstrate.

A PODE report is usually needed in offsetting cases because the value of rights given up is so important

- The CE is the cash sum which some pension schemes will pay in exchange for the discharge of their obligation to fund a promise of income in retirement. Due to a variety of actuarial factors peculiar to each pension scheme, economies of scale and individual taxation, the value of the pension to an individual may be quite different from the value placed on it for the scheme's CE purposes.
- An individual contributing to a pension arrangement can benefit from tax relief on the contributions made. Once a pension is in payment, the amounts received are treated as earned income and taxed as such at the individual's current tax rate. The party receiving a settlement by way of 'offset' will not be subject to tax on the amount received, although of course the offset capital may be invested in such a way as to give rise to its own tax issues.
- Lawyers, parties and advisers need to be aware of the potential interaction of any order with entitlement to means tested benefits (see paragraph 11.19).

7.9 These simple **case studies demonstrate the need for particular care** in ascertaining **pension values for the purposes of offsetting** (or other pension remedies):

Case 1: Why CEs are misleading – Defined Benefit v Defined Contributions

W aged 60 (just before retirement) has Public Sector (DB) pension CE **£300,000**

H aged 60 (just before retirement) has Scottish Widows (DC) pension CE **£300,000**

We have equality of CEs, therefore should there be no offsetting on the basis we already have equality of pensions? ***But beware***:

- **W** will receive pension of **£12,800** pa, plus a lump sum of **£38,400**, plus a widower's pension of **£6,400 from her Defined Benefit scheme.**
- **H** may be able to secure an index linked pension of **£7,800** pa with no lump sum, or pension of **£6,809** pa with a lump sum of **£38,400**

Is a pension a capital asset to be judged on CE (in which case no difference) or is it a future income stream (in which case substantial difference)?

Case 2: Why CEs are misleading – Defined Benefit v Defined Benefit

H aged 59, member of Defined Benefit scheme, CE **£750,000**

W aged 59, member of different Defined Benefit scheme, CE, **£500,000**

Both parties wish to retain their pensions. So offsetting is the chosen remedy, with **W** to receive **£250,000** more of non-pension assets.

But beware, because closer examination of schemes reveals:

- Both H and W will receive a pension of c. **£20,000** pa from age 65.
- So these pensions are almost identical – it is just that the CEs have been calculated differently by the two different schemes.

Offsetting: suggested practice point for lawyers

7.10 It is currently rare to find on the face of a court order or within Form D81 any reference to the pension and non-pension assets that form the basis of an offsetting agreement, or to the justification as to why the offsetting order is thought to be fair.

7.11 The evidence suggests that disadvantageous offsetting decisions have been a significant source of negligence claims against lawyers and a prudent lawyer might wish to **minimise this risk** by ensuring that the **justification for an offsetting agreement** is recorded on the **D81 or other documentation** supporting the draft order.

Explain the reasoning behind the offset in the D81 or supporting documents

7.12 This would be best practice. The discipline of providing justification for the agreement should reduce (1) the number of cases where disadvantageous agreements are made without proper thought, and (2) the number of cases where judges considering whether to approve consent orders need to refer the order back to the parties for an explanation as to why the order is thought to be fair.

7.13 It is recognised that the way negotiations take place in these cases, with parties having a range of motivations for agreeing to a compromise, sometimes an expressed arithmetic explanation may be impractical or unhelpful, in which case a textual or narrative explanation with some reasonable indication of overall values should be included. It is noted however that there may be rare occasions when this is not reasonably practicable and good practice might need to give way to practical expedience.

7.14 The D81 requires the parties to state the pre-implementation position only. Accordingly, it is inadequate for pension purposes in that it does not enable the judge asked to approve a consent order to see both the pre- and post-implementation positions of the parties. Recommendations are made at Appendix V paragraph V.37 for reform to Form D81. In the meantime, it is recommended that in relation to cases involving pensions, both **the pre- and post- implementation figures** are included within or in an annexe to **Form D81**, as a matter of good practice.

Steps in the pension offsetting process: in summary

7.15 The valuation of a pension for offsetting purposes can be seen as a **three-stage process**:

a. Value pension asset

b. Adjust for tax

c. Adjust for utility?

7.16 Terminology in this context can be confusing. With Defined Benefit pensions the actuarial exercise of valuing the present capital value of a future income stream (at step 1) requires the expert to select an appropriate rate of 'discount' to reflect the investment assumptions that will elicit a present capital sum. This technical use of the word 'discount' is not to be confused with the same word when used in the context of making an adjustment or discount for tax or utility. To avoid confusion, we refer to 'adjustments' for tax and utility.

7.17 The following sections explore these issues in more depth, starting with valuation of the appropriate offset in simple cases and in complex cases.

Step 1: Valuation for Offsetting

7.18 The critical issue here, as ever, is that in some cases the CE of a Defined Contribution scheme may be a reliable value for divorce purposes, whereas the CE of a Defined Benefit scheme often is not.

Simple cases

7.19 For simple Defined Contribution schemes (with no implicit guarantees or underpins), simply constituted SIPPs containing straightforward assets, small pensions or pensions in big money cases, it may be sufficient to proceed without PODE assistance using up-to-date statements of benefits for each pension and the CE values. However, even here, some care is required to ensure that there are no features (particularly to older policies) such as guaranteed annuity rates or defined benefit underpins (e.g. GMP), which may render the CE in this context as misleading as it is in the Defined Benefit context (see paragraph 6.11 above).

More complex cases

7.20 In complex cases, notably Defined Benefit schemes and other cases where the CE is poor value for money and/or where there is disproportionate destruction of value in the event of a Pension Sharing Order, first thought should be given to whether the benefits which are actually being offset are the benefits as measured by reference to what the pension-holder will be surrendering or, alternatively, what the cost would be to the non-pension holder of acquiring. These figures are not always the same. Valuing the loss of Defined Benefit pension rights to the non-pension holder is significantly more complex and it is hard to see how this can be done without the assistance of a PODE. It is our view that the usual approach should be to adopt the value to the pension holder. **Valuing the actual benefits to the**

pension holder would be a more reliable basis than using the CE valuation, which has probably been the default approach hitherto.

The usual approach is to assess the value of the pension benefits to the pension holder

7.21 However, even valuing the benefits to the pension holder may not always be the right approach, especially where there is a material difference in ages or in cases where both parties are already retired, where such an approach may be unfair or misleading. In such cases, a PODE will be required to present the figures for competing approaches as between the value which the pension holder would be surrendering and the cost to the non-pension holder of acquiring.

7.22 In complex cases, where a PODE should be involved, there are three options for considering the value of a pension for offsetting purposes:

(1) The CE

(2) A figure based on equality calculations (whether of capital or income) produced to consider whether a Pension Sharing Order is appropriate (see paragraphs 6.12 to 6.21 above and Appendix O)

(3) The value of the **pension holder's retained present or future benefits assuming no pension share has been implemented.**

7.23 Option (3) above is **likely to be the fairest method in most cases**. The CE may not capture all benefits in a Defined Benefit pension. Option (2) assumes a Pension Sharing Order, which can sometimes be destructive of value. Option (3) will value the pension benefits without any of the destruction of value which may be brought about by a Pension Sharing Order.

Example of how a PSO can destroy value

Take a case where Husband and Wife are the same age. The only pension is Husband's Private Sector Defined Benefit pension, where he is in receipt of a pension of £30,000 pa, index linked, and the CE is £500,000. The scheme will not allow the Wife, if awarded a pension credit, to retain the credit in the scheme. Instead she will be forced to secure an income on the open market. We will assume that the Wife is able to secure a pension of £4,000 pa for every £100,000 of pension credit she may receive.

As the calculation below shows, in order to equalise incomes, there may need to be a Pension Sharing Order of 60%, which reduces Husband's pension from £30,000 pa, by 60% to £12,000 pa. The Wife will receive a pension credit of £300,000, this being 60% of the CE of £500,000. With such a pension credit she is able to secure an immediate income of £12,000 pa as well.

CEV of Husband's Private Sector DB scheme	£500,000
H in receipt of Pension (Index Linked) of	£30,000 pa
Pension Sharing Order required to equalise incomes	60.0%
Husband's pension post pension sharing	**£12,000 pa**
Pension Credit received by Wife	£300,000
Immediate income secured by Wife	**£12,000 pa**
Combined income pre Pension Sharing Order	£30,000 pa
Combined income post Pension Sharing Order	£24,000 pa

As can be seen, before the Pension Sharing Order the parties had a combined pension of £30,000 pa. Post pension sharing they have a combined income of £24,000 pa. This is due to the CE of Husband's Defined Benefit pension not representing the cost of buying an equivalent pension on the open market. This is what is referred to as the destructive value of a Pension Sharing Order. It is however worth bearing in mind, that the above shows a loss of £6,000 pa of *gross* income. After tax, the net income loss will not be so pronounced, in this example, due to full use of Wife's personal allowance now being made.

7.24 What valuation methodology should the PODE consider adopting when applying investment assumptions to discount the flow of future benefits back to a present lump sum? There are the following possibilities (though this is not necessarily an exhaustive list):

(a) The **Defined Contribution Fund Equivalent (DCFE),** explained as follows: A consistent basis of valuation of a pension is variously sometimes referred to as a 'true' value or 'fair' value, but (see the discussion in Part 6 above of valuations for capital and income equalisation) there is no standard definition of the value of a Defined Benefit pension. The approach that would arguably be most useful in offsetting cases is a 'Defined Contribution Fund Equivalent' (DCFE), where a DCFE is the **gross replacement value of a Defined Benefit pension**, using the same assumptions the expert would use to determine the estimated income from a Defined Contribution scheme for equality of income pension sharing calculations. In the offsetting context, it is suggested that it would be fair to base this on an assumption that an annuity would be purchased to match the pension member's income.

(b) Realisable value: if the Pension Holder is over 55, what capital would be available, perhaps after the tax-free lump sum is taken, drawdown has been exercised and tax paid.

(c) Fund account value/Cashflow modelling which involves a bespoke analysis of parties' capacity for risk.

(d) Actuarial value: similar to DCFE but with the PODE making certain adjustments to reflect that an annuity is unlikely to be purchased.

(e) Duxbury or similar (see below for a discussion): based on amortising a lump sum to zero on median expected life expectancy, which assumes a high level of risk for the claimant.

7.25 Values (a), (b) and (d) are likely to be the appropriate methods in most cases. Option (c) requires detailed consideration of a party's individual circumstances and may not be practicable other than by a Financial Planner.

7.26 In valuing pensions for offsetting purposes, the **PODE must cater for different pension features** such as pension increases, commutation, the effect on accrued benefits for active members and the effect of drawing benefits earlier or later than the Normal Retirement Age (NRA). In addition, the PODE needs to make demographic, economic and financial assumptions (see Appendix O).

7.27 The Duxbury tables have become well established as a method of capitalising a spouse's income claim. However, these tables assume a degree of risk which is often unacceptable in the context of pensions if the other spouse is, or will become, the beneficiary of a guaranteed benefit. The capitalisation of maintenance is almost always assessed against an earned income, the acquisition of which includes endeavour and risk, which is then reflected in the payee's investment assumptions. In contrast, a pension asset is already acquired and payable for life, not just to median life expectancy. Also, the Duxbury tables in At A Glance[24] assume the recipient receives the 'full' State Pension, meaning that this amount would need to be added to the amount to be offset if the tables are to be used. However, even this adjustment is a crude one if the State Pension Age is some years off. The standard Duxbury tables cater for a present income stream, whereas in the pension offsetting context the parties may wish to consider a deferred income i.e. payable in the future (e.g. the right to £10,000 p.a. starting in 12 years' time). For these reasons in the pension context, option (e) does not enable a comparable outcome.

7.28 A helpful methodology would be for a PODE to **select two or three of the options suggested** above and set out the **calculations flowing from each option**. The PODE would highlight any caveats and perceived advantages or disadvantages of a particular option and state their preferred option on the facts of the information before them. The role of the PODE is **not to recommend an answer**, which is for the parties, or ultimately the court. Note that FPR PD25B 9.1(g) enjoins experts to state the range of opinion.

7.29 Over time, it is hoped that it may be possible – perhaps in conjunction with the much mooted 'Pensions Dashboard', which would give every pension holder in the UK an up-to-date statement of their pension assets – to produce software that will enable family lawyers (or others) to input current projections for their pensions, and that will then produce a set of Capitalised Values, suitable for offsetting purposes (without adjustment for the tax / utility issues) that are comparable with all other pensions.

7.30 Appendix U discusses the future possibility of a new approach to pension asset valuation akin to that used by Ogden tables.

Steps 2 and 3: Adjustment for tax and utility

7.31 The **Family Justice Council Needs paper** for lay readers states that once a proper valuation of the pension has been arrived at, adjustments for tax and 'utility' may result in a combined figure of between 20% and 40% being taken off the pension valuation figure.[25] This figure has no formal mathematical grounding, but it is the typical range into which, anecdotally, offsetting solutions tend to fall. The suggested parameters of 20%-40% are not intended in any way to be a straitjacket to judicial discretion but may often assist in reaching an outcome in the appropriate parish. For the reasons set out in the following sections, **we suggest the following refinement to these figures**:

(1) For **tax**, an **adjustment might be between 15% and 30%,** depending on whether it is anticipated that the pension holder will be a basic rate taxpayer in retirement or a higher rate taxpayer.

(2) For '**utility'** it may be appropriate to make **no further adjustment** (see discussion below). If justified in a particular case, a range of 0% to 25% might be appropriate.

24 It is possible to disapply the State Pension assumption in Capitalise (the electronic version of Duxbury).

25 www.judiciary.gov.uk/wp-content/uploads/2016/04/fjc-financial-needs-april-16-final.pdf or https://www.advicenow.org.uk/guides/survival-guide-sorting-out-your-finances-when-you-get-divorced at page 46

Step 2: Adjust for tax

7.32 Decide whether, and if so by what amount, it is necessary then to adjust the figure in light of the fact that, on receipt, the **pension will be only partly tax-free** and otherwise **taxed at the pension-holder's marginal rate**. This often results in an adjustment of between 15% and 30%.

> Adjustment for tax reflects the tax treatment of pension assets and income

7.33 A pension will conventionally have a tax-free lump sum of 25% of its value, with the balance drawn as income and taxed at the pension holder's marginal rate of income tax. If the 75% is subject to basic rate income tax at 20% the overall adjustment to the gross value of the pension is a 15% deduction (100% less 25% tax free leaving 75% x 20% = 15%).[26]

7.34 If the pension holder will be a higher rate tax payer when in retirement, a higher adjustment for tax would be appropriate up to a maximum of 30% (100% less 25% tax free leaving 75% x 40% = 30%).

7.35 In cases where there is no compelling argument for a utility adjustment (see below) we suggest a refinement to the Family Justice Council suggested range of 20% to 40%. If 15% (see above) has been applied to adjust for basic rate tax, then no further adjustment would be appropriate. The Family Justice Council range, if no utility adjustment is to be applied, should be between 15% and 30%, depending on whether it is anticipated that the pension holder will be a basic rate taxpayer in retirement or a higher rate taxpayer.

7.36 A further justification for the tax adjustment is that the **spouse who receives the non-pension capital will have an either/or option that will yield a tax advantage:**

- **Either** they will receive the lump sum by way of offset and may be able to re-invest this into a pension and obtain tax relief, and so potentially, having grossed up the contributions, achieve a pension fund in excess of that of the other party who has retained their pension.
- **Or** they will retain their offset capital in a non-pension environment, and arrange their affairs so that the income generated is not all taxable income (e.g. an ISA investment), but some may comprise a return of the capital, the net effect being less tax is paid on the 'income' than is paid by the pension member, where all of his or her pension income will be taxable.

Step 3: Adjust for utility?

7.37 Decide what, if any, further adjustment should be made for '**utility**': i.e. in recognition of the perceived benefit of receiving liquid capital now rather than at some future point.

7.38 Unlike tax adjustments, adjustment for utility is **not a matter on which the PODE should be expected to comment:** any utility adjustment is a matter for s25 discretion exercised to arrive at a fair and pragmatic overall settlement, not a matter of evaluation.

7.39 Quantifying the utility adjustment is more problematic than the tax discount. s25 may require a robust and pragmatic division of assets, where the realities of the parties must take precedence over the finer points of calculating precisely by how much an award deviates from equality.

26 The tax treatment of pensions is a complex subject and further detail is not discussed here beyond noting that breach of Lifetime Allowance Limits or the Money Purchase Annual Allowance may result in additional tax liabilities over and above what is posited here. See Part 9.

7.40 **It is impossible to come up with a 'rule of thumb'** formula which may assist parties with how they might apply a utility adjustment; much will depend on the facts of the case. Indeed, in some cases it may be appropriate to make no further adjustment.

It may well be appropriate to make no further adjustment for utility

7.41 The following observations are not considered to be exhaustive or a checklist, but may assist the court or parties when considering how a utility adjustment may be factored in:

a. With the advent of pension freedoms, it is arguable that the utility adjustment has lost its usefulness when considering many Defined Contribution pensions. This is because when pension holders reach 55 they are often able to liquidate their pension funds, subject to tax, converting the fund to cash. A similar argument could also be made in respect of Defined Benefit pensions, which, following professional advice and except for unfunded public service schemes, can be transferred to a Defined Contribution scheme and liquidated in the same way.

b. In 'needs' cases it may be harder to see justifications for a 'utility adjustment'.

c. If the assets are larger and the non-pension holder has income and/or capital beyond their needs, then consideration of what utility adjustment may be appropriate may be more readily defensible.

d. If the pension claimant requires present capital to meet a basic housing need for themselves or minor dependents this would point against any utility adjustment.

e. Conversely, if the pension holder is subject to an offset which results in the permanent loss of owner-occupied accommodation, this might justify the application of a utility adjustment.

f. The closer the parties are to their normal retirement age, the more the justification for a utility adjustment diminishes.

g. Our anecdotal observation is that **in many cases pensions appear to have been excessively adjusted for perceived utility.**

h. There is an argument that the recipient of an offset is at a long-term disadvantage to the pension member, rather than an advantage, by not having the equivalent amount of pension fund.

i. None of the forgoing considerations should operate to prevent fair and pragmatic overall settlements being arrived at.

7.42 Dependent on the facts of each case **a range of 0% - 25% could potentially be argued** to be appropriate as a further adjustment to pension values for offsetting purposes where the application of a utility adjustment is considered justified on the facts of the case.

7.43 Indeed in many cases property may be retained by one party on a 'needs' basis and the pension is left in the hands of the other party, not as a result of a calculated offset solution, but simply because it might be the only other substantial asset and so the justice of the case demands that the person without the property keeps something, even if it is worth palpably less than the value of the property being retained by the other party.

Part 8
The impact of 'pension freedoms'

Key points

- Be aware of 'pension freedoms' which since April 2015 allow greater flexibility and access to Defined Contribution pension schemes
- Pension freedoms give the opportunity to make a 'reverse pension sharing order' e.g. where a spouse over 55 takes the benefit of a share of the younger spouse's pension (subject to tax) to raise capital for re-housing
- Transferring benefits from a Defined Benefit to a Defined Contribution scheme to access 'pension freedoms' requires qualified financial advice and cannot be applied to unfunded public sector schemes
- Flexi-access drawdown removes the cap to income drawdown in any one year but is subject to risks and potential tax penalties
- Be aware of the Money Purchase Annual Allowance which limits the amount which can be invested in a pension in any one year (£4,000 in 2019/20) and is triggered in various ways, potentially restricting the ability to re-build a pension pot following a pension share
- Spouses with the benefit of a pension attachment order need to take advice to limit the risk of the pension holder attempting to thwart the order by drawing an Uncrystallised Funds Pension Lump Sum
- The tax regime is complex and if being considered, specialist advice should be taken.

The impact of 'pension freedoms': background

8.1 Changes to UK pension rules introduced by the Taxation of Pensions Act 2014 (the 2014 Act) provide for a **much greater degree of flexibility in how private pensions can be accessed** for individuals reaching the minimum pension age, currently age 55. These changes took effect on 6 April 2015. For many, the ability to access this additional flexibility has resulted in transfers to private pension schemes from former occupational pension schemes. These changes are frequently referred to as Pension Freedoms. This guidance does not seek to cover these changes in detail, rather to set out the key considerations in the family law context.

Pension freedoms mean that pension funds are more accessible, but with tax consequences

8.2 Prior to April 2015, individuals wishing to access their private Defined Contribution pension funds, other than in situations of ill-health and terminal illness, had limited choices. They could take their tax free lump sum, either in whole or in part, and with the remaining fund they could either (i) buy an annuity, (ii) draw down income from the remaining fund (known as Income Drawdown) or (iii) do a combination of these options. Hybrid options such as temporary annuities were and remain an option, where part of the drawdown fund is used to buy a short-term annuity, providing a combination of a stable income along with a flexible element.

8.3 Deferred members of occupational pension schemes, be they Defined Benefit or Defined Contribution schemes, in the vast majority of cases had to transfer their scheme benefits to an individual pension arrangement to access these options. This continues to be the case, except that transfers from unfunded public sector pension schemes to private pensions which allow pension freedoms are no longer permitted, and appropriate independent advice has to be taken before a transfer from a Defined Benefit occupational pension scheme is allowed for transfer values over £30,000.[27]

New pension freedom options and family law implications

8.4 There are **three key changes** that have an impact in the family law context and merit further explanation. These key changes are the introduction of **Flexi-Access Drawdown**, the **Uncrystallised Funds Pension Lump Sum** and the new **Money Purchase Annual Allowance.**

Flexi-Access Drawdown

8.5 Flexi-Access Drawdown is the new post-2015 terminology for **Income Drawdown**. Whereas previously the amount of income that could be taken from Income Drawdown was in most cases capped in a particular year, the amount of income that can be taken under the Flexi-Access rules is uncapped. This means that there is now **no limit to the amount of income that can be taken from a private pension fund**, so long as the pension provider offers the Flexi-Access option. If the option is not available, then the fund can be transferred to another provider that does provide it. It is standard practice to take the tax free lump sum before taking any further funds as taxable income.

8.6 For those who commenced Income Drawdown prior to 6 April 2015, drawdown arrangements were re-named Capped Drawdown and the old rules continue to apply. But Flexi-Access Drawdown **can be triggered at any time** simply by taking £1 more than the maximum amount of the cap in any year. Some providers will change a Capped Drawdown plan to Flexi-Access Drawdown on request.

8.7 By way of an example, under the new rules an individual with a fund of £100,000 and an unrestricted tax free lump sum entitlement could take the maximum tax free lump sum of £25,000 and then draw down anything up to £75,000 as taxable income (no income is also an option). This can be paid as a series of income payments, lump sums, or a one-off amount as the individual chooses, but **the income would be subject to income tax** in the tax year it is taken and usually at their marginal rate of income tax. For this reason, sensible tax planning is advised.

8.8 If an individual over the age of 55 is required by the circumstances of the divorce to raise a lump sum from their pension fund for whatever reason, it is **important** that they and family law practitioners **also understand the impact of the Money Purchase Annual Allowance** and when it is triggered (see paragraph 8.12), as well as the income tax implications.

Income Drawdown compared with Defined Benefit

8.9 While pension freedoms introduced the concept of Flexi-Access Drawdown and the ability to take an entire Defined Contribution pension fund as one cash sum, it must be remembered that Drawdown is not a new concept and has existed in various guises since 1995. Therefore, an **invested alternative to annuity purchase**, at least up until the age of 75, has been an available option for well over 20 years. While the attraction of the drawdown option has increased over this time, especially for those with larger pension pots and significant non-pension capital to supplement their expenditure requirement, the fact remains that

27 See Pension Schemes Act 2015, chapter 2.

an annuity remains the only way to provide a secure income for life, no matter how long somebody lives. An annuity is therefore the only reliable comparison for someone in a Defined Contribution scheme when comparing with another person's Defined Benefit pension scheme, if that Defined Benefit scheme is broadly risk free.

8.10 Conventional **annuities** (i.e. those that have no investment linking) are a **defined benefit in that they are absolutely guaranteed**, including the fact that should the annuity provider go bust the annuitant is 100% protected by the Financial Services Compensation Scheme (FSCS). Conversely, **those who choose the route of Income Drawdown accept many risks**, the principle ones being investment return risk, interest rate risk, sequencing risk, mortality drag, longevity risk and the inability to provide secure spouses pensions.

Uncrystallised Funds Pension Lump Sum

8.11 Uncrystallised Funds Pension Lump sum is an option introduced by the 2014 Act which allows a single lump sum to be drawn from an uncrystallised Defined Contribution pension scheme, part of which is taxable and part non-taxable. It is the option that people would probably select if they had either a relatively small pension fund and they wanted to cash it all in at once, or if they wanted to encash a series of lump sums but did not want or require the flexibility or relative complexity of Flexi-Access Drawdown. 25% of the fund is non-taxable and the remaining 75% is taxable. The 2014 Act specifically makes it clear that the 25% of the lump sum that is non-taxable is not technically a tax free lump sum (or Pension Commencement Lump Sum as a tax free lump sum is technically known). This has potential implications for Pension Attachment Orders where lump sum orders have previously been made against the tax free lump sum (see paragraphs 8.15 to 8.17 below).

Money Purchase Annual Allowance (MPAA)

8.12 The Money Purchase Annual Allowance (MPAA) is a mechanism devised to prevent people from drawing down on their pension funds under the new freedom rules and then reinvesting in the pension fund with the advantage of further tax relief. The **MPAA is £4,000** in 2019/20, which means that once it has been triggered, individuals who pay more than £4,000 p.a. into a Defined Contribution pension plan will usually be taxed at their marginal rate on the excess. This can have major implications for individuals wishing to rebuild their pension pots following a pension share on divorce and so it is important to understand what events **trigger the MPAA**, which are:

- Taking any income whatsoever under Flexi-Access Drawdown (FAD)
- Taking an Uncrystallised Funds Pension Lump Sum
- Taking income from Capped Drawdown greater than the cap and triggering FAD.

8.13 It is worth noting that an individual could take their entire tax free lump sum but so long as they take no income whatsoever from their Flexi-Access Drawdown, they do not trigger the Money Purchase Annual Allowance.

> The Money Purchase Annual Allowance can substantially hinder attempts to rebuild pension pots

Impact on Pension Sharing

8.14 The **pension freedom changes have little impact on pension sharing** other than allowing the recipient of a Pension Sharing Order greater flexibility in the way they access their pension fund. However, there can also be **opportunities** where perhaps one spouse has a pension fund that could be more useful in the context of divorce proceedings if it could be cashed in, but that individual is under the minimum pension age of 55. This might be, for example, to provide further liquidity for re-housing. If the other spouse is over the age of 55 then the pension could instead be transferred to them by way of a Pension Sharing Order so that they can cash it in. This might be in addition to any pension share that is being transferred to the younger ex-spouse where the older spouse has greater pension assets/benefit entitlement on divorce. Any pension cashed in does, of course, come with potential income tax consequences. This is in effect a form of reverse pension sharing to allow Defined Contribution pension schemes to create further liquidity when the spouse with the large pension assets (and from whom there is likely to be a pension share) has Defined Benefit pensions that are not so readily accessible.

Impact on Pension Attachment

8.15 Pension Attachment Orders have not been widely used for many years, largely following the advent of pension sharing, but they do still have a place and many such orders have been made. It would have been impossible when orders were made before 6 April 2015 to foresee the changes that have been introduced. There is anecdotal evidence that some parties with Pension Attachment Orders in place **are trying to thwart the original intention of the order by using this new flexibility**, especially the new options that did not exist until quite recently.

8.16 **Individuals with Pension Attachment Orders** against their ex-spouse's pension would be advised to **take immediate legal advice** as to whether the attachment still provides for what was intended or whether an application should be made to the court to seek to vary the order, or indeed preserve the pension (by injunction or suitable undertaking) from being accessed in a way that was never intended.

All those with existing Pension Attachment Orders against a former spouse's pension should take immediate legal advice in light of pension freedoms

8.17 It should also be noted that due to the way in which drawdown income is taxed by HMRC, overpayments of tax can initially arise. This has the effect of netting-down the net value of receipts that are formally attached, and the recipient of an attachment order will have no obvious legal basis for seeking their proportionate share of the overpaid tax, which is subsequently reclaimed by the pension holder from HMRC.

Part 9
Taxation of pension benefits on divorce

Key points

- The Money Purchase Annual Allowance is triggered in various ways and limits the amount which can be invested in a pension in any one year (£4,000 in 2019/20), potentially restricting the ability to re-build a pension pot following a pension share
- The Lifetime Allowance test (£1,055,000 in 2019/20) is applied on numerous crystallisation events; where pensions in this region or higher are involved seek expert advice on whether the LTA is likely to be an issue
- Check whether the pension holder has elected to protect their LTA and beware of triggering loss of protected status
- The value of a pension for LTA purposes is not necessarily the same as the CE, particularly for Defined Benefit pensions
- A party with the benefit of a Pension Sharing Order may in certain circumstances apply to HMRC for a Pension Credit factor

Taxation of pension benefits on divorce

9.1 This subject is complex and largely beyond the scope of this guidance; however, key points to be aware of in the family law context are set out below.

Background

9.2 Occupational and personal pension rules were overhauled in 2006, with pension funding being controlled by **two primary restrictions**; how much can be **contributed or accrued annually** (Annual Allowance) and how much can be **accumulated over a lifetime** (Lifetime Allowance).

Annual Allowance and the Money Purchase Annual Allowance (MPAA)

9.3 The Annual Allowance controls the annual amount of pension input into a pension scheme and so is not really impacted by pensions on divorce, except in one situation. When somebody starts to take their pension benefits, if they take any income from a money purchase or Defined Contribution scheme over and above the tax-free cash, or they take an Uncrystallised Fund Pension Lump Sum (UFPLS) (see Part 8), they trigger what is known as the Money Purchase Annual Allowance (MPAA).

9.4 The purpose of the MPAA is to prevent individuals abusing generous pension funding tax reliefs, but the MPAA could pose problems for anyone who has divorced and has been forced to take income over and above their tax free cash allowance, unless they have purchased a guaranteed annuity. Triggering the MPAA **restricts future money purchase pension funding to £4,000 p.a.** in 2019/20 and so could significantly **restrict somebody's capacity to rebuild their pension pot.** Pension holders need to be made aware of this trap if they are cashing in pensions to release additional liquidity for the divorce 'pot'.

Lifetime Allowance (LTA)

9.5 It should be noted that this is a complex subject and more detailed financial guidance and worked examples are beyond the scope of this report. Where large pensions are involved, expert advice should always be sought as to whether the LTA is likely to be an issue.

Lifetime Allowance is a complex subject and if likely to be an issue, expert tax advice should be sought

9.6 The **Lifetime Allowance** (LTA) was designed to restrict the amount an individual could accumulate in registered pension schemes over their lifetime before LTA tax charges are imposed. Pension benefits that are accumulated in excess of the LTA are subject to a Lifetime Allowance charge. The LTA started at £1.5 million in 2006 and steadily increased to £1.8 million before being cut back as a result of austerity measures to £1 million in April 2016. Following inflationary increase, it will rise to **£1,055,000 in 2019/20**. LTA charges apply where an individual's pension benefits are crystallised (taken) in excess of the LTA, with the LTA test being applied only at the point of crystallisation. There are **numerous different crystallisation events where the LTA test is applied.**

9.7 To some extent pension scheme members with significant pension benefits have been able to protect themselves from LTA charges when the various changes and reductions were introduced by applying to HMRC to retain the higher LTA prior to the reduction. These include the original introduction of the LTA in 2006 (Primary and Enhanced Protection), and then when the phased reductions commenced in 2012, 2014 and 2016 (Fixed and Individual Protection). Scheme members with LTA protection are significantly restricted as to future investment accrual and are usually unable to make further pension contributions. It is important to enquire whether the pension holder has **elected to protect their Lifetime Allowance.**

9.8 Pension sharing on divorce creates both **opportunities** in respect of the LTA, as well as **difficulties**. Losing pension scheme benefits through pension sharing can sometimes result in the **loss of a valuable protection against the LTA charge**. Conversely, sharing pensions on divorce can often remove pension benefits from the threat of an LTA charge by **utilising two LTAs rather than just the one**.

9.9 The **value of pension benefits** in a UK registered pension scheme for testing against the Lifetime Allowance is **not necessarily the same as the Cash Equivalent (CE).** For a Defined Contribution arrangement, the value is the fund value at retirement which will usually be the same as the CE. However, for a Defined Benefit scheme, the current method of estimating the value of a Defined Benefit pension for testing against the Lifetime Allowance is to take 20 times the pension payable plus any additional Cash Lump Sum payable under the rules. This value will not be the same as the CE and should not be confused as such. Beware of any scheme that offers an 'estimated CE' using this method as this could be significantly different to the true CE.

9.10 Once a pension benefit has been **crystallised and tested against the LTA** the value of that benefit **cannot be tested a second time.** However, any growth on the benefits that have been tested previously could be subsequently tested and subjected to a tax charge, unless that growth is drawn down as income, in which case it is subject to Income Tax.

9.11 Pension claimants are not tested against the LTA where the pension share is made against a pension already in payment, be that an annuity or a Defined Benefit scheme.

9.12 Where pension claimants receive pension benefits on divorce that have previously been tested against the LTA and which, together with their own pension benefits, are likely to take them over the current LTA, either now or in the future, they can apply to HMRC for a Pension Credit factor. This has the effect of increasing their own LTA by the value of the pension received on divorce.

Part 10
Age differential and 'income gap' syndrome

Key points

- Consider in all cases whether there is an age gap between the parties, or whether the terms of the pension scheme allow the pension holder to access the pension at an earlier age than the pension claimant
- In such cases, a pension sharing order may result in an immediate drop in income for the pension holder with no immediate benefit to the pension claimant; the pension claimant may be left needing a source of income to fill in the gap
- Always clarify in advance the terms of shadow membership where the pension claimant seeks an internal share of a Defined Benefit scheme
- It is particularly important to consider all the parties' assets and income in the round where a potential income gap syndrome arises; all ways of mitigating the problem come with risks and practical implications. Financial advice may be important.

Age differential and 'income gap' syndrome - causes of the problem

10.1 An **'income gap'** resulting from a pension sharing arrangement on divorce can arise for **two reasons:**

- There may be an **age difference between the parties** such that one former spouse can access a pension fund, whereas the other will not reach the minimum pension age for some time, potentially many more years.
- One former spouse may be **entitled to receive their pension early** following, for example, military or police service, or even serious ill health, but the other who was not a member of that pension scheme will not be able to access the pension credit until much later.

Income gaps can arise where there are large age differences in pensionable age, or where one party can take a pension earlier than the other

10.2 An individual with the benefit of a Pension Sharing Order (referred to here as the pension claimant) cannot (under current rules) access the pension until age 55, or the minimum age required by the scheme, unless their health is such that they will never work again. If that spouse, unable to access a pension fund immediately, is in reasonably paid work, these scenarios may not present a practical problem; indeed, that individual may have the ability to add to their pension funds in the intervening working years. But if the pension claimant has been out of the workplace for many years, they are unlikely to be able to support themselves through working and could be in difficulty without financial support to bridge the period before the pension becomes available to them. The problem is compounded if the **age gap between the parties is such that the pension-holder is**, by the time of the divorce or shortly afterwards, **already entirely reliant on pension income.** The effect of the pension share will reduce the pension holder's income, impairing their ability to pay significant spousal maintenance to the pension claimant before that spouse reaches the minimum age to access the pension. Additionally, even if the rules of the scheme permit the pension claimant to access the pension at 55, there is a considerable risk that the pension credit will be inadequate to meet the pension claimant's retirement income needs if income starts to be drawn from the pension fund at that age.

10.3 There are some **creative ideas** that may improve the position, and these are outlined below.

10.4 It should be emphasised to all judges, practitioners and experts that it is necessary to consider in <u>all</u> cases whether there is a potential income gap on divorce and, if there is, what steps can be taken to address or minimise the problem.

10.5 First, it is worth bearing in mind the following points:

- The **CE of a Defined Benefit pension or an annuity** *in payment* **can be misleading** in the divorce context as it **rarely reflects the replacement cost of the pension being valued.** Also, it is necessarily a snapshot in time: the figure then will have eroded by the time a Pension Sharing Order is implemented. If pensions are in payment, it would be helpful for the pension report to include a timeline that sets out the change in the percentage of the Pension Sharing Order required to achieve the appropriate income level for the pension claimant as the months march on.

- The calculation basis of the CE for a Defined Benefit scheme is frequently not provided and although it would be helpful if the pension provider provided information that set out the basis of their calculations, it is not a legal requirement, and many will not do so.

- Unless the parties worked for the same organisation (e.g. two police officers), or 'shadow membership' of the original pension scheme (i.e. internal membership of a pension scheme as a pension credit member) is available for the pension claimant, the recipient of a Pension Sharing Order from a Defined Benefit scheme has to transfer the pension credit to a qualifying pension arrangement of their own that is prepared to accept it. In most cases this will be a personal pension or similar. In that event, the new scheme will be a very different financial instrument and will often carry benefits that are necessarily less certain than the originating pension scheme, although greater flexibility is available when it comes to taking pension benefits.

- If the claimant spouse can **become a pension credit member of the pension holder's Defined Benefit scheme,** details of the basis on which this is offered should be clarified from the outset, as the **benefits provided are not necessarily the same as those available to the primary member**.

- Where one party has retired but there are still dependent children of the family, considerable care needs to be taken to ensure there are enough income resources available to cover the needs of those dependent children.

- Care needs to be taken in respect of **tax considerations** (see Part 9 for a fuller discussion of these). Payments from a pension may be subject to income tax, and when pension benefits are crystallised they are usually tested against the Lifetime Allowance. The Lifetime Allowance could have a **significant impact** in the future on a large pension share (e.g. one of, say, £500,000 received at the age of 40) if the recipient is relatively young and the spouse who originally had the pension benefits had not taken benefits prior to the pension share. The claimant spouse should take advice about the possibility of Lifetime Allowance protection. Where pension benefits have already been tested against the Lifetime Allowance and are then transferred by way of a Pension Sharing Order, the transferred funds can be protected from any further Lifetime Allowance test by applying for protection from HMRC. Tax considerations also change over time: the ability to make further pension contributions could be affected by changes to pension tax relief, the annual allowance, the Lifetime Allowance or a combination of all of these.

Possible mitigation of the problem

10.5 There are **six ways** from the perspective of pensions alone that might help mitigate the problem although none are perfect, some are often impracticable, most conflict with the 'clean break' break principle and most involve huge risk, which is why we remind practitioners of the **need to consider all the parties' assets and resources in the round**:

1. **Return to work -** Where the original pension-holder is still of employable age, it might be practicable for them to return to work to **supplement the pension income** that will be reduced by the pension share. Where this is no longer possible, the pension claimant might be able to help support the pension holder while they are still of working age. Where neither party is likely to work again, then it is important to explore ways in which surplus capital can improve pension income (see below).

2. **Reverse pension sharing to release additional cash -** As well as pensions, re-housing will usually be an important consideration. Where there are insufficient funds to re-house both parties adequately, it might be appropriate – if the older spouse is over the minimum pension age – to **transfer the pension fund(s) of the younger spouse to the older spouse by way of a Pension Sharing Order so that some capital could be accessed immediately** (either by way of drawdown from a Defined Contribution scheme or a tax-free lump sum). This is a convenient way of accessing pension funds that would otherwise have been out of reach until the younger spouse reached the minimum pension age, even though the older spouse may own the majority of the pension assets. Although this may come with tax consequences for any non tax free lump sum taken, if the release of capital enables the parties to re-house without the need for additional borrowing, their monthly outgoings are to that extent reduced. Careful financial advice would be needed.

3. **Maximising pension benefits** - In some circumstances, examples of which are given below, there might be surplus income or capital available to supplement further personal or State Pension provision. The first three examples below highlight the potential importance of State Pensions:

   a. Check the State Pension position (see Part 11 below). State Pension entitlement is an important bedrock of pension provision and can be increased, if appropriate, by **buying missing years of National Insurance contribution credits** (using other assets, if available) or by contributing towards future years, either on a voluntary basis or through employed or self-employed NI contributions. For those individuals who will not achieve the full New State Pension by their State Pension Age, advice should be taken from The Pensions Service on making up missing years, as this has become much more complicated following the introduction of the New State Pension in April 2016.

   b. NI credits are paid to individuals who are not in paid employment but who are in receipt of Child Benefit in respect of children up to the age of 12. Following changes to Child Benefit rules that mean higher income households who continue to receive Child Benefit incur tax charges, many non-working spouses in higher income households stopped claiming their Child Benefit. However, they should still **claim Child Benefit in order to obtain these NI credits**, but choose not to claim any payment. This is known as **Zero Rate Child Benefit**.

More information on this option can be found on the gov.uk website explaining Child Benefit. It is important if Child Benefit has not been claimed thus far in such a situation, that the spouse concerned starts claiming it as soon as possible in order to secure the NI credits going forward. A full NI contribution statement clarifies this point, as well as the position in (a) above, so that the pension claimant's own State Pension entitlement is clear.

c. Where the earning spouse rather than the non-earning spouse claimed Child Benefit, any **missing NI credits** in respect of those years where it was payable can be **re-allocated to the non-earning spouse** for those years where the earning spouse also qualified for credits through their own NI contributions. This ensures the State Pension entitlement of both spouses is maximised.

d. If the (younger) pension claimant is a member of a Defined Benefit scheme, **find out if the scheme permits the purchase of 'added years'**, and if so, what that would cost. That payment could also come from other assets, if available.

e. If the (younger) pension claimant is working, **spousal maintenance for a fixed term** might enable them to increase contributions to a pension scheme and possibly secure higher, matched employer contributions as a result. This may have to be backed up by a life assurance policy for that fixed term period (or, if unaffordable, provision under a will) that would ensure that the plan is not derailed by the premature death of the older party.

4. **Deferring divorce** - With the agreement of both spouses and in certain circumstances, deferring either the divorce or the Decree Absolute itself might enable some financial planning, during which time the (younger) pension claimant might continue to be entitled to a spousal pension by way of security in the event of the death of the other spouse. This degree of financial planning will usually require **a high level of co-operation and trust** between the parties.

5. **Adjournment** - The application for a Pension Sharing Order could be adjourned so that the (older) pension holder continues to pay maintenance to the pension claimant using income from all sources, including pension income (not yet reduced by pension sharing), until such time as the pension claimant is able to access pension benefits. It may also enable the pension holder to access a tax free lump sum, undiminished by a Pension Sharing Order, to the potential benefit of both parties provided suitable safeguards are in place. At the point where the pension claimant can access pension benefits, a Pension Sharing Order could be made. This deferral would lead to the reduction in the fund in a Defined Contribution scheme/personal pension (and a reduction in the eventual CE of a Defined Benefits scheme). But it would avoid reducing the pension holder's income by reason of a pension share that, thanks to the income gap, yields no contemporaneous benefit to the (younger) pension claimant.

   However, **this option carries risks**, requires a high level of co-operation and trust between the parties, and should be assessed very carefully with the help of good financial advice.

- The landscape at the time of the adjourned Pension Sharing Order taking effect could be entirely different, both in terms of legislation and the couple's circumstances.

- The pension holder might die before a Pension Sharing Order could be made. If the remainder of the financial order had been approved and the Decree Absolute pronounced, then (depending on the specific rules of the scheme) any death benefits under the pension scheme may not be available to the pension claimant. Some form of life cover would therefore be needed to protect the pension claimant from the potential loss on the death of their former spouse (although this assumes suitable life cover is available at an affordable cost; there are also circumstances, such as suicide, where some life policies do not pay out). It would additionally be possible to obtain a Pension Attachment Order against a death in service lump sum if that is available. However the Pension Attachment Order would need to be discharged before a Pension Sharing Order could be made on the adjourned application.

- There would be complications if the pension holder remarried and then either died or divorced a second time. A Pension Attachment Order against the same pension scheme in favour of a subsequent spouse would prevent the proposed order being made, and a Pension Sharing Order against the same scheme in favour of a subsequent spouse would reduce the fund available for sharing for the original pension claimant.

- If the pension being shared is a Defined Benefit scheme that permits shadow membership, the pension claimant's internal pension credit factor provides them a higher pension (and possibly lump sum) if the Pension Sharing Order takes effect at a date before the pension claimant reaches their pension age. So, if the PSO took effect at age 50, the pension will be higher at age 55 or 60 than it would have been had the PSO been adjourned for a few years to take effect on either of the later dates.

- While the intention to make a pension share in future could be recorded in the financial order, if the financial circumstances of either party materially changed, there is no certainty that a court would approve a Pension Sharing Order in the future; the pension claimant should therefore be cautious about relying on this alone.

- In any event, the Pension Sharing Order will have to take effect at a date some distance from the original order, and so will have to be approved by the court separately from that order. The CE values will have changed by that time and so there will be a need for further negotiation and consideration of the appropriate level of the order. The parties would be prudent to agree the principles on which they would carry out that further negotiation as part and parcel of any agreement for an adjournment of the pension sharing application. It is also possible that pension sharing could be abolished, or replaced by another, less helpful, regime in the intervening period.

6. **Deferred PSO** - It may be possible, but it is **almost certainly not advisable**, to mitigate the problem by making a deferred Pension Sharing Order. The law arguably permits for the effective date of a Pension Sharing Order to be set in the future.

Whilst the wording contained in the PSO annex suggests deferred sharing is not permissible, it probably cannot trump the express wording of s24B(2) MCA 1973 and Regulation 9 of the Divorce etc (Pensions) Regulations 2000.

However, proceeding in this way **comes with significant risk**, not least if the pension member dies before the order takes effect, and prudent litigants attempting this should probably be considering taking out a suitable life insurance policy to cover the eventuality that the Pension Sharing Order, for whatever reason, never takes effect. Obtaining scheme approval for the deferral may also be a challenge depending on the scheme's interpretation of the law.

Deferring a Pension Sharing Order by delaying serving the order on the pension provider is ineffective as the Pension Sharing Order will still have taken effect. This method can cause huge problems with pensions in payment, where a significant clawback could start to accrue (see Appendix F, paragraph F.14 et seq).

Part 11
State Pensions on divorce

Key points

- Obtain and consider State Pension information in all cases. Both parties, as early as possible (to allow ample time for a response from DWP) should complete online Form BR19 and Form BR20
- Claimants in the Old State Pension (i.e. those who reached their State Pension Age before 6 April 2016) can still substitute their former spouse's National Insurance record for their own, if this produces a higher Basic State Pension. By contrast, it is the date when the pension holder reaches State Pension Age which determines whether a claimant spouse can share any Additional State Pension
- Individuals in the New State Pension (i.e. those who reached their State Pension Age on or after 6 April 2016) can no longer substitute their former spouse's National Insurance record for their own, but can share Additional State Pension in specific circumstances
- In lower income cases be aware of the potential interaction of any Pension Sharing Order or pension offsetting with eligibility for means tested benefits both before and after State Pension Age; if this is material to the case consider whether expert advice is required.

State Pensions on divorce

11.1 State Pensions are **often one of the most valuable assets in a divorce** and should not be overlooked. Estimates of pension entitlement can be obtained by completing Form BR19. Valuations of shareable rights on divorce can be obtained by completing Form BR20. Completing both forms is the most reliable way of obtaining a full picture of an individual's State Pension entitlement, and doing this online will produce the information much more quickly than by postal applications. Be sure that you check all pages of the replies, not just the first page.

State Pensions are often among the most valuable assets in a case

11.2 Be aware that if there are gaps in a party's contribution record, **State Pension entitlement can be increased, if appropriate, by buying missing years of National Insurance contribution credits** (using other assets, if available) or by contributing towards future years, either on a voluntary basis or through employed or self-employed NI contributions. A National Insurance contribution history can be obtained via the government gov.uk website.[28] It is also worth checking that missing years where a client ought under the relevant rules to have been credited as unemployed, a carer or responsible for a child under 12 are appropriately credited. For those individuals who will not achieve the full New State Pension by their State Pension Age, advice should be taken from The Pensions Service on making up missing years, as this has become much more complicated following the introduction of the New State Pension in April 2016.

11.3 This section covers the following topics:

- Old State Pension
  - Basic State Pension substitution
  - Additional State Pension sharing
  - Graduated Retirement Benefit

28 https://www.gov.uk/check-national-insurance-record
https://www.gov.uk/national-insurance-credits
https://www.gov.uk/national-insurance-credits/eligibility

- New State Pension
    - Temporary measures for pre- 6 April 2016 divorce petitions
    - Sharing of Protected Payment

Introduction

11.4 The UK's state retirement pension can be broken down into two discrete systems, the New State Pension and the Old State Pension. Individuals who reached their state retirement age prior to the 6th April 2016 are in the **Old State Pension** and those who reach their State Pension Age on or after that date are in the **New State Pension**.

11.5 For those individuals who have a National Insurance (NI) contribution history before 6 April 2016 but **had not reached state retirement age by that date**, the New State Pension is calculated on a **transitional rate**, either through work-related contributions, through various forms of credits, or by paying Voluntary NI contributions. The starting weekly rate in the New State Pension was determined on the 6 April 2016 by calculating the higher of an individual's entitlement under the Old State Pension with their entitlement using the calculation basis for the New State Pension. This was a one-off exercise and individuals with a starting amount lower than the maximum rate of New State Pension can accrue additional credits up to the maximum rate of New State Pension through any of the above means up until the tax year before the tax year in which they reach State Pension Age. Those with a New State Pension starting amount on 6 April 2016 higher than the maximum rate of New State Pension are unable to increase their weekly rate further, irrespective of whether they continue to pay NI contributions.

Old State Pension

11.6 The Old State Pension comprises the Basic State Pension, Additional State Pension and Graduated Retirement Benefit.

Basic State Pension

11.7 Entitlement to Basic State Pension is obtained through one's own NI contribution history, known as a Category A pension, or on a reduced rate basis using the NI contribution history of a spouse, known as a Category B pension. The Basic State Pension **cannot be split or shared on divorce**. However, **individuals in the Old State Pension can substitute their former spouse's NI contribution history for their own where their former spouse has a higher Basic State Pension entitlement.** This is known as 'substitution' and it increases those individuals' own Basic State pension up to an amount broadly equivalent to the amount of Basic State Pension being received by their former spouse with the higher pension, **without reducing the latter's entitlement**.

11.8 To claim substitution, the claimant (i.e. the person with the lower Basic State Pension) would need to send either an original or certified copy of the Decree Absolute to the Pensions Service, providing their and their ex-spouse's NI number. Where the claimant reaches State Pension Age before 6 April 2016 but their ex-spouse reaches State Pension Age on or after 6 April 2016, only the ex-spouse's NI contribution history up to 6th April 2016 can be substituted. This is because no further Basic State Pension was accrued after 6th April 2016 as it is not a feature of the New State Pension.

Additional State Pension

11.9 An **Additional State Pension can be shared** in the same way as occupational and private pensions.[29] Additional State Pension is the composite term for the earnings-related component of the State Pension built up under the State Earnings Related Pension Scheme (SERPS) from 1978 and then from 2002 until 2016 under the State Second Pension. Some individuals can have significant amounts of Additional State Pension, particularly those who were relatively high earners and who never contracted out of the Additional State Pension through an employer's pension scheme or their own private pension. The **Additional State Pension can be one of the largest assets in a divorce, sometimes worth in excess of £100,000.**

11.10 An individual can obtain a valuation of their Additional State Pension from the Pensions Service by completing a Form **BR20**. Paper and online versions are available, but online applications are dealt with more quickly than paper ones. The weekly amount of Additional State Pension can be found on the State Pension statement that the Pensions Service sends each year to those in receipt of their State Pensions. Individuals who have deferred taking their State Pension will need to contact the Pensions Service for written confirmation of their weekly amount, including the addition for deferral.

11.11 For there to be a pension share against Additional State Pension, only the person whose Additional State Pension is to be shared must **have reached State Pension age prior to 6 April 2016**, even where that person has applied to defer taking their State Pension. A pension share can be made against the Additional State Pension in these circumstances on any petition issued on or after 1 December 2000, even if the petition is issued after 6 April 2016, unlike the rules for those now in the New State Pension (see below). The percentage inserted into the pension sharing annex is the percentage of the Cash Equivalent.

Graduated Retirement Benefit

11.12 Graduated Retirement Benefit can form part of the Old State Pension for those who accrued state pension credits before 1975, although it tends to be a relatively modest amount of money. On average, it is approximately £1.40 per week for women and approximately £5.50 per week for men. **It has never been possible to share Graduated Retirement Benefit**, either through pension sharing or substitution.

New State Pension

11.13 The New State Pension commenced on the 6 April 2016. In principle, it **cannot be shared**. There are, however, two limited circumstances where divorcing individuals can receive a pension share against their ex-spouse's former (under previous rules) **Additional** State Pension where their former spouse is in the New State Pension.[30]

11.14 Individuals who reached their state pension age on or after 6 April 2016 and are therefore in the **New** State Pension are **unable to increase their pension by substituting their former spouse's NI contribution history for their own**. This is because the Basic State Pension does not form part of the New State Pension.

29 This will apply only where the divorce petition was issued on or after 1 December 2000. While this restriction will not affect the vast majority of cases, it would affect some: [2015] UKSC14 *Wyatt v Vince*-style late applications and some variation applications (no statute of limitation for financial remedy applications).

30 Note that there can be no sharing against a New State Pension where there are no pre-April 2016 Additional State Pension rights, i.e. in the case of very young spouses who have only acquired State Pension rights since April 2016.

Sharing Additional State Pension for petitions pre-6 April 2016

11.15 The first instance is where the **petition for divorce was issued before the 6 April 2016**, in which case the entire Additional State Pension, if any, can potentially be shared. Once again CEs can be obtained from the Pensions Service using a Form BR20, but the Service would need to be advised of the petition issue date if a valuation is required of the full Additional State Pension in this scenario. The pension claimant would receive a percentage pension share based on the CE of their former spouse's Additional State Pension, and the Pensions Service then calculates at the point of implementation the additional amount of weekly pension to be added to the pension claimant's own State Pension entitlement. For those individuals who have deferred taking their State Pensions, any pension sharing amount that they are awarded is added to their basic entitlement before the addition of their deferral amount.

Sharing of Protected Payment

11.16 The second instance in which Additional State Pension can be shared in New State Pension cases is where an individual who reached State Pension Age on or after 6 April 2016 had **such a large Additional State Pension that their total weekly amount of New State Pension exceeds the full amount of New State Pension** (£168.60 per week in 2019/20). On 6 April 2016 a calculation was run to determine the starting amount in the New State Pension for those individuals who reached State Pension Age on or after that date. This compared their entitlement under the old system with their entitlement based on the new calculation basis for the New State Pension. Where an individual's New State Pension weekly starting amount is higher than the full amount of the New State Pension, the difference is known as the 'Protected Payment'. So, for example, somebody with a New State Pension amount of £180 per week in 2018/19 would have a Protected Payment of £11.40.

11.17 Unless the divorce petition was issued before 6 April 2016, **only the Protected Payment element of a New State Pension can be shared**. Individuals can obtain valuations of their Protected Payment amount from the Pensions Service using the Form **BR20**. The calculation for sharing the Protected Payment has been much simplified compared to the sharing basis under the Old State Pension. The pension share is now based on a percentage of the pension holder's weekly amount of Protected Payment. For example, a 50% Pension Sharing Order against £20 per week of Protected Payment would leave the pension holder with £10 per week in addition to their full amount of New State Pension. The pension claimant would receive an additional £10 per week to their own State Pension. To give effect to that example, the figure 50% would be inserted into the relevant box on the Pension Sharing Order Annex as the percentage value of the shared weekly amount.

Interaction with means tested benefits

11.18 There are many means tested benefits available to people after State Pension Age to those on low income and with modest non-housing capital. At the date of writing this report, the most common means tested benefits for those over State Pension Age are pension credit, housing benefit, council tax benefits and cold weather payments; but pension share recipients may also be under State Pension Age or may have a partner who is, and so be eligible for universal credit and/or other means tested benefits. Receipt of means tested benefits may then passport the recipient onto other benefits. Social care funding is also means tested. Means tests may include capital and income, and benefits are often tapered. Each benefit has different eligibility criteria, and some such as social care funding may have local rules.

11.19 Lawyers who are advising in lower income cases need to **be aware of the potential interaction of any Pension Sharing Order or pension offsetting with eligibility for means testing** both before and after State Pension Age in case this is material to the case, and to take specialist advice if this is likely to be an issue for one or both parties.

Beware: pension sharing may result in the reduction of other benefits

Part 12
Some issues arising in valuing pensions for the purposes of divorce

Key points

- Apportionment of the pension according to the period of the marriage or relationship is rarely appropriate in needs cases
- In sharing cases, where apportionment may be appropriate, give the PODE clear instructions on whether the calculation is to be based on the deferred pension method, the CE, or a straight timeline. In some cases, the straight timeline is the only practical approach
- Substantially impaired life expectancy should be reflected in a PODE's calculations, but minor health conditions or those amenable to change should not normally be so
- Where there is a choice of pensions to share, a PODE should be instructed. The PODE should outline the alternatives with their advantages and disadvantages and highlight cases where there is a loss of value due to pension sharing
- A PODE should indicate if there are potential Lifetime Allowance issues but specialist advice may also be needed
- See also Part 9 and Appendix S.

Apportionment for period of relationship

12.1 Whether pensions should be apportioned for a period of the relationship is a matter of judicial discretion in adjudicated cases, and a matter for the parties in uncontested cases. However, broadly speaking, **in needs cases** (where the assets do not exceed the parties' needs) **apportionment is rarely appropriate**; in sharing cases (where the assets do exceed the parties' needs) apportionment may be appropriate (see Part 4 for more detail).

Apportionment for periods of a relationship is rarely appropriate in 'needs' cases

12.2 In those cases where apportionment on a basis **other than straight timeline** is considered appropriate, the **PODE will need clear information about the relevant career and contribution history.** Alternatively, he or she will require instructions on whether the calculations should assume a straight timeline discount of the pre-marital or post-separation accruals. Full details of the different methods are set out in Appendix S. In summary:

a. The deferred pension method apportions by identifying the pension rights accrued to the date of marriage and then allowing for any revaluation increases that would have been made to a deferred pension during the period to the present date. This figure is then compared with the value of the accrued pension at the present date to identify the proportion of the pension rights to be excluded.

b. The Cash Equivalent (CE) method apportions by taking the CE as at the date of marriage with no adjustment and comparing that with the CE now. This will, in many cases, lead to a relatively small proportion of the pension fund being excluded from consideration, but can often be objectively fairer.

c. The straight timeline method apportions on the basis that the benefits are simply divided up assuming they have all accrued evenly over the period. Thus, if the member has 30 years' service and 10 of those are prior to the marriage, then a simple 20/30ths of the total benefits is included in the calculations. The straight timeline method apportions promotional salary increases granted during the marriage on pensionable service before the marriage to the pre-marriage element.

12.3 Sufficient data are not always available to calculate either the deferred pension method or the CE method and, in some cases, the straight-line method is the only practical approach.

12.4 Defined Contribution or money purchase schemes cause difficulties due to lack of availability of contribution, fund switch, and fund return data. If a premium history is available, but no fund return information, a notional fund return approach on a proportionate basis is an acceptable method.

Parties' health status

12.5 Where there is a **clearly diagnosed medical condition with a substantial probability of impaired life expectancy, this should be reflected in the calculations.** More minor or less obvious conditions, especially where there is the possibility of change (e.g. a heavy smoker or drinker, or overweight or obese) should not normally be reflected in the calculations.

12.6 A PODE report should clearly state any assumption made about health and, where allowance has been made, the approach taken and the effect of any adjustments on the calculations.

Which pensions to share

12.7 The PODE must consider in all cases **whether it matters which pension(s) are shared**. The PODE must also clearly state **whether there is any potential loss of value on a PSO**.

12.8 Generally speaking, a pension share from a Defined Contribution scheme would be the first to consider. However, in some cases, it is not straightforward. For example, where the CE of a Defined Benefit scheme is very high, the calculations can show a higher income for both parties if the Defined Benefit scheme is shared first. In such cases, alternative methods should be demonstrated with the outcome and any advantages and disadvantages clearly explained.

12.9 In cases where there is a loss of value due to pension sharing this should be highlighted and explained together with an explanation of the alternative options for dealing with the pension assets.

Lifetime Allowance

12.10 A summary of the Lifetime Allowance and the issues it may raise for pensions on divorce is given in Part 9 above. With the reduction in the Lifetime Allowance, more cases are likely to be affected by Lifetime Allowance issues. Where relevant, the potential issues raised by the Lifetime Allowance must be detailed in an expert report. If requested, additional calculations allowing for the Lifetime Allowance at the current rate should be provided. However, it should be made clear that appropriate specialist advice should be taken with respect to the Lifetime Allowance and financial planning. Sometimes, divorce will offer an opportunity to rebuild a pension if a party transfers pension rights and has income from which to rebuild.

Part 13
Pensions where an application has been made to vary the original order

Key points

- The court has a wide discretion when dealing with variation applications and pensions should be considered alongside all the other factors
- Pension Sharing Orders are not available on variation applications that relate to petitions issued before 1 December 2000
- As a general rule, a Pension Sharing Order cannot be made twice against the same pension from the same marriage. However, on a capitalisation application, a Pension Sharing Order might arguably be made against the same pension from the same marriage which has previously been subject to a Pension Sharing Order.
- A pre-existing pension attachment order can be discharged on the variation application, thus permitting a Pension Sharing Order to be made instead against that same pension, even if it relates to the same marriage
- All Pension Attachment Orders are capable of variation except for an order attaching a member's death in service, which cannot be varied after the death of one of the parties.

Pensions where an application has been made to vary the original order

13.1 The role that pensions play in **variation applications** is **problematic**. The breadth of judicial discretion is such that it is **difficult to advise clients with any certainty** of the outcome of variation applications. This is demonstrated by the following example:

> It is difficult to advise with any certainty on variation applications

13.2 The parties (H and W) to a 25-year marriage with two now adult children divorced in 2001.

A compromise was reached such that:

- The £1.6m non-pension capital was divided equally between them.
- Pensions were divided such that W received a pension share of H's money purchase scheme and H retained entirely a public sector pension. The Cash Equivalents (CEs) at the time were broadly equivalent. The certainty of the return and prospects for growth of the different pensions were very different.
- H was to pay W maintenance of £50,000 p.a. on a joint lives basis from his earned net income of £150,000 p.a.

In 2016, H opens a discussion with W as to how a clean break might be achieved on his imminent retirement. Their respective financial positions are:

H:

- He lives in the former matrimonial home which is now worth c£3.5m and is subject to a £1.7m mortgage.
- He has additional non-pension assets worth in the region of £1m.
- The element of his retained money purchase SIPP is now worth £400,000. His public sector pension now has a CE of £3.2m and will produce a guaranteed index-linked income in retirement of £120,000 gross per annum.

W:

- She lives in an £800,000 property free of mortgage.
- She has an ISA with a value of £120,000.
- She has a SIPP with a value of £700,000.

13.3 The leading authority relevant to this set of facts is *Pearce* v *Pearce*.[31] A Pension Sharing Order was not available on Mrs Pearce's application to vary a periodical payments order because her petition long pre-dated 1 December 2000 (so, unlike in the example being explored here, the court lacked any jurisdiction to make orders over the parties' pensions at any stage). However, Thorpe LJ stated as follows:

> *Of course I recognise that it is likely to be many years before the typical case invoking the court's jurisdiction under section 31(7B) [the power of variation] has cleared the restriction imposed by section 85(3)(b) [which prevents Pension Sharing Orders being made ancillary to petitions issued before 1 December 2000]. That is regrettable. In this outpost of the ancillary relief territory the task of the practitioners and the judges would be much eased by the option of providing for the former wife a personal pension carved out of the former husband's pension portfolio.*[32]

Thorpe LJ concluded his judgment as follows:

> *There are advantages and possible dangers in attempting in a paragraph to summarise the message of this judgment. What follows is therefore not intended to be a substitute for a full reading where necessary. But my essential general conclusions are:*
>
> *i) On dismissing an entitlement to future periodical payments the court's function is not to reopen capital claims but to substitute for the periodical payments order such other order or orders as will both fairly compensate the payee and at the same time complete the clean break.*
>
> *ii) In surveying what substitute order or orders should be made first consideration should be given to the option of carving out of the payor's pension funds a pension for the payee equivalent to the discharged periodical payments order.*[33]

13.4 The breadth of the court's discretion on the above example set of facts is such that it is conceivable that awards could be made at the following extremes following a contested hearing:

A W receives a pension share against H's public sector scheme that provides her with a guaranteed index-linked pension that, when aggregated with the income generated by her SIPP on an equivalent basis, would meet her reasonable income needs.

B A clean break could be imposed between the parties on the basis that W would treat her SIPP as a *Duxbury* fund such as to meet her reasonable income needs as assessed by the court and there would be no share of H's pension.

13.5 These divergent possible outcomes would leave H and W in radically different financial positions in retirement. A would be far more attractive to W and B to H. However, sight must not be lost of each party's broader financial circumstances when advice is given in relation to a capitalisation application. Pension 'tunnel vision' must be avoided.

31 [2003] EWCA Civ 1054.

32 Ibid at [15].

33 Ibid at [45].

Recommendations and reminders for dealing with variation applications

- Pensions must **not be viewed in isolation** on variation applications. It is important to consider them alongside all the other factors which the court is required to balance on a variation application.

- Pension Sharing Orders are **not available on variation applications that relate to petitions which were issued before 1 December 2000.**

- By the Matrimonial Causes Act 1973, s24B, Pension Sharing Orders are **not available twice against the same pension relating to the same marriage**. It is a matter of debate whether another Pension Sharing Order against the same pension might be available under Matrimonial Causes Act 1973, s31(7B)(ba) on a capitalisation type variation application, the words "under this section" appearing to open this possibility. On one view the wording of s31(7G) prevents this. On another view that section only prevents two orders against the same pension under s31(7B)(ba). There being no decided authority on this point, the PAG expresses no view on this debate.

- A Pension Sharing Order cannot be made against a pension in respect of which a Pension Attachment Order subsists. However, a pre-existing Pension Attachment Order can be discharged on the variation application, thus permitting a Pension Sharing Order to be made instead against that same pension even if it relates to the same marriage.

- It should be remembered that **all species of Pension Attachment Orders are capable of variation <u>except</u> for an order attaching a member's death in service**, which cannot be varied after the death of one of the parties.

Part 14
Pensions and international issues

Key points

- It is not possible to make a pension sharing or pension attachment order against a foreign pension, but depending on the jurisdiction and degree of cooperation between the parties, other strategies including offsetting may be available
- A pension sharing order made in a foreign court is not enforceable in this jurisdiction, but if jurisdiction here can be established an application may be possible under Part III of the Matrimonial and Family Proceedings Act 1983.

Pensions and international issues

14.1 Two main areas need to be considered:

1. where a pension remedy is required in this jurisdiction against an overseas pension, and

2. where a pension order is required in this jurisdiction against an English/Welsh pension following an overseas divorce.

Pensions orders against overseas pensions

14.2 Given the very real difficulties which can exist in enforcing orders against overseas pensions and the fact that a pension fund may be one of the largest marital resources, the location of the pension may well be a very important issue in deciding the most beneficial forum for proceedings.

Pensions can be an important issue in deciding forum for proceedings

14.3 The **anti-alienation restrictions** contained in UK pensions law preventing the transfer of the funds away from the pension holder **do not apply to all overseas pensions**, although some jurisdictions have comparable restrictions. Where no such restrictions exist, it will be possible to use the flexibility of such pension funds to make a conventional lump sum order as an alternative to a Pension Sharing Order either immediately or on deferred terms (on the basis the pension holder can withdraw funds from the pension to comply with the order) with suitable life cover to protect the intervening period.

14.4 It is **not possible to make a Pension Sharing Order** (or a Pension Attachment Order) **against any foreign pension**.[34] Alternative **strategies** are required, depending on the other jurisdiction concerned. Scottish pension providers will usually implement an English Pension Sharing Order. If necessary, an application may be considered under the Civil Jurisdiction and Judgments Act 1982, Sched 6 (Enforcement of UK Judgments (Money Judgments). In certain circumstances (e.g. in the USA), it may be possible to implement the sharing of an overseas pension by incorporating in a consent order a recital, backed by undertakings, by means of a Qualified Domestic Relations Order (QDRO) obtainable in the state where the pension is held. This solution involves invoking a freestanding jurisdiction abroad equivalent to the Matrimonial and Family Proceedings Act 1984, Part III. In some jurisdictions (e.g. Australia), pensions may be split by an agreement as opposed to a court order.

34 *Goyal v Goyal* [2016] EWFC 50. See, however, Appendix V, paragraph V.4 et seq

14.5 A further possibility, only available with the agreement of the pension holder, might be to transfer the overseas pension (depending on the law of the jurisdiction concerned) into an English pension arrangement so that it will become amenable to a Pension Sharing Order.

14.6 Where there are sufficient assets, off-setting may also be a possibility. Other solutions for dealing with an overseas pension might include the use of periodical payments, a variation of settlement order,[35] or a conventional (non-attached) lump sum order.

14.7 It must also be borne in mind that in certain jurisdictions, e.g. Germany, pensions are divided administratively on divorce under a prescribed formula regardless of where the divorce proceedings are taking place. It is important that the English court is aware of such an administrative division of pensions so that no off-setting order is made, resulting in double relief.

Pensions orders and overseas divorce

14.8 English pension providers are **not prepared to recognise and implement Pension Sharing Orders made by a foreign court.** An English Pension Sharing Order will, therefore, be required to mirror the overseas order.

14.9 Where a divorce has been granted overseas, such an order may be made under the Matrimonial and Family Proceedings Act 1984, Part III (financial relief in England and Wales after an overseas divorce). However, jurisdiction to make such an order only exists on the basis of the domicile of either party or either party's habitual residence in this jurisdiction for a period of one year prior to the application. The existence of the former matrimonial home in this jurisdiction will not found jurisdiction for the purposes of making a Pension Sharing Order. The jurisdictional position is complicated further by the EU Maintenance Regulation.

14.10 Where the English court does not have jurisdiction under Part III, the overseas pension sharing/splitting order/agreement may remain unenforceable. Alternative routes may be off-setting (where this is feasible both procedurally and in terms of available assets) or the restructuring of the original overseas order (by way of appeal or variation). Other solutions might include transferring (part of) the English pension to an overseas pension arrangement, against which the overseas order/agreement would be enforceable or by taking advantage of the pension freedoms created by the Taxation of Pensions Act 2014 (where possible and subject to due consideration of the tax consequences). A further (but less satisfactory) solution might be to adopt a form of deferred implementation once the pension is in payment, i.e. by a type of maintenance order made in the overseas proceedings akin to pensions attachment.

35 This possibility was left open by *Goyal*.

14.11 It is possible at the time of writing to found jurisdiction to obtain a pension order in the English court by reliance upon s 15(1A) of the 1984 Act and the EU Maintenance Regulation, Art 7 (forum necessitatis) which confers jurisdiction where proceedings cannot reasonably be brought or conducted or would be impossible in a third State with which the dispute is closely connected (e.g. where the divorce proceedings have taken place). The dispute must have a sufficient connection with the member state of the court seised (e.g. the pension scheme being administered in England and Wales). The Pension Sharing Order would need to recite that the Pension Sharing Order was made for the purposes of maintenance/ needs to bring the order within the jurisdiction of the EU Maintenance Regulation. Reliance on the EU Maintenance Regulations is complicated by the uncertainty at the time of writing in relation to Brexit. A fall-back solution, where Art 7 is not available, might be to apply to the High Court for the registration of the foreign pension order for enforcement under CPR 1998, Pt 74.

Appendix A
Glossary

Common pension terms and terms used in this report	Abbreviation Used in this paper	Meaning/Comment
Additional State Pension	ASP	The part of the Old State Pension originally known as SERPS and, later, S2P that provided an earnings-related tier of State Pension. ASP rights can be subject to PSOs but where the pension holder reaches SPA post 6 April 2016 a PSO is only available in certain circumstances.
Annual Allowance	AA	The total of contributions or benefit accrual which an individual can make to pension schemes in any tax year before incurring a tax charge. The current (2018-19) limit is £40,000 per annum or 100% of earnings if less, although there are circumstances in which it could be significantly less for higher earners. See, also, Tapered Annual Allowance and Money Purchase Annual Allowance.
Annuity		An insurance-based income received on a regular basis, most commonly for life or for a contractually determined period. Income can be guaranteed or investment linked, level or increasing, and may or may not continue to a surviving spouse or dependent after death.
Auto Enrolment		A method of compulsion of employers by government to provide pension schemes for employees into which both employers and employees pay.
Basic State Pension		The basic part of the Old State Pension related to a person's National Insurance contribution record accrued prior to 6 April 2016.
Buy Out Plan (s32 contract)	S32	Insurance based annuity contract introduced by Finance Act 1981, section 32 to transfer the liability from an Occupational Pension Scheme to the insurer of an individual pension arrangement.
Capped drawdown		See Drawdown.
Career Average Revalued Earnings (CARE) scheme	CARE	A type of Defined Benefit scheme under which the benefit earned in any one year is calculated as a specified fraction of that year's pensionable pay. That year's pension accrual is then 'revalued' every year up until retirement, usually in line with inflation subject to a predetermined ceiling, to ensure it maintains its value in real terms. The pension at retirement is then the sum of all the years' accruals and therefore reflects the member's career average earnings rather than their final earnings (as occurs with a 'final salary' type scheme).

Common pension terms and terms used in this report	Abbreviation Used in this paper	Meaning/Comment
Cash Equivalent	CE	A term meaning the capitalised value of pension benefits. Sometimes referred to as the Cash Equivalent Value (CEV), Cash Equivalent Transfer Value (CETV) or Cash Equivalent of Benefits (CEB), they are all essentially the same. For a Defined Benefit pension scheme the CE is the value placed on the member's benefits by the scheme actuary, using assumptions such as future investment returns, inflation and life expectancies. In the case of an active scheme member, the calculation assumes they left service on the date of the CE. For a Defined Contribution pension scheme the CE is usually the fund value, but this may be adjusted, for example, because of an insurance company's transfer penalty charges or, in the case of a 'with profits' fund, market value reductions or additional final bonuses.
Clawback		Repayment requirements for over paid pension income falling on the pension holder due to the delay between a PSO taking effect and the date it is actually implemented.
Commutation		See Pension commutation.
Consumer Price Index	CPI	The measure of inflation most commonly used now by Defined Benefit pension schemes where pensions are fully or partially protected against inflation.
Contracted-out		A Contracted-out pension scheme is one that enables the scheme member to be (or previously have been) contracted out of SERPS or its successor, S2P. The Contracted-out member will have paid reduced rate National Insurance contributions (or had them rebated in the case of a Defined Contribution pension) and will have nil or reduced entitlement to Additional State Pension. A Contracted-out pension scheme has to meet certain provisions or provide certain minimum benefits, e.g. Guaranteed Minimum Pension (GMP) in the case of Defined Benefit schemes or 'Protected Rights' in the case of Defined Contribution schemes, to which certain rules apply. Contracting-out ended in April 2016 and Defined Contribution Protected Rights was abolished in April 2012, when Protected Rights benefits were converted into normal DC or money purchase benefits. GMP benefits continue to apply for those Defined Benefit scheme members who were Contracted-out prior to April 1997.

Common pension terms and terms used in this report	Abbreviation Used in this paper	Meaning/Comment
Crystallisation		The commencement of pension benefits payments from all or part of a pension scheme, as pension income and/or lump sum. At any point in time pension savings are either 'uncrystallised', 'crystallised' or 'partially crystallised'. Crystallising Defined Contribution funds can often trigger the Money Purchase Annual Allowance.
Deferred member		A member of an Occupational Pension Scheme who has left service with deferred pension benefits i.e. no immediate pension rights and has not yet reached the scheme pension age, nor (if permitted) begun to take the pension under the scheme's early retirement provisions.
Defined Benefit scheme	DB	A pension scheme where the pension rights are related to a formula at retirement, usually related to the final salary or the career average salary of the pension holder.
Defined Contribution scheme	DC	A pension scheme where the pension rights are related to the amount of money contributed to the scheme and any investment return. Sometimes also called a money purchase scheme.
Defined Contribution Fund Equivalent	DCFE	The value of a Defined Contribution fund a spouse would need, to match a member's Defined Benefit pension. Sometimes also referred to as a gross replacement value. Figure based upon assumption that DC fund would be used to purchase annuity to provide the same security of income as the DB holder.
Destination Pension Scheme		The pension scheme utilised by the pension claimant and to which the Pension Credit from the PSO is transferred. This may be the same scheme as the one from which the pension share is derived, or another scheme (new or existing) set up for the former spouse.
Discount/Deferment rate		The % discount rate (per annum) used by actuaries and financial experts to calculate the present value of an asset which will not be realised until some date in the future.

Common pension terms and terms used in this report	Abbreviation Used in this paper	Meaning/Comment
Drawdown		Generic term to describe the taking of 'income', normally from a Personal Pension Plan/SIPP and often by making regular withdrawals from the fund. Regulations applicable to Drawdown depend on which of the following classifications it falls into: **'Flexi-Access Drawdown'**, introduced from 6 April 2015, allows individuals the freedom to take any amount they wish from their pension plan (providing the plan's rules so permit). **'Flexible Drawdown'**, available prior to April 2015, allowed individuals who satisfied a minimum income requirement from other sources, to draw down unlimited amounts from their pension plan. **'Capped Drawdown'** commonly known prior to April 2015 as **'Income Drawdown'**, was the only drawdown option available before April 2015 for individuals who did not meet the minimum income requirement. It continues to be an option for those who were in income drawdown prior to 6 April 2015. The maximum income that can be drawn down is capped at 150% of the notional income calculated using the relevant annuity rate set by the Government Actuary's Department (GAD).
Earmarking		See Pension Attachment Order.
Enhanced Protection		See Lifetime Allowance.
External Transfer		A PSO implemented by transferring rights to a Destination Pension Scheme that is not the same as the scheme from which the Pension Credit is derived (see also Internal Transfer).
Family Procedure Rules 2010	FPR	Rules governing procedures in the family courts in England in Wales. Particular FPR rules or Practice Directions are referred to in this paper as, for example, FPR r 25.1 or FPR PD 25D.

Common pension terms and terms used in this report	Abbreviation Used in this paper	Meaning/Comment
Final Salary scheme		A type of DB scheme under which the pension at retirement is defined by a formula related to salary at or near retirement (or earlier death) and length of pensionable service with the employer e.g. 1/60th of Final Pensionable Salary for each year (or part year) of service.
Financial Assistance Scheme	FAS	The Financial Assistance Scheme is the precursor to the Pension Protection Fund. It was set up to protect members of Defined Benefit pension schemes who had lost all or part of their pension following their scheme winding-up underfunded, where their employer became insolvent before 28 February 2006 and the scheme started to wind up between 1 January 1997 and 5 April 2005.
Financial Conduct Authority	FCA	Regulator for financial services firms and markets in the UK.
Financial Ombudsman Service	FOS	Resolves complaints against financial services providers and advisers in the UK.
Fixed Protection 2012, 2014 and 2016		See Lifetime Allowance.
Flexi-Access drawdown	FAD	See Drawdown.
Flexible annuity		An annuity, the income payments from which may increase or decrease in value over the term of the annuity.
Flexible drawdown		See Drawdown.
Government Actuary's Department	GAD	Department of government providing actuarial services across government, including public service pensions.
Graduated Retirement Benefit		An earnings-related way of accruing State Pension rights between 1961 and 1975.
Guaranteed Annuity Rate (and other implicit guarantees)		Early types of individual pensions (typically pre-1990) often contained some form of guarantee as to the pension or lump sum payable at the selected retirement age (or range of ages). Sometimes this guarantee came in the form of an annuity rate payable, which usually proved to be generous in hindsight.

Common pension terms and terms used in this report	Abbreviation Used in this paper	Meaning/Comment
Guaranteed Minimum Pension	GMP	Between April 1978 and April 1997, a DB scheme had to provide a pension at least equal to the (revalued) GMP in order to be Contracted-out of SERPS. If a member left Contracted-out employment the GMP had to be 'revalued' (i.e. increased each year up to State Pension Age) on one of a choice of bases such as fixed rate revaluation (the fixed rate depends on the date of leaving service) or in line with Statutory Orders (in effect in line with National Average Earnings). Changes to the Contracting-out legislation were made from April 1988. Any GMP earned prior to that date did not have to include pension increases after retirement. GMPs earned after that date had to provide increases to the pension in payment in line with RPI capped at 3% each year.
Hybrid pension scheme		A pension scheme that displays attributes both of Defined Benefit and Defined Contribution pension schemes.
Income gap syndrome		This arises where the ages of the parties are such that, after implementation of a pension sharing order, the non-member spouse cannot draw pension income until a date after the member spouse draws pension income. This can lead to significant cashflow issues for parties if the pension is to provide a significant portion of current income.
Individual Pension plans		Pension schemes in which an individual has contractual rights to benefits. These include Stakeholder schemes, Retirement Annuity Contracts, Personal Pension Plans and SIPPs.
Individual Protection 2014 and 2016		See Lifetime Allowance
Institute and Faculty of Actuaries	IFoA	Professional body which regulates actuaries who subscribe to its code of conduct.
Internal Transfer		A PSO implemented by the pension claimant being awarded rights as a Pension Credit Member within the existing pension scheme. (see also External Transfer and Shadow membership).
Level Annuity		An annuity (policy) under which the income will never increase (and hence will be eroded by inflation over time).

Common pension terms and terms used in this report	Abbreviation Used in this paper	Meaning/Comment
Lifetime Allowance	LTA	Introduced in April 2006 it is the total capital value (as calculated in accordance with regulations) of benefits which an individual can accrue in all UK regulated pension schemes during their lifetime without incurring additional tax charges. The limit was originally £1.5m, which rose over a period of years to £1.8m and then reduced in stages to £1m in 2017/18. Since then it has increased with inflation and is £1,055,000 in 2019/20. Various protection regimes exist for those who are able to benefit from a previous, higher Lifetime Allowance (Fixed Protection 2012, 2014 and 2016 as well as Individual Protection 2014 and 2016), or, where appropriate, the often more generous limits that applied under earlier legislation before April 2006 (Primary Protection and Enhanced Protection).
Lifetime annuity		An annuity (policy) that will pay an income, normally guaranteed, for the duration of the life of the annuitant(s).
Limited Price Indexation	LPI	A legal requirement to increase pensions in payment under a Defined Benefit scheme by a minimum amount each year. The minimum is in line with the Consumer Price Index (CPI) or, if lower, 5% (for benefits accrued between April 1997 and April 2005) and 2.5% for benefits accrued after April 2005.
Money Purchase scheme		See Defined Contribution scheme.
Money Purchase Annual Allowance	MPAA	The reduced tax-relievable contributions which may be made to any Defined Contribution scheme after certain Crystallisation events have taken place in one of those schemes. From 6 April 2017 the figure was reduced to £4,000 per annum (it is still £4,000 in 2019/20).
Moving target syndrome		Because the implementation procedure takes a number of months to execute, the valuation of the pension against which the pension sharing order is to be enforced may be quite different at the time of implementation from the valuation identified by the parties and the judge at the time of the order. Commensurately, the targeted level of the pension credit will have moved by the time it has been realised.
New State Pension	NSP	State Pension entitlements for those reaching State Pension Age on or after 6 April 2016. Previously referred to as 'the single tier state pension'.

Common pension terms and terms used in this report	Abbreviation Used in this paper	Meaning/Comment
Normal Retirement Age	NRA	The age defined in the pension scheme rules which is normally the earliest age at which DB pension rights can be taken without reduction for early retirement.
Occupational Pension Scheme		Pension scheme related to a particular employment and established under a trust arrangement for the benefit of the scheme members (employees).
Offsetting		The process by which the right to receive a present or future pension benefit is exchanged for present capital within divorce or dissolution proceedings.
Old State Pension		State Pension entitlements for those reaching State Pension Age on or before 5 April 2016.
Pension Attachment Order	PAO	Court order (formerly called Earmarking) that redirects all or part of a person's pension benefits to a former spouse or spouse separated by an order of the court.
Pension Claimant		The divorcing spouse seeking pension rights by way of court intervention. The terms 'non-member spouse' or 'transferee' are also used for this party in some contexts.
Pension Commencement Lump Sum	PCLS	A lump sum drawn from a pension scheme (up to 25% of the CE in many cases but can occasionally be greater) which may be drawn down tax free.
Pension Commutation		This relates to Defined Benefit schemes only and refers to the option usually (but not necessarily) available to the member to exchange (commute) part of their future pension income for a tax free lump sum (PCLS) at retirement.
Pension Compensation Attachment Order	PCAO	The equivalent of a PAO made in relation to a scheme within the PPF.
Pension Compensation Sharing Order	PCSO	The equivalent of a PSO made in relation to a scheme within the PPF.
Pension Credit		The amount of benefit rights that the pension claimant becomes entitled to in the destination pension scheme following a PSO.
Pension Credit Member		A pension claimant who has Pension Credit rights by virtue of a PSO under the Destination Pension Scheme. Sometimes referred to as 'shadow member' of the scheme, particularly when the Pension Credit arose through an Internal Transfer.

Common pension terms and terms used in this report	Abbreviation Used in this paper	Meaning/Comment
Pension Debit		The amount of benefit rights given up by a scheme member when a PSO has been made against the scheme.
Pension Freedoms		Flexibility in the way that Defined Contribution scheme benefits can be taken which mostly derive from the Taxation of Pensions Act 2014.
Pension Holder		The divorcing spouse who holds the pension being considered for court intervention by way of PSO, PAO, offsetting or otherwise. The terms 'member spouse' or 'scheme member' or 'the party with pension rights' or 'transferor' are also used for this party in some contexts.
Pension Protection Fund	PPF	The statutory scheme for administering an Occupational Pension Schemes that is unable to meet its future liabilities where the sponsoring employer has become insolvent.
Pension Provider		The trustees, insurance company, SIPP provider or other institution providing and/or managing the pension fund. The term 'person responsible for a pension arrangement' is used in some contexts and defined in s46(2) of WRPA 1999.
Pension Scheme		A generic term for one of a range of occupational pension rights, personal pension rights, policies, contracts, annuities or State Pension rights.
Pension Sharing		Introduced by WRPA 1999 to enable a percentage of the pension rights of one party to be transferred to a pension scheme of their spouse upon divorce by order of the court. Effective for divorce petitions issued on or after 1 December 2000.
Pension Sharing Order	PSO	Court order stating the percentage of the CE of an individual's pension scheme benefit rights to be transferred from their pension scheme to a Destination Pension Scheme for the benefit of their former spouse.
Pensions on Divorce Expert	PODE	Actuaries or other financial experts who specialise in this field.
Personal Pension Scheme		A type of Individual Pension plan which includes SIPPs.
Primary Protection		See Lifetime Allowance

Common pension terms and terms used in this report	Abbreviation Used in this paper	Meaning/Comment
Protected Payment		Where a person's pre 6 April 2016 Additional State Pension entitlement takes their total State Pension entitlement to a figure higher than the single tier base figure as at 6 April 2016 the difference will be designated as a 'protected payment' and this may be subject to a PSO.
Protection (Primary, Enhanced, Fixed and Individual)		There are a variety of forms of protection against the Lifetime Allowance Charge which have been available to allow those who would have been adversely by changes to the LTA rules since they were introduced in 2006 to protect themselves against the charge, either in whole or in part. See Lifetime Allowance.
Purchased Life Annuity	PLA	A non-pension annuity purchased from already taxed personal funds. The income from a PLA is taxed more favourably than that from an annuity purchased with pension savings because the latter will have previously benefited from tax reliefs.
Relevant valuation		The person with pension benefits must apply for a Cash Equivalent (CE) within 7 days of notice of the First Appointment, unless there is already one in existence dated not earlier than 12 months before the date of the First Appointment. This valuation is the 'relevant valuation'.
Retail Price Index	RPI	The measure of inflation commonly used by most Defined Benefit pension schemes prior to 2011 where pensions were fully or partially protected against inflation. Still used by some schemes.
Retirement Annuity Contract or s226 policy	RAC (s226)	Insurance based annuity contract, a type of Individual Pension Plan introduced by Finance Act 1956 Part III for the self-employed and those in non-pensionable employment, subsequently governed by Income and Corporation Taxes Act 1970, section 226 and replaced by Personal Pension Plans in July 1988.
Self-Invested Personal Pension	SIPP	A Personal Pension Plan where the pension holder can make their own investment decisions using the full range of investments approved by HMRC.
Shadow / Primary membership **Shadow membership**		A person who is a member of a pension scheme by virtue of a pension credit is referred to as a shadow member, in contrast to the original member, who is referred to as a primary member. See Pension Credit member.

Common pension terms and terms used in this report	Abbreviation Used in this paper	Meaning/Comment
Shadow PODE		A shadow PODE is a Pension on Divorce Expert instructed by one party to advise that party e.g. on questions to ask the SJE PODE.
Single Joint Expert PODE	SJE PODE	A PODE instructed on a Single Joint Expert basis.
Small pots lump sum		Ability to draw small sums (up to £10,000 in no more than 3 pensions) from pension schemes rather than purchase an annuity. The limit of 3 schemes does not apply to unrelated Occupational Pension schemes.
Small Self-Administered Scheme	SSAS	A form of Occupational Pension Scheme typically set up for key employees or directors of a company with fewer than 12 members.
Stakeholder Pension Scheme		A type of Individual Pension Plan that satisfies certain government criteria for a cap on charges, no exit penalties and low minimum contributions. Introduced in April 2001 as a result of the WRPA 1999.
State Earnings Related Pension Scheme	SERPS	Additional State Pension accrued by employees who were not Contracted-out between April 1978 and April 2002.
State Pension Age	SPA	The age at which an individual is entitled to receive their State Pension. The SPA may be subject to ongoing changes.
State Second Pension Scheme	S2P	Additional State Pension accrued by employees who were not Contracted-out between April 2002 and April 2016.
Substitution or Basic State Pension substitution		Where, on divorce, the spouse with the worse National Insurance contribution record substitutes this for the better National Insurance contribution record of the other spouse to increase their Basic State Pension. This is no longer available for claimant ex-spouses who reach State Pension Age after 5.4.2016. For claimant ex-spouses who reached State Pension Age prior to 6.4.2016, it is only the NI contribution record of the other spouse up to 5.4.2016 that can be substituted.
Tapered Annual Allowance		The progressive loss of the Annual Allowance for those whose adjusted income (income + pension contributions) exceeds £150,000. The Annual Allowance is reduced to £10,000 p.a. when earnings exceed £210,000.
Transfer Day		The day on which the Pension Sharing Order takes effect, which will typically be the later of Decree Absolute and 28 days after the order was made.

Common pension terms and terms used in this report	Abbreviation Used in this paper	Meaning/Comment
The Pensions Advisory Service	TPAS	Guidance service relating to pensions and workplace pensions to be merged with other government finance bodies to become the Money and Pensions Service from April 2019.
The Pensions Ombudsman	TPO	An independent organisation with legal powers to resolve complaints about pension scheme administration that cannot be resolved by other means. A decision of the Pensions Ombudsman is final, legally binding and enforceable in court. From 1 April 2018 the dispute resolution team at TPAS was transferred to TPO and became the Early Resolution Team, providing an end to end dispute resolution service.
Uncrystallised funds pension lump sump	UFPLS	Lump sums paid from uncrystallised funds. Can be used to cash out a DC scheme pot in part or in full without entering drawdown.
Utility adjustment or discount		A notional adjustment sometimes applied in the pension on divorce offsetting process to reflect the perceived advantages of holding cash now rather than pension benefits later.
Valuation Day		A Pension Sharing Order should be implemented during the 'implementation period'. This is defined as the period of four months beginning with the day the order takes effect (i.e. the Transfer Day) or, if later, the first day on which the pension provider is given certain necessary information. The amount transferred on implementation will be the specified percentage of the CE, but not of the CE figure which the court will have had before it on the day the order was made – instead that of a fresh valuation figure of CE. This fresh valuation figure will be made as at the 'Valuation Day' of the rights that existed at 'Transfer Day'. The 'Valuation Day' will ordinarily be some months after the court hearing and will be a date selected by the pension provider within the four month implementation period.
Welfare Reform and Pensions Act 1999	WRPA 1999	Act of Parliament introducing Pension Sharing and Stakeholder Pension Schemes

Appendix B
Procedure: the contrast between contested and uncontested cases

B.1 The Family Court Practice ('The Red Book', published annually) provides detailed and helpful notes explaining the procedural differences between contested and uncontested cases for both Pension Sharing Orders and Pension Attachment Orders, depending on whether Form A has been issued. The following summary provides an outline of that procedural framework for each type of order in turn.

Pension sharing applications

Where Form A has been issued

B.2 The application is made in the application for a matrimonial and civil partnership order (petition) or at any time after an application for a matrimonial or civil partnership order has been made.[36]

B.3 The person with pension benefits must apply for a Cash Equivalent (CE) within 7 days of notice of the First Appointment, unless there is already one in existence dated not earlier than 12 months before the date of the First Appointment (a 'relevant valuation'[37]).

B.4 The pension provider must be served with a copy of the application in Form A and given 21 days to provide information including details of any obstacles to a Pension Sharing Order being made.[38]

B.5 The form of the order must:

c. be expressed as a percentage of the CE,[39] calculated in accordance with the Pensions on Divorce etc. (Provision of Information) Regulations 2000, reg 3;

d. state in the body of the order that there is to be provision by way of pension sharing in accordance with the annex(es) (Form P1 (Pension Sharing Annex)) for each pension arrangement.[40] The order must not take effect until 7 days after the time has expired for appealing or the date of Decree Absolute (whichever is the later);[41] and

e. direct whether the court or other party is to send the Pension Sharing Order, annex(es) and the relevant decree/order to the pension provider.[42]

B.6 The final stage is implementation. The court or one of the parties serves the order.[43] The information needed from the parties for implementation to take place is set out in the Pension on Divorce etc. (Provision of Information) regulation 2000, reg 5 et seq. See Appendix F for a discussion of post-order implementation issues.

36 FPR 2010, r 9.4.

37 FPR 2010, rr 9.3(1) and 9.30.

38 FPR 2010, r 9.31 and Pensions on Divorce etc. (Provision of Information) Regulations 2000, regs 2(7) and 4.

39 MCA 1973, s 21A; *H v H (Financial Relief: Pensions)* [2010] 2 FLR 173, FD.

40 FPR 2010, r 9.35.

41 MCA 1973, ss 24B(2), Regulation 9 Divorce etc (Pensions) Regulations 2000/1123, and see para 2.21 above.

42 FPR 2010, r 9.36.

43 FPR 2010, r 9.36.

Consent applications where no Form A has been issued

B.7 A special procedural framework for dealing with consent-based pension sharing applications, where there has been no prior service of a formal application (Form A),[44] is provided for by FPR 2010, r 9.32. This procedure will apply where, for example, the parties have been in negotiations and have reached an agreement without any formal application having been made. Unless the information set out in Section C of the Pension Inquiry Form (Form P) has already been provided for the pension arrangement in question, that information must be requested and, on receipt, a copy must be sent to the other party. It is good practice in all cases involving a pension to serve Form P on each pension provider.

B.8 There is no formal requirement to seek the approval of the pension provider to a consent Pension Sharing Order, whether an application has been served under r 9.31 (as will be the case where the case was originally contested) or is made under r 9.32. However, it is good practice whenever practicable to seek such approval to ensure that there are no difficulties in implementation once the order has been made.

B.9 As a general point relating to Pension Sharing Orders (whether or not made on a contested application): Pension Sharing and Pension Compensation Sharing Orders are the only type of financial remedy order for which an application can be made after the pension claimant has remarried.[45]

Pension attachment applications

Where Form A has been issued

B.10 The application is made in the application for a matrimonial or civil partnership order (petition) or at any time after an application for a matrimonial or civil partnership order has been made.[46]

B.11 The person with pension benefits must apply for a CE within 7 days of notice of the First Appointment, unless there is already one in existence dated not earlier than 12 months before the date of the First Appointment (a 'relevant valuation').[47]

B.12 The pension provider must be served with the application and the addresses referred to in FPR 2010, r. 9.33(1). The pension provider may then within 21 days of service request from the pension holder the provision of the pension section of Form E, which must be provided on exchange of Forms E or within 21 days of the date of the request (whichever is the later).[48]

B.13 Having received a copy of the requested section of Form E, the pension provider may send to the court and to the parties a statement in answer within 21 days of receiving that material.[49]

B.14 Where the pension provider files a statement in answer, the pension provider is entitled to be given notice of the First Appointment and to be represented at that appointment.[50]

44 Under FPR 2010, r 9.31.

45 See MCA 1973, s 28(3) and s 21 (definitions of "financial provision" and "property adjustment" orders).

46 FPR 2010, r 9.4.

47 FPR 2010, rr 9.3(1) and 9.30.

48 FPR 2010, r 9.33(2)-(4).

49 FPR 2010, r 9.33(5).

50 FPR 2010, r 9.33(6).

B.15 The form of the order must:

1. be expressed as a percentage[51] of the payment which becomes due to the pension holder;

2. state in the body of the order that there is to be provision by way of pension attachment in accordance with an annex(es) (Form P2 (Pension Attachment Annex)) for each arrangement;[52] and

3. within 21 days of service, direct whether the court or one of the parties is to send the Pension Attachment Order, annex(es) and accompanying documents to the pension arrangement.[53]

B.16 The court or one of the parties serves the order.[54]

Consent applications where no Form A has been issued

B.17 A special procedural framework is created for applications for consent-based Pension Attachment Orders where an application has not been already served under FPR 2010, r 9.33(1) (as will be the case where the case was originally contested). In these circumstances, the parties must serve on the pension provider a copy of the application for a consent order, a draft of the proposed order and Pension Attachment Annex and particulars of the addresses referred to in r 9.33(1). The pension provider then has 21 days from the date of service of the consent order application in which to object.[55]

51 MCA 1973, s 25B(5).

52 FPR 2010, r 9.35.

53 FPR 2010, r 9.36.

54 FPR 2010, r 9.36.

55 FPR 2010, r 9.34(3).

Appendix C
Who can be instructed as a PODE or Single Joint Expert

C.1 There is currently no professional qualification or regulatory system for PODEs. The following are recommendations regarding regulation, indemnity insurance, standards and competencies.

C.2 PODEs come from a range of professional backgrounds and have varying professional affiliations. These include:

- Actuaries who are members of and are regulated by the Institute and Faculty of Actuaries (IFoA).
- Actuaries who are not members of the IFoA and who therefore fall outside their regulatory system.[56]
- Independent Financial Advisers (IFAs) who are regulated by the Financial Conduct Authority (FCA) and approved to practice by the Chartered Insurance Institute and/or the Chartered Institute for Securities & Investment.
- Financial Planners and former Financial Advisers who are not regulated by the FCA.
- Managers of regulated or unregulated actuaries, not themselves actuaries.
- Members of the Academy of Experts or the Expert Witness Institute, which are not professional bodies but have codes of practice and complaints procedures.
- Others who do not fall into any of the above categories, but hold themselves out as having, possibly with good justification, the necessary knowledge and expertise to carry out PODE work.

C.3 The PAG was divided as to whether best practice would suggest that PODEs should be members of an appropriate professional body. The Institute of Actuaries, the Chartered Insurance Institute and the Chartered Institute for Securities & Investment were identified as the three relevant professional bodies. It was noted that the calculations provided by an IFA may not fall into the scope of 'regulated advice' and that this should be noted by the PODE if it is the case.

C.4 The advantages of belonging to a professional body include:-

- Being recognised by peers as competent to carry out actuarial work/financial advisory work
- Being subject to rules of professional conduct
- Being subject to disciplinary proceedings for breach of those rules
- Being insured in respect of a professional negligence claim that might arise.

C.5 The disadvantages of requiring belonging to a professional body include:-

- Not necessarily relevant to the work being carried out
- A concern that such a requirement could exclude competent experts in a context where there are not many experts available
- Such a requirement would increase the costs of expert reporting without necessarily ensuring sufficient compensating benefits in expertise

C.6 Such membership can not be a legal or mandatory requirement if an appointed expert is nevertheless able to demonstrate their expertise to the satisfaction of the court.

C.7 Should it be a mandatory requirement that PODEs should have undertaken any education or training or obtained any qualifications? This would be a difficult requirement to impose in view of the range of existing PODE categories identified above. Further, the qualifications on offer are not especially relevant to PODE work and no education, training or qualifications are available which focus on the necessary

56 The description "actuary" is not a reserved title and may be used by those actuaries who are not members of the IFoA.

skills and expertise of a PODE. Accordingly, it is probably not possible or desirable to impose such a mandatory requirement and the best mechanisms for ensuring good standards lie as set out below.

C.8 As a matter of good practice, and to make good any perceived issues regarding knowledge, regulation and training as noted above, any PODE producing a report should self-certify, endorsed with a Statement of Truth, the following matters:

a. That the reporting PODE believes that they have the core competencies for producing PODE reports. The details of these core competencies are set out in a Table in Appendix D. The PAG recommends that these competencies are set out as an annex to all letters of instruction to PODEs or explicitly referred to.

b. That the reporting PODE has a meaningful and operational complaints system in place. Sufficient details of how and where to apply should be included in the report.

c. If the PODE is not a member of a recognised professional body, this should be made clear in the report.

d. That the reporting PODE has in place Professional Indemnity Insurance covering the nature and size of the relevant work. A concern has been raised that some insurers might object to the specific inclusion of such a statement, which might make this requirement impractical, but the PAG's view is that it would be unreasonable for an insurer to take such a stance and that further investigation should be made of this possible problem to see whether it can be resolved.

e. That the reporting PODE has a policy for peer review. Some details of this policy should be included in the self-certification. This requirement should not be construed as requiring peer review of every calculation or in relation to every report and the requirement of peer review should be treated in an appropriately proportionate manner.

f. That the reporting PODE engages in appropriate Continuing Professional Development to maintain their competencies. Some details of how the PODE keeps up to date with contemporary issues and changes in the analysis and valuation of pensions should be included in the report.

C.9 Before a PODE is instructed, the person instructing the PODE, whether a solicitor or otherwise, should ensure that a statement to the above effect will form part of the eventual report. That person should also seek important details (for example of qualifications and experience, as well as membership of professional bodies) to place before the court, prior to the court granting a Part 25 application for the instruction of a single joint expert.

C.10 The PAG considered whether it might be feasible for an existing institution or newly created specialist PODE institution to be responsible for running an accreditation system and/or a unified PODEs complaint system. While it was felt this would be a good idea, no obvious way forward could be identified. There is no funding mechanism, and given the relatively small number of PODEs, creation of a new scheme would not at present be practical or economical.

Appendix D
Self-certification of expertise

D.1 The PAG recommends that all PODEs self-certify as follows, and endorse their reports with a Statement of Truth that they have the following competencies:

1. An understanding of the operation of family law in financial remedy applications on divorce and the procedures followed in The Family Court for the resolution of financial cases on divorce
2. An understanding of FPR 2010 Part 25 and associated Practice Directions, including writing reports and the role of Single Joint Expert.
3. An understanding of the information needed on the pensions involved in order to provide the required analysis, including awareness of the limitations of information supplied by scheme administrators and consultants when providing such information.
4. The ability to analyse the accrued pension rights of Defined Benefit scheme members, taking account of the many different arrangements in Defined Benefit schemes including for (1) normal retirement age; (2) revaluation of the different pension elements between leaving and retirement; (3) provisions for increases on the different pension elements in retirement, including arrangements which are discretionary but where there is an established practice; (4) provisions for spouses pensions; (5) provisions for GMPs in revaluation before retirement, between retirement and GMP age, in step-ups and step-downs at GMP age, and in retirement after GMP age; (6) provisions for commuting pension into retirement lump sums; (7) provisions for early and late retirement, including arrangements which are discretionary but where there is an established practice; (8) provisions for temporary payments between retirement and State Pension age – with the ability to specify the correct equations and parameters for pension valuation according to established current actuarial methods.
5. The ability to analyse the accrued pension rights of active Defined Benefit scheme members taking account (in addition to the factors in 4 above) of (1) accrued pension revaluation different from that applying to leaver pensions during continuing service; (2) the effect of known or likely promotions or future pay movements (such as pensionable pay caps); (3) the effect of continuing service on retirement and early retirement (particularly important in the uniformed services); and (4) the effect of any early retirement and other terms which are dependent on employer consent but where there is an established practice of giving that consent for members in service with significant effect on the value of the pension.
6. The ability to analyse the accrued pension rights of Defined Contribution and Hybrid Defined Benefit/Defined Contribution pensions, taking account of annuity rate and other guarantees and underpins (such as GMP underpins in s32 policies, and such as the various points in 4. and 5. above relating to the Defined Benefit element of Hybrid Defined Benefit/Defined Contribution pensions).
7. The ability to analyse and estimate projection over short periods (up to one year) of: the calculation of Cash Equivalents (CEs) for Defined Benefit pensions, including understanding the variety of market practices; how this takes account of changing financial market conditions; how this takes account of the financial position of the fund and the employer; and the framework for the calculation for public service pensions.

8. The ability to analyse the benefit debits and credits from sharing the various pensions, including an understanding of how to consider the loss of value if pensions are shared, and how to analyse and report on the relative merits of sharing each pension.
9. The ability to analyse pension sharing credit options, where available, of internal (actuarial equivalent) and external (money-purchase) sharing.
10. The ability to analyse Defined Benefit pensions (1) at risk of, (2) under assessment for, and (3) entering or already entered into the Pension Protection Fund, including how CEs are calculated and how pension sharing debits and credits are calculated.
11. The ability to analyse aspects where Defined Benefit pensions and Defined Contribution pensions (including external sharing of Defined Benefit pensions) are qualitatively different, including (1) choices and flexibilities of Defined Contribution pensions not available with Defined Benefit pensions, including the ability to draw cash, (2) different lump sum commutation terms, (3) uncertainties of Defined Benefit pension payment due to underfunding, employer default, entering PPF, or with established employer discretionary benefits possibly being withdrawn, and (4) Defined Benefit early and late retirement terms sometimes significantly different in value to the early and late retirement effect on Defined Contribution pensions.
12. The ability to analyse and take into account different ways of comparing the value of pensions with fixed and with inflation-linked increases where the gap in market annuity rates is arguably higher than the real, relative value due to market distortions.
13. The ability to analyse the various aspects of State Pension benefits, including how they can be shared or otherwise affected by divorce.
14. An understanding of how health impacts on retirement income from the various types of pension scheme and expertise sufficient to identify when specialist health or impaired life underwriting/annuity advice should be taken.
15. An understanding of the tax regimes, in particular the Lifetime Allowance charge, applicable to the pension benefits in the case, an understanding of how tax efficient solutions might be arrived at in the case, and expertise sufficient to identify when specialist tax advice should be taken.
16. An understanding of how investments, such as property investments in SIPPs and SSASs, can impact on pension and pension sharing benefits, and expertise sufficient to identify when specialist advice should be taken.
17. An understanding of the sensitivity of valuations to assumptions, and how an independent value might vary according to variation in those assumptions. The assumptions include both assumptions about the parties' circumstances and behaviour, and assumptions about the parameters used in the valuation.
18. An understanding of the wider regulatory environment for pension benefits.
19. An understanding (and proportionate recognition of) APS X2 from the Institute and Faculty of Actuaries; in particular the requirement of peer review.

20. An understanding (and proportionate recognition) of APS X3 from the Institute and Faculty of Actuaries; in particular the requirement in paragraphs 2.2 to 2.3 that actuaries cannot accept work unless they are satisfied that they have the necessary level of relevant knowledge and skill.
21. An understanding (and proportionate recognition) of TAS 100 (July 2017 standard for actuarial work); in particular the requirement that reports should contain sufficient detail for a technically competent person to understand the matters involved and assess the judgements and calculation results made. In the context of PODE reports it is noted that the predecessor to this clause was worded "… contains sufficient detail so that someone with the same experience and expertise can satisfy themselves that the calculations appear not to be inaccurate. The expert is encouraged to assist users subsequently in understanding how the figures are derived" and a PODE report should understand and acknowledge the need for parties to understand the matters involved, as far as is practicable.

Appendix E
Specimen letter of instruction to Single Joint Expert (SJE)/ Pension on Divorce Expert (PODE)

SPECIMEN LETTER OF INSTRUCTION TO Single Joint Expert (SJE)/ PODE

Mr Smith
Smith's Pension Consultants
1 High Street
Uptown
UP1 3YH

Dear Sir/Madam

Pension Report for the Purposes of Family Proceedings - Mr and Mrs Jones

This letter is written on the joint instruction of Mr and Mrs Jones, who are involved in divorce and associated financial proceedings in the Family Court sitting at Uptown – Reference VVF17XXXXXXX

Mr Jones is represented by Mr White of A Firm LLP (Telephone number XXXX Email Address: XXX Ref XXX) and Mrs Jones is represented by Ms Green of B Firm LLP of XXX (Telephone number XXXX Email Address: XXX Ref XXX)

[It has been agreed] / [An order has been made] by District Judge Brown in the Family Court sitting at Uptown on [ ] that a report should be prepared by a single joint expert about [Mr Jones'][Mrs Jones'] [the parties'] pension provision and pension sharing [or attachment orders]. [A copy of the order is enclosed.]

The purpose of this letter is to set out your formal instructions to act as the Single Joint Expert in this matter.

Overall the aim of the instruction is for the court and parties to understand [*insert brief details as to what the parties and court need to understand]*

Background

Mr Jones' date of birth is [ ] and he works as a [ ].

Mrs Jones' date of birth is [ ] and she works as a [ ].

You may ask such questions about the parties' health as you think relevant.
The parties' respective pension resources and Cash Equivalents (CEs) are summarised in the table below:

Pensions	**Mr Jones (CE) £**	**Mrs Jones (CE) £**
Pension 1		
Pension 2		
Pension 3		
Total CEs		

We enclose the following documentary evidence:

[NB This list is not exhaustive. The expert may have their own list of information that needs to be provided at the outset, but provision of the following information should be considered.]

- Paragraph 2.13 from each party's Form E and supporting documents, including evidence of CEs
- Form P for each policy and the response from the pension provider
- State Pension forecasts for each party

We anticipate that you will need to obtain additional information. Letters of authority from both parties to enable you to obtain that information directly from the pension providers are also enclosed.

Nature of instructions

[NB Consider carefully what the expert is being asked to report on, possibly with the assistance of a shadow PODE or financial adviser. This list is intended to cover common requests but is not exhaustive.]

The questions raised of the expert will need to be carefully considered as it will impact on costs if unnecessary questions are raised. The questions below are intended to be illustrations of possible questions for the expert.

As a guide, where pensions are all Defined Contribution pensions (e.g. personal pensions, SIPPs) with no in-built guarantees, equalisation of benefits by reference to CE is likely to be the correct approach and can often be calculated by solicitors based on CEs. A pension report may not be needed at all.

Where there is a Defined Benefit pension, whether public or private sector, which may be the subject of a PSO, equalisation of benefits by reference to projected income will in most circumstances be the appropriate approach.

Where there is a Defined Benefit pension, and equalisation of benefits by reference to capital value is thought to be necessary, a report is likely to need to deal with the issue as to whether CEs represent a fair value.

Reference may be made to the PAG report Part 6 for a fuller consideration of these issues.

You are therefore instructed, as a single joint expert, to provide a report advising on:

- the Pension Sharing Order or orders that would achieve equalisation of pension benefits in retirement, both in respect of income and lump sum (where possible), based on the current benefits of the parties' pensions; and/or
- the Pension Sharing Order or orders that would be required to achieve capital equalisation of the parties' pensions based on an assessment of the capital value of the parties' respective pensions; and/or
- *[NB consider whether the report should consider offsetting or attachment orders.].*
- *[If offsetting is required]*

Please set out the offsetting valuation options available and an analysis of them, including highlighting any caveats and perceived advantages or disadvantages of a particular option, and state your preferred option on the facts of this case.

- Please consider the issue of how tax may impact upon the calculation.
- We do not require you to give any adjustment on account of any perceived 'utility' as that will be a matter for the parties or the court.
- Please state the factors for and against any approach to be taken if there is to be some pension sharing and some offsetting.
- Any other issues which you feel are relevant or require consideration by either party

It should be assumed for the purposes of your report that:

[NB These are just examples of assumptions that may be relevant. Again, it is important that the purpose of the report, and therefore the basis on which it is being requested, is considered carefully in each case. Before committing to a joint report, it may be appropriate to take advice from a shadow pension expert. These may or may not be relevant and are not exhaustive or in any way standard assumptions.]

- The benefits are to be equalised at the following date(s) *[see explanatory notes below on the selection of a date or dates]*
- State Pension entitlements will be taken into account;
- Pensions increase in payment at equal rates. *[NB Pensions can often increase at different rates e.g. where there are guaranteed annuity rates attaching to a pension or index-linked pensions, compared to some that may not increase in payment at all. Fairness may be achieved where pensions are assumed to increase at an equivalent rate.]*
- There will be no income from other sources (so that income tax treatment will be equal).

As you will be aware, the instruction of experts in family proceedings is set out in Part 25 of the Family Procedure Rules (FPR). Please note in particular Part 25.14, which sets out details of the contents of an expert's report and the statement required at the end of your report under Part 25.14 (2).

We are attaching a copy of Part 25 and of the relevant Practice Directions to Part 25, known as PD 25A, B, D and E.

Please confirm that you are able to sign a statement of truth and self-certify in accordance with the Pension Advisory Group Appendix D as attached.

As a jointly instructed expert you should not enter into correspondence or engage in conversations with one party or their advisers without copying it to the other party or their solicitor, as your role in the proceedings is an impartial one.

If there is any aspect of this letter which is unclear, please write to both A Firm LLP and Firm B Law & Co Solicitors to raise any issues or questions which may arise, including proportionality, lack of clarity or completeness in the instructions and/or the possible effect on fees of complying with the instructions.

You should be aware that, although it is very unlikely, you may be required to give evidence in person to the Court following your report, by attending a hearing in the case. If this eventuality arises we will contact you further to ascertain your available and non-available dates.

Timing

[The court has ordered] or [It has been agreed] that this report should be produced by no later than [ ].

If you believe that you cannot prepare your report within that timescale please let us know as soon as possible and provide an indication of the timescale that you would consider realistic to complete your report.

We will keep you informed of any changes to the court dates.

Your fees

Mr and Mrs Jones accept that they will each be responsible for 50% of your charges and each solicitor should be invoiced for one half of your fees *[or alternative details as agreed or ordered]*. Separate invoices should be addressed to [each firm of solicitors] [each client].

[NB Consider what the appropriate costs position should be for the costs associated with raising questions after the report. These costs will usually be in addition to the costs of the main report and therefore how they are to be paid should be dealt with at the outset. A request for this to be included in the directions made by the court is suggested, e.g.: If either party raises questions about your report, the party who raises those questions will be responsible for your costs of answering the questions and a separate invoice should be raised for that purpose [or alternative details as agreed or ordered].

You have indicated that you envisage your fee will be [£] plus VAT for the production of your report [inclusive or exclusive of expenses/disbursements]. [Please do not start work on your report until you have provided us with your costs estimate and that estimate has been accepted by both parties.] [Please advise us if having now received the letter of instruction your fee estimate has changed]

Please also indicate what your fees will be for attendance at a hearing, in the unlikely event that this is required.

Firm B Law & Co Solicitors have confirmed their agreement to these instructions by countersigning this letter/writing to you direct.

Could you please send one copy of your report to each solicitor and one additional copy to us for filing at court.

We look forward to hearing from you.

Yours faithfully

A FIRM LLP

B LAW & CO SOLICITORS

Dated:

Explanatory notes for draft letter of instruction

Due to the complexity of pension schemes, particularly Defined Benefit schemes which each have their own nuances, detailed information is often required. It is strongly recommended that Form P has been obtained before requesting the pension report from the pension expert.

The ability to obtain detailed information can lead to extensive delays in preparing pension reports.

The draft letter of instruction is based on a core standard of information that will be included within a pension report.

Additional instructions can be added to the standard but such additions are likely to have an effect on the cost of the report and possibly the length of time to produce the report.

Retirement age

When an 'equalisation of incomes' report is to be produced it is important that careful thought is given to the date towards which the expert is being invited to target his calculations. Although the PODE may be able to provide some comments on the choice of date (for example, if it is a date prior to relevant benefits being payable without discount from a particular scheme), the choice of date is primarily for the selection of the parties, possibly with the assistance of a shadow PODE or financial adviser. The choice of this date will depend on issues such as the normal retirement date in relevant pension schemes, State Pension age, the ages of both parties and the difference between these ages, income gap issues and the asserted future work plans of relevant parties. It may be possible for the parties to agree the target date, which is often the normal retirement date of the dominant private pension, but sometimes the parties will differ, seeing some advantage to them in a particular selection. If so, the expert can be invited to provide calculations for two or (exceptionally) more target dates. Parties should be made aware that the more calculations the PODE is required to make, the greater will be the cost, and potentially the delay in production, of the report. Accordingly, parties should be firmly cautioned against too great an array of dates, although sometimes a limited range of target dates and thus possible outcomes can be useful.

Offsetting

If a request for offsetting calculations is to be included within the letter of instruction, then the parties should give thought to the parameters of this investigation in the context of Part 7 of the report of the Pensions Advisory Group on offsetting issues. For example, the expert might be asked to provide a range of outcomes for offsetting purposes (e.g. realisable value, replacement value or net actuarial value). The expert will usually be asked to consider taxation issues, but not 'utility' issues.

Lifetime Allowance/Tax Implications

The expert(s) can be asked to comment on the extent to which the Lifetime Allowance may affect either party. This may include the impact if either party has any form of protection against the Lifetime Allowance and comment on the protections that may be applied for in order to minimise or mitigate the effect of the Lifetime Allowance.

Apportionment for period of marriage

If it is a 'needs' case, then it is unlikely that a court will be assisted by the production of calculations which exclude pension rights accruing from pre-marital or post-separation contributions and these should rarely appear in letters of instruction to PODEs.

In a case where the assets exceed the needs then there might be justification for including separate calculations which exclude pension rights accruing from pre-marital or post-separation contributions. The simplest and therefore cheapest methodology for this is for the PODE to apportion the benefits on a straight timeline basis, but this can lead to an unfairness in some circumstances and the PODE might be asked to consider calculations based on other methods, for example calculating the CE of the fund at the beginning and end of the marriage. See Appendix S of the report of the Pension Advisory Group on apportionment in Defined Benefit salary schemes.

Appendix F
Post-order implementation issues

F.1 This section covers the following essential issues related to the implementation of a pension order once it has been made by the court, in order to ensure that the order is indeed implemented as intended:

- Checking the pension order
- Who should serve the order and when?
- Applying for Decree Absolute (DA)
- Undertakings and protecting pension benefits
- What is required to implement a Pension Sharing Order?
- Ensuring a Pension Sharing Order is implemented
- Payment of fees
- Death benefits once a pension order has been made
- Pension provider practice

Key points/recommendations:

- Obtain advance notice of the pension scheme's requirements and fees. A scheme's charges may be requested by either party pursuant to Regulation 2 of the Pensions on Divorce (Provision of Information) Regulations 2000 and additional charges are covered by Regulation 4.
- Serve Pension Sharing Order (PSO) as soon as possible and follow up with DA once made.
- Pension claimant (or their solicitor) should serve the court documents.
- Obtain prior scheme approval (if practicable) that the proposed order is acceptable.
- Parties should not apply for DA until 28 days after the consent order is approved due to the effect of Regulation 9 of the Divorce etc. (Pensions) Regulations 2000 (unless the circumstances in paragraph F.7 below apply, and the time for appealing has been shortened or lengthened in which case this should be 7 days after the last date on which an appeal could be filed). This is so that the PSO can take immediate effect on pronouncement of DA and preserve death benefits in the meantime. If the DA is obtained before the expiration of 28 days, the Pension Sharing Order will not have taken effect under Regulation 9 and if the pension holder dies during this time, very valuable spousal death benefits may be lost.
- Consider undertakings to protect Pension Sharing Order.
- Ensure pension holder is warned about possible clawbacks and their potential impact.
- Request if implementation requirements can be provided in advance to minimise delays.

Checking the pension order

F.2 When making an application for a consent order for pension attachment, the draft order and annex must be sent to the pension scheme for checking before it is submitted to the court for approval to ensure that it is acceptable to the pension scheme and capable of implementation.[57]

F.3 Whilst this is not a requirement with a Pension Sharing Order annex, it is good practice to do so whenever practicable (but it is recognised that doing this, for example, in the course of an FDR, may not be practicable). This will help to avoid problems arising once the order has been approved by the court, in particular, issues that delay a pension order being implemented.

57 FPR 2010, r.9.34.

Who should serve (send) the order and when?

F.4 It is the court's duty to send the Pension Sharing Order or Pension Attachment Order to the pension provider, or direct one of the parties to send it. In practice, the court should not be relied upon and it would be sensible for the lawyer representing the pension claimant (transferee in the case of a PSO) to send it, or the recipient if they are representing themselves. It is also good practice to request written confirmation from the pension scheme that they have received the order and that it is implementable, or that they have no problems with it. If the order has been checked with the pension scheme before it was made then such problems should not arise.

F.5 Traditionally, a pension order is sent to the pension scheme once the Decree Absolute has been made (see below) because without the Decree Absolute the pension order cannot take effect. However, it might be considered good practice to serve the sealed pension order on the scheme as soon as it has been made and then send the Decree Absolute once it has been pronounced. The rationale for this relates to avoiding potential dangers arising from the new pension freedoms that make pensions more readily accessible, e.g. allowing the entire pension scheme to be taken as a lump sum. Sending the pension order to the pension scheme at the earliest opportunity puts the pension scheme on notice that the order has been made, even if it is not yet effective. Given that knowledge, personal pension providers are likely to think twice before allowing pension benefits to be taken or transferred without at least checking that a Decree Absolute was not imminent. Trustees of occupational pension schemes are likely to take legal advice (which might take sufficiently long for the DA to be produced in the meantime) but that advice could reasonably be that the Trustees have no right to prevent a scheme member exercising their statutory right to transfer in the absence of an effective PSO. Alternatively, on receipt of a sealed PSO the Trustees may view the pension claimant as a potential beneficiary of the scheme and may find it hard to allow any action that might thwart that person's interest.

F.6 One way to prevent a pension share being thwarted by a last minute transfer or by a partial taking of benefits is to obtain an undertaking from the pension holder that they will not transfer or otherwise interfere with the pension until the PSO has been implemented (see Paragraphs F.9 to F.13 on Undertakings below). Another option, which might be more appropriate where there are genuine concerns that an occupational pension scheme might be transferred, is – where proportionate to do so – to make an application under s 37 MCA 1973 against the pension holder and serve a copy of this on the Trustees so that they too are aware of it.

Applying for Decree Absolute

F.7 A Pension Sharing Order takes effect on the later of 7 days following the period for appeal, or the date of the Decree Absolute. As the period for appeal is normally 21 days, the earliest a Pension Sharing Order can usually take is effect is 28 days after it is approved by the court. However, a Part 18 application may be made to the court to shorten (or increase) the 21-day appeal period, which could, in some circumstances, reduce the period before the Pension Sharing Order takes effect to only 7 days.[58] It is therefore considered sensible practice to delay applying for the Decree Absolute until <u>after</u> the 28 days (or, if the period for appeal is extended or shortened, 7 days after that period) so that the Pension Sharing Order takes effect immediately on the date of the Decree Absolute. This ensures

58 FPR 30.4(2)(a)

that the recipient of the Pension Sharing Order remains the legal spouse during the 28-day period. Crucially, this means that if the scheme member unexpectedly dies in that period, the Pension Sharing Order would not take effect and the scheme would instead find itself dealing with a death claim from a surviving spouse. See also the suggestion below of a corresponding undertaking from the pension-holder. However, in taking this decision about timing, the client needs to be advised about countervailing considerations: for example, the need to obtain Decree Absolute to enable enforcement of a lump sum order may be of greater importance to the client than the possibility of the spouse dying after Decree Absolute and before 28 days have passed.

F.8 Note that the Pension Attachment Orders take effect on Decree Absolute.

Undertakings and protecting pension benefits

F.9 There are a number of pension sharing situations where problems frequently occur that might otherwise be avoided by the use of an appropriate undertaking to preserve the status quo, pending the implementation of the Pension Sharing Order. PAG recommends that undertakings to this effect are considered for inclusion within the relevant Standard Family Orders. The pension claimant would be well advised to ensure that any undertakings are brought to the notice of the pension provider as soon as the order has been made. The court has a duty under FPR 9.36 to send, or direct a party to send, the order to the pension provider. However, this obligation might get overlooked in a busy court office. If a sealed copy can be obtained on the day of the making of the order, this would also be a prudent step. The recipient of a Pension Sharing Order backed with undertakings as suggested should however also be aware that the pension provider is not obliged to heed a draft order.

F.10 See paragraph F.6 above; it would be good practice, particularly given the new pension freedoms, to obtain an undertaking from the scheme member that the pension benefits will not be transferred, drawn down or otherwise interfered with or (and have not been so done to date – where assurance has been given to that effect) until the PSO has been implemented.

F.11 Related to the point made in the preceding section, in order to secure the recipient's position, it would be prudent to include an undertaking in the consent order by the pension holder that <u>they</u> will not apply for the Decree Absolute until 28 days following the date the order is approved by the court. This would reduce the possibility of financial disadvantage to the pension claimant should the pension holder unexpectedly die before the order can take effect.

F.12 Delays in the payment of fees by the pension holder is another issue that can often lead to delays in the PSO being implemented. While various regulations exist to deal with this, it would be helpful if an undertaking is made by the pension holder that they will pay their share of the implementation fees within 21 days of the request by the relevant pension scheme to do so. A corresponding undertaking from the pension claimant <u>should not</u> usually be necessary as in many cases their share of any implementation fees can be deducted from the transfer value.

F.13 Similarly, it would assist with the start of the implementation period if the pension holder made a further undertaking that within 21 days of a request to do so they will complete and return any documentation required by the scheme, or any other information that is required.

Pensions in payment and clawbacks

F.14 Where the pension that is to be shared is in payment, there will usually be a clawback (calculated and apportioned on a daily basis) of some of the pension income from the date the Pension Sharing Order took effect. This is because the pension claimant had an entitlement to some of that pension income from that date, not from the *later* date of implementation being completed. The pension claimant ex-spouse then receives this entitlement via the transfer value once the Pension Sharing Order has been implemented. A minority of pension schemes will pre-empt this problem by amending the pension holder's payments as soon as the scheme is in receipt of an effective order. Most pension schemes continue to make the full pension payment to the pension holder until the order is finally implemented, resulting in overpayment to the pension holder that has to be clawed back. While schemes are generally quite good at warning about this in their initial disclosure packs, it still seems to come as a surprise to many individuals.

F.15 Pension schemes will make a reasonable offer to the pension holder for the recovery of the clawback from their future, reduced, pension payments. Where this is likely to cause financial hardship the pension holders might be advised to create a reserve to meet the potential clawback or some other provision made in the court order.

F.16 An even greater problem can occur where the pension holder is required to pay interim maintenance to their pension claimant ex-spouse either until a Pension Sharing Order has taken effect or until it has been implemented. It should be noted that there can be a dramatic time difference between these two events, and lawyers drafting consent orders should give careful consideration to which is intended. If interim maintenance is to be paid until the pension sharing has been <u>implemented</u>, then not only is the pension holder likely to suffer a clawback situation (described above), but the pension holder will suffer a clawback from those very payments that are allowing the maintenance to be paid. To avoid or mitigate against this problem where the scheme member is required to pay interim maintenance payments until the Pension Sharing Order has been implemented, consideration could be given to imposing some form of time limit on such payments, say, for 2 or 3 months to allow the pension claimant time to take advice and get the order implemented and with an appropriate incentive to do so.

What is required to implement a Pension Sharing Order

F.17 When pension schemes send out the information pack with the CE, they must set out their requirements for the implementation period to begin. Such requirements can vary from a simple on-line request from the receiving scheme and nothing else, to forms requiring completion, fees to be paid, age to be evidenced and current health position to be checked out. In the majority of cases, especially where there has to be a transfer out to a pension scheme of the ex-spouse's choosing, it is hard to complete this process without the assistance of a regulated pension adviser, and ideally one that has experience in the area of pensions and divorce. Mistakes are occasionally made by transferring schemes and an adviser experienced in this area is most likely to spot them. Examples of these mistakes are set out in paragraph F.33 below.

F.18 On receipt of all the scheme's requirements, including payment of any fees, the implementation period begins. A pension scheme has four months in which to implement a Pension Sharing Order, unless it has grounds to seek an extension of the implementation period[59] or an application has been made to appeal of out of time (or to set aside – see Appendix V, paragraphs V.19 and V.20.)

Ensuring a Pension Sharing Order is implemented

F.19 The longer it takes to get a PSO implemented, the more likely that problems will arise. This is particularly the case where schemes have not been served with the court documents and so are unaware that the order has been made in the first place. Lawyers are encouraged to put systems in place to ensure that, as far as possible, the PSO gets implemented so that they can close their file on that case. This could include recommending an appropriately qualified adviser and requesting updates from the adviser once the adviser has been instructed. Recipients of the PSO are well advised to seek advice from an appropriately experienced financial adviser at the earliest opportunity.

F.20 In a minority of cases, individuals who have been awarded a PSO fail to engage in the process. Lawyers' files should be well-documented to demonstrate they have done all that is reasonably required. Once an adviser has been appointed, in order to reach the point at which the file can be closed it would be sensible to request that the lawyers are notified once the order has been implemented, or that the lawyers are alerted if no action has been taken.

F.21 The importance of the pension claimant choosing a destination scheme for their pension credit where there is to be an external transfer cannot be over-emphasised. If the pension claimant has been alerted to the need to choose between an internal and external transfer and chooses the external transfer option, the scheme against which the PSO has been made needs to be informed of the choice of destination scheme. Otherwise, the scheme may select a default option. This will either be by transferring the credit externally to an alternative arrangement or internally.[60] That said, it has been argued that, until a destination for the credit is available, the implementation period does not begin.[61] This point may operate to the disadvantage of the pension claimant because the credit may be placed in a less advantageous scheme than would have been the case if the claimant had taken proper advice as to the best destination scheme. It may also operate to the disadvantage of the pension holder because the provider may be reluctant or unable to commence benefits in circumstances where there is a pension share which has not been implemented. For all of these reasons, it is crucial for both pension claimant and pension holder to ensure that a Pension Sharing Order is implemented in a timely manner.

59 The Pension Sharing (Implementation and Discharge of Liability) Regulations 2000, Reg 3

60 Welfare Reform and Pensions Act 1999, s35(1), Sch 5; Pension Sharing (Implementation and Discharge of Liability) Regulations 2000 (SI 2000/1053), regs 7-9.

61 Ibid, s 34(1)(b); Pensions on Divorce etc (Provision of Information) Regulations 2000 (SI 2000/1048), reg 5(c).

Payment of fees

F.22 A pension scheme is entitled to make a charge for PSO services and particularly the implementation of a PSO if information about those charges was provided before the order was made.[62] These fees frequently range from nothing at all to large sums running into thousands of pounds. Schemes are allowed to set the fees that they feel appropriate, but these generally fall within a range recommended by the Pensions and Lifetime Savings Association. Once the fees have been quoted they can only be increased each year by inflation, unless another CE is requested by the pension holder, in which case any increase in charges since the last CE quotation can now be advised.

F.23 As a matter of best practice, the lawyers should identify in advance of the order being made the funds from which the implementation fees should be paid and by whom. If any fees are to be paid by the pension claimant, this could be done from the pension share itself, if the scheme is willing to facilitate this. If the fees are to be paid by the pension holder, they usually have to be paid in advance of the order being implemented and this could be supported with an appropriate undertaking by the pension holder (see paragraph F.12 above). Pension Sharing regulations provide for a number of remedies where fees are not paid and the implementation cannot proceed.[63] Consideration of the percentage split and the source of the funds should be considered when drafting Heads of Agreement or drafting the consent order in court, where a copy of the Pension Sharing Annex is often not immediately to hand and this particular aspect can easily be overlooked.

F.24 It is common for the charges to be shared between the parties. In most cases, the implementation period will not start until both parties have paid their fee. If one party delays the commencement of the implementation period by failing to pay their share of the fees, it is important that that party is made aware that by not paying the fee they are preventing the pension scheme from implementing the order, assuming all other requirements have been met. Rules around how the non-payer's fees can be met will differ from scheme to scheme, but the court would be likely to take a dim view were this matter to come before the court for enforcement.

F.25 If the pension holder is resistant to paying an element of the fee, ideally the issue should be addressed and agreed before the order is made. If this is not possible or has not been done, there are other options available:

a. WRPA 1999, s41(2)(a) and Pensions on Divorce etc (Charging) Regulations 2000, reg 7 permit the pension administrator to postpone the implementation of the Pension Sharing Order pending payment of the charges.

b. WRPA 1999, s41(2)(c) and Pensions on Divorce etc (Charging) Regulations 2000, reg 9 permit the pension administrator to deduct the charges from the pension credit or (on an internal transfer) from the transferee's pension credit benefits, from the accrued rights of the member, from the calculation of the transfer value or, if the pension is in payment, from the member's pension benefits. The parties may pay in cash if they prefer.

62 Pensions on Divorce etc (Charging) Regulations 2000 (SI 2000/1049), reg 2.

63 E.g. postponement of implementation (WRPA 1999, s 41(2)(a), Charging Regulations, reg 7); deduction from pension credit or (on an internal transfer) from the transferee's pension credit benefits, from the accrued rights of the member, from the calculation of the transfer value or, if the pension is in payment, from the member's pension benefits (WRPA 1999, s 38(2)(c), Charging Regulations, reg 9). The parties may pay in cash if they prefer.

In default of the fees being specified in the Pension Sharing Annex, the pension holder is liable for all the fees.

Death benefits once a pension order has been made

F.26 Once a PSO has been approved by the court, it cannot take effect for at least 28 days, or until the date of the Decree Absolute, whichever is the later (however, see paragraph F.7 above, where the issue of possible shortening or lengthening of the time to appeal is discussed, with consequences for the date on which the order can take effect).

Assuming the normal 28 day limit applies (and no shortening or lengthening of the appeal period has been ordered):

F.27 It is important to protect the financial position of the pension claimant during this period, and the easiest way to deal with this is to avoid applying for the Decree Absolute until the 28 days has expired.

F.28 Should the pension holder die before or during the 28 period then the PSO cannot take effect and the scheme benefits that would otherwise have formed part of the pension share now form part of the death claim. Death benefits are distributed by the scheme Trustees according to the rules of the scheme.

F.29 Should the pension holder die after the 28 days has expired and after the Decree Absolute has been pronounced, then the PSO has taken effect. In this event, the pension claimant is entitled to the benefits awarded by the PSO and the order must still be implemented. Only benefits remaining after the PSO has been implemented would be subject to death benefit payments available under the rules of the scheme.

F.30 Should the pension claimant die after the PSO has taken effect but before it is implemented the proceeds of the PSO would be paid as a death benefit to their estate or to their nominated beneficiaries in the absence of a standard precedent in the consent order allowing the pension holder leave to apply to set aside (since 3 October 2016) or appeal out of time the PSO, whichever is appropriate (see Appendix V, paragraphs V.19 and V.20). Appeal out of time remains the appropriate route to challenge where an error of the court is alleged or where the scheme has already acted to its detriment.[64]

F.31 In the case of a Pension Attachment Order: should either party die after the order has been made then no further payments are due to be made.

Pension providers: points to watch out for

F.32 Pension providers or administrators should be encouraged to invest in more training for those administrators involved in this particularly complex area. Mistakes are sadly all too common and it is also a concern that mistakes often go unchecked. Those organisations that have established national or centralised pension on divorce teams should be applauded and other larger organisations encouraged to follow suit. It is not uncommon to see good practice from one department and poor practice from another of the same organisation.

64 Matrimonial Causes Act 1973, s.40A or s.40B.

F.33 Some common mistakes that are frequently observed – and which lawyers should therefore be particularly aware of – are:

- Incorrect CE or calculation of pension holder's benefits
- Incorrect information being provided relating to pension holder's benefits and related scheme rules
- Lack of understanding of how CE at the point of implementation (Valuation Day) is calculated, i.e. CE calculated during the implementation period based on the benefits that existed when the PSO took effect (Transfer Day)
- Misunderstanding about when the Valuation Day is and that it has to be some point during the implementation period – valuations are often, incorrectly, produced in advance of the implementation period commencing
- Not understanding the definition of the Transfer Day, i.e. the day on which the PSO takes effect
- Generally misunderstanding the entire pension sharing process
- Trying to enforce external transfers from a Defined Benefit scheme when a CE has been reduced due to scheme underfunding
- Scheme Trustee's/administrator's failure to understand that 'original' court orders do not exist, only original copies that have been sealed by the court

F.34 The importance of understanding that the interaction between the Transfer Day and Valuation Day becomes particularly important in a post- pension freedoms world, where significant Defined Contribution benefits can be drawn down from a Defined Contribution scheme after the order has taken effect, but before the implementation period begins. Any such benefits are a deduction from the pension holder's remaining fund after the PSO has been implemented.

F.35 Where mistakes have been made, or where there is concern that a mistake has been made by the transferring scheme, this should be taken up with the scheme. If this does not resolve the problem and where the scheme is an occupational pension scheme, the pension holder or pension claimant should first complain to the scheme under what is known as the Internal Dispute Resolution Procedure (IDRP). Only once that route is exhausted can the complaint be taken to The Pensions Ombudsman. Once the complaint has been accepted by The Pensions Ombudsman, individuals may first be encouraged to seek help from the Early Resolution Team, through which complaints can often be resolved without resorting to formal Ombudsman adjudication. There is no cost for this service.

Pensions and enforcement of other financial remedy orders

F.36 It should be remembered that Pension Sharing Orders are not presently available as a *direct* method of enforcement. The Law Commission's report *Enforcement of Family Financial Orders*[65] contained a headline proposal that pension sharing should be available as an enforcement method. This recommendation has not been implemented (see further Appendix V, paragraph V.2 below). However, it should be borne in mind that judgment creditors can enforce against a debtor's pension following the procedure in the Chancery case of *Blight v Brewster*.[66] This procedure has application for people who are owed monies under a financial order made in family proceedings and may be summarised as follows:

a. The respondent may be ordered to delegate his power of election for drawdown of pension benefits to the applicant's solicitor or receiver (by way of mandatory injunction);

b. The applicant's solicitor or court appointed receiver may then be authorised to make the election for drawdown of the tax free lump sum directly to the pension provider;

c. A third-party debt order can be made, which takes effect when the election is made and attached to the debt now due from the pension fund to the respondent. The third-party debt order has the effect of channelling the tax-free lump sum directly to the applicant.

F.37 In addition to the procedure in *Blight v Brewster*, in the case of *Amin v Amin*,[67] the Court of Appeal upheld Moylan J's decision to adjourn the wife's application for a Pension Sharing Order pending the payment of a lump sum. On the husband's failure to pay the lump sum, Moylan J made a Pension Sharing Order in the wife's favour. In this way, pension sharing may be used as an indirect enforcement/policing mechanism.

65 Law Com No 370 (HMSO, 2016). The Government announced in August 2018 that it would improve enforcement with non-legislative measures.

66 [2012] EWHC 165 (Ch).

67 [2017] EWCA Civ 1114

Appendix G
Death in service benefits

G.1 Death in service benefits, including dependants' benefits, are an under-used resource, sometimes of considerable value, and often overlooked as potentially providing much needed life insurance.

G.2 Where Defined Benefit schemes are involved, it is always worth checking whether the death in service benefit component of the scheme is integral to the main pension scheme or whether it is set up under its own separate trust. This is a relevant enquiry to make when analysing pension scheme benefits at the information-gathering stage.

G.3 It is not possible to have both a Pension Sharing Order and a Pension Attachment Order against the same pension arrangement. But where the pension provider has established the death in service scheme under a separate trust, then it should be possible to have a Pension Sharing Order against the main pension scheme and, if appropriate, a lump sum Pension Attachment Order against the death in service benefits. This can be a way of providing much needed life cover for no additional cost, particularly where the establishment of a new and separate life insurance policy is cost prohibitive for the parties.

G.4 It would be important that any Pension Attachment Order is made against "the Trustees of the [*insert correct name of scheme*] Death in Service arrangement". It should be pointed out to the Trustees when the order is served that the specific insurer is advised of the existence of the attachment order in the event they end up settling any claim. The Trustees should also be advised that it is their responsibility to advise any new insurer in the future should there be a change of insurer.

G.5 However, death in service benefits are a poor substitute for a properly established life insurance policy separate from the pension scheme. Were the scheme member to leave the employment of that particular company, then the death in service benefit would immediately cease. At that point it might no longer be possible to obtain life insurance, for reasons of health or simply because the person whose life is to be insured may no longer cooperate. With that in mind, it might be sensible if contemplating such an arrangement that an undertaking is obtained from the pension holder that they would co-operate in a life insurance application in the event they left the company and the death in service benefit ceased during the period that life insurance was still required.

G.6 Advice should be sought from an appropriately qualified and experienced adviser as to any taxation implications of payments from a Death in Service policy as the amounts of death benefit paid can be large.

G.7 Taxation issues (e.g. Lifetime Allowance) have been ignored for the purpose of this section – but note that the LTA issues could be significant (see Part 9).

Appendix H
Small Self-Administered Schemes (SSAS)

What is a SSAS?

H.1 A SSAS is a type of pension scheme, typically found in owner-managed businesses, often family run. When considering the responses to a Form P, it may not be spelled out that the scheme is a SSAS, but words like "XYZ Ltd Directors Retirement Scheme" will give a clue that you are dealing with a SSAS. These schemes are complex in nature.

H.2 The scheme will comprise of anywhere between 1 and 11 members. Membership is at the discretion of the business owner and is open not only to owner-managers, but also to key staff, family members and even those not involved in the business. A SSAS can make a secured loan to the sponsoring employer up to a maximum of 50% of the scheme's net assets; similarly, a SSAS can borrow up to a maximum of 50% of its net assets.

H.3 Assets within a SSAS are only notionally apportioned as between the members. Provided written confirmation is given by all member trustees, it is possible to allocate funds paid in for a particular member to specific investments made with these funds, so that that member's share of the SSAS is determined by the performance of these investments.

Dealing with a SSAS – key issues and problems to spot

H.4 It is in both parties' interests to discuss how they propose dealing with a Pension Sharing Order over a SSAS at an early stage. Once an order capable of implementation has been made and served on the pension provider, they have just four months in which to implement it, once they are in receipt of any outstanding fees and information. It is helpful if the parties have considered the practical problems of implementing such an order, prior to the four month period, to avoid rushed decisions being made, and to avoid the possibility of the pension provider being in breach of their legal requirement to implement the order in that four-month window.

Problems with valuations

H.5 The calculations as to the percentage Pension Sharing Order required are usually relatively straightforward, once the valuation of assets is agreed, but in the case of a SSAS this in itself can be contentious. Often, a SSAS will comprise different asset classes, including commercial property, managed investment portfolios, bank accounts, loans to companies, and insurance policies.

H.6 When confronted by a SSAS, the first step is to ensure all of these assets have been recently valued. It may be that a set of scheme accounts is produced, in which the values of the assets are stated. This can be misleading even if the accounts are relatively recent; they may be taking property at a historical value. If so, fresh property valuations may be required. It should however be noted that obtaining professional valuations can be an expensive and time-consuming exercise, and proportionality of costs should be kept in mind.

Problems with illiquidity, and how to get around them

H.7 Since a SSAS can include property and loans as an asset, some SSASs are very illiquid, and would struggle to discharge, in the normal way, a request for a pension debit. Very serious problems will be encountered if it is agreed that any Pension Sharing Order should be for an amount exceeding the immediately available liquid assets, and it is vitally important that these issues are addressed *prior* to any order being made. Problems with liquidity can be further complicated if there are other members of the scheme, besides the divorcing member, who have issues with seeing liquidity eroded.

H.8 If liquidity remains an issue, there are a number of options. However, often none of the options is palatable, or indeed workable, and the least bad option needs to be identified. Both sides need to discuss the options, and how they intend to implement the order, *prior* to its being made by the court.

H.9 The options for dealing with a Pension Sharing Order that requires a pension credit to be granted to the pension claimant in excess of the available liquid assets within the SSAS are:

i. The scheme can try to persuade the pension claimant to retain the credit in the SSAS. In so doing, they need not create any liquidity. However, unless both parties are entirely confident of their ability to work together as trustees post-divorce (a beneficiary of a SSAS must also be a trustee), this solution is rarely attractive. Although this internal option (the pension claimant retaining the credit in the scheme) may appear initially attractive, often all it does is defer the problem caused by lack of liquidity.

Many SSASs rules do not allow the pension claimant to become a member of the scheme, precisely for fear of scheme paralysis. Indeed, some schemes refuse to allow the scheme rules to be amended to admit an ex-spouse as a member.

Conversely, although the scheme may well try and persuade the pension claimant to retain their credit in the SSAS, it cannot force the claimant to do so; the pension claimant can insist on external implementation.

ii. If the pension claimant were to insist, as he / she is entitled to, to have a pension credit transferred out, the scheme can look at ways of creating sufficient liquidity. This could potentially be done in one of three ways:

a) one or more of the properties could be sold

b) a mortgage / finance could be raised against the property portfolio

c) the sponsoring employer could make pension contributions to create liquidity.

iii. If the scheme were unable to create sufficient liquidity, and the pension claimant refused the option to retain the credit in the scheme, one possibility would be for one or more of the properties to be transferred *in specie* into a pension arrangement for the claimant.

For example, if the claimant were to receive a pension credit equating to £500,000, then it might be possible for the claimant to establish a Self-Invested Personal Pension (SIPP) in their own name, and a pension credit comprising one or more of the properties could be transferred into their SIPP.

This might not be an ideal solution: it could be dependent on the dynamics of the relationship and involvement of the parties in the business (if it is a family business) post-divorce. But if the pension claimant is not part of the business post-divorce, this arrangement will mean that the pension claimant, via their pension, is the landlord of properties let out to the other party's businesses. It is also the case that, were the pension claimant, via their SIPP, to own these premises, the claimant could sell them at any point to a third party; that may not be appealing to the business owner who would then be a tenant of a (potentially) unknown third party.

It is also the case that, were the pension claimant to establish their own SIPP into which the properties are transferred *in specie*, stamp duty would be payable, as the properties would need to be re-registered in the name of the SIPP trustees. A variation on this solution might get around this problem, whereby a separate sub-trust of the existing SSAS is created into which the properties are transferred. This option would not, however, get around the underlying problem of the pension claimant being the landlord and the pension member, via his business, potentially being the tenant.

H.10 As can be seen, there are disadvantages to all the solutions. The extent of the difficulties would plainly be reduced if the pension holder has other pension benefits outside the SSAS which could be shared in favour of pension claimant instead, thereby reducing the quantum of the Pension Sharing Order required over the SSAS. Alternatively, consideration should be given to whether the case could be resolved by offsetting instead, or at least in part, restricting pension sharing to the extent of liquid assets in the SSAS, and offsetting dealing with the balance.

H.11 Plainly, there is often no ideal solution. What is essential is dialogue between the parties *before* the court seals any order, and creative thinking that may entail a combination of the suggested solutions above.

Appendix I
Complexities in certain public sector occupational schemes

Introduction

I.1 Public sector pension schemes have always contained traps for the unwary divorce practitioner. Most of the public sector employers had more than one section or Scheme prior to 2015. The introduction of the new benefits in 2015 has added to the complications and potential pitfalls. Some of the public sector schemes introduced new schemes, others introduced a new section within the existing scheme. For the purposes of the remainder of this part of the guidance we refer to new schemes. However, please note in some circumstances it will be a new section within an existing scheme. Expert advice is recommended particularly in uniformed service cases.

I.2 It is important for the practitioner to understand what benefits and scheme or section they are dealing with. It is very dangerous to assume that because a certain solution worked for a previous client, the same will be available for the next case.

I.3 Issues that the practitioner should be wary of, outlined in what follows, include:

- Introduction of the new 2015 (Career Average/ CARE) schemes and transitional arrangements (sometimes referred to as tapering) for members moving to these schemes. In December 2018, the Court of Appeal ruled that the 'transitional protection' offered to some members as part of the reforms amounts to unlawful discrimination.[68] At the time of writing, the Government is seeking permission to appeal this decision. If this is unsuccessful, the Court will require steps to be taken to compensate employees who were transferred to the new schemes
- Issues about whether benefits that an individual has accrued with the same employer (or employers who are all part of the same public sector) can be shared in different proportions
- Variable retirement ages that are dependent on service and can be impacted by the 2015 schemes
- Members in service past the age at which they can retire
- Overnight increase to the Cash Equivalent
- Absence of a late retirement factor in the older schemes
- 'Income gap' issues where the pension credit member receives benefits at a later age than the member
- Early Departure Payments in the Armed Forces Pension Scheme
- Re-Settlement Commutation in the Armed Forces Pension Scheme
- Consumer Prices Index being difficult to deal with through open market annuities
- The effect of Pension Sharing where there is a pensionable salary cap
- Re-employment after retirement

68 The Lord Chancellor & Another v McCloud & Others [2018] EWCA Civ 2844

New Career Average (CARE) schemes and transitional arrangements (‘tapering’)

I.4 New schemes (or sections within existing schemes) based on Career Average Revalued Earnings (CARE) have recently been introduced. The Local Government Pension Scheme introduced a new section to the Local Government Pension Scheme in 2014, and the other public sector Schemes introduced their new Schemes on 1 April 2015. These schemes generally have retirement ages later than the Schemes they replaced.

I.5 Each Scheme has its own rules about when members have to move into the new schemes for future accrual. Younger members and new members will be in the new scheme from April 2015 (April 2014 for Local Government Pension Scheme). However, different schemes have different rules for older members about how long they can remain in the scheme they were already in and when they have to move to the new scheme. These are variously called ‘tapering’ or ‘transitional’ arrangements or rules.

I.6 Benefits will be retained in the original schemes (in the Armed Forces Pension Scheme, known as ‘legacy schemes’) and in most cases will retain the link to the member’s pensionable salary for as long as they remain in service. The member will then usually have rights in two separate schemes.

Whether different sections within schemes can be shared in different proportions

I.7 Each of the schemes has rules about whether the different sets of benefits have to be shared in the same proportion and the practitioner should check carefully when considering an order whether what is proposed is acceptable and feasible. For example, the NHS Pension Scheme requires that the 1995 and 2008 section rights are shared in the same percentage but the 2015 section rights can be shared in a different percentage. The Armed Forces Pension Scheme allows all three sections to be shared in different percentages but if there are two sets of independent rights in the same section, these two have to be shared in the same proportion.

Variable retirement ages dependent on service and the impact of 2015 schemes

I.8 There have always been issues with public sector schemes where there is a retirement age for deferred pensions for those who leave after only a small amount of service, but an earlier retirement age is available as long as the member has achieved a certain level of service. For example, in the Police Pension Scheme 1987 Section, those leaving with under 25 years’ service had a retirement age of 60 but this could reduce to age 48 if the member has achieved 30 years’ service. Police, Firefighters and Armed Forces are well known examples, but there are also the Special Classes in the NHS Pension Scheme, Prison Officers (Civil Service Pension Scheme) who joined before a certain date, and in the Local Government Pension Scheme the “Rule of 85” means if the age at retirement + number of years’ service was 85, the member could take benefits without immediate reduction or at age 60 if later. Practitioners should consider obtaining a specialist report in such cases.

I.9 The issue arising in these cases is that if, following a specified period of service, the age at which the member can retire without suffering a reduction in benefits reduces below the Scheme's Normal Retirement Age, then a CE calculated before that period of service has expired will be an undervalue. For example: consider the policeman who after 24 years' service is entitled to retire at 60 if he were to leave service – the CE will be based on the accrued income being taken at age 60. However, if the officer accrues one further year's service (to 25 years), the age at which the benefit is payable becomes age 50 and the CE is much higher. (After 30 years' service the pension may be payable at age 48). The same benefit payable for an extra 10 or 12 years has a much greater value and this effect is also reflected in the pension sharing calculations that would be made in such a case.

I.10 Practitioners should therefore be alert to whether one or other spouse is an active member of such a scheme and consider obtaining additional evidence of the value of the benefits available to the active member.

I.11 The situation has been made more difficult as a result of the introduction of the 2015 schemes. Policemen with benefits in both schemes (the first being the 1987 scheme) find that although they can retire on an unreduced pension after 30 years' service in respect of their rights in the 1987 scheme (even if some of those 30 years were accrued in the 2015 scheme), the benefits that they stand to acquire under the 2015 scheme will be reduced if they retire before the later retirement age in that scheme.

I.12 The making of a Pension Sharing Order against such a background makes matters even more complicated. Potentially, the value of the benefits in the 1987 scheme will actually reduce as the officer works past the 30 years' point because of the way that pension debits are treated and adjusted according to the age that the benefits are taken. However, the benefits in the 2015 Scheme will be reduced if the member retires and takes benefits before the Normal Retirement Age for the 2015 Scheme and that reduction will reduce the longer the member serves and the older they get. In addition, the member will accrue further benefits if they remain in service.

I.13 Previous assumptions about the optimum retirement age for such individuals are no longer valid, and it is much more difficult to know when they will retire. Practitioners will often have to consider this on a case by case basis.

Members in service past the age at which they are entitled to retire

I.14 This is an issue in a number of cases, but in particular in the Armed Forces Pension Scheme.

I.15 For example: Officers in the Armed Forces Pension Scheme 1975 can retire on an immediate pension at age 37 with 16 years' service and the pension is not reduced to reflect early retirement. Under the Pensions on Divorce etc. (Provision of Information) Regulations 2000, a CE has to be calculated on the assumption that an active member leaves service on the date of calculation.

I.16 Thus, in this case the officer of age 37 with 16 years' service who is still in service would have his CE calculated on the basis that it comes into payment immediately. So the pension would be valued on the basis of it being paid immediately and for approximately 50 years when in practice, it may not come into payment for another 18 years and only be payable for 32 years. So the CE reflects much higher benefits than the member might expect from the pension rights accrued to date.

I.17 As a result, a 50% Pension Sharing Order can wipe out almost the whole of the accrued pension to the date of the divorce if the member remains in service until, say, age 60. This happens because the CE at the time the pension is shared has to be calculated assuming the member leaves service at the time (and therefore where the member can take benefits immediately, it assumes they do) and this creates a debit for the member to repay a proportion of that CE. The debit can only start to be repaid when the member does actually leave service, so the repayments have to be made over a shorter period and therefore have to be higher than if they were repaid from the date of the calculation. So if the accrued pension is say £20,000 per annum at the time of a 50% Pension Sharing Order, the scheme member has the obligation to pay £10,000 per annum back to the scheme immediately and for life. If this member remains in service until say age 60, the same actuarial equivalent has to be paid back but as it starts later and is expected to be repaid over a shorter period, the annual payments increase and could be as high as £20,000 per annum depending on the age at the time of Order and at retirement.

I.18 This is a feature of the Armed Forces Pension Scheme, Police Pension Scheme and Firefighters' Pension Scheme but not all public sector schemes. For example, Special Classes in the NHS Pension Scheme and members of the 1995 NHS Pension Scheme who work beyond the Normal Retirement Age of 60 do not suffer these losses.

I.19 Practitioners should take particular care for members who are still in service after the date at which they can first take benefits.

'Overnight' increase in the Cash Equivalent

I.20 The Regulations also mean that a CE can increase dramatically overnight. An officer in the Armed Forces Pension Scheme 1975 on the day before achieving 16 years' service will have his accrued benefits calculated based on them being paid from age 60 or 65. The day he achieves 16 years' service, the CE has to be calculated based on his leaving and the pension coming into payment so assumes the pension will payable immediately and he may be only age 37. The CE is calculated on it being paid for 23 or 28 years more and therefore it could be two or three times higher than it was the day before.

Absence of a late retirement factor in the earlier schemes

I.21 Some of the earlier schemes, for example NHS Pension Scheme 1995, have the issue that, although retirement age is 60, if the member in fact remains in service until age 65 no actuarial enhancement is applied to the benefits. This can have the effect of overvaluing benefits, particularly for younger members. The individual may not be able to afford to retire at the earlier age and therefore the CE may not be appropriate.

I.22 A competent PODE/ SJE will pick up on this issue but practitioners need to be aware of it so that they know to seek an SJE report in these cases.

‘Income gap’ issues

I.23 An income gap issue will occur when the parties are trying to equate incomes but one party receives that income before the other (either in time or because the intention is to equate at a certain age but one receives the income at an earlier or later age than the retirement age proposed in the calculations). As is discussed in the section earlier in this guidance on age differential (Part 10), income gaps can occur in any schemes where the parties are different ages, but in the public sector they can also occur when they are the same age but the Scheme rules mean that they take benefits at different ages.

I.24 Issues can arise, for example, where the age at which the pension claimant (i.e. the party with the benefit of a PSO, as pension credit member of the scheme) receives the pension credit benefits is greater than the age at which the pension holder (the original scheme member) can receive their benefits. This is particularly relevant for example in the Police Pension Scheme 1987 and Armed Forces Pension Scheme 1975 Section where a Pension Sharing Order can result in an immediate reduction in a pension that is already in payment but the pension credit member may have to wait for a number of years before they can take benefits from their pension credit under the scheme rules.

Early departure payments in the Armed Forces Pension Schemes

I.25 Both the Armed Forces Pension Scheme 2005 and the Armed Forces Pension Scheme 2015 have rules whereby if the member leaves after achieving a certain amount of service (and sometimes also a certain age), although their pension is not payable until the Scheme Retirement Age (Age 65 or State Pension Age), they will receive a lump sum and income known as Early Departure Payments (not classed as pension) from the date of leaving until the date when their pension is due (Scheme Retirement Age).

I.26 These are not pensions and so cannot be subject to a Pension Sharing Order, but are nevertheless payments which are made after leaving as a result of service so have many of the properties of pensions and are an income stream and source of capital for the member.

Retirement from the Armed Forces Pension Scheme 1975 before age 55

I.27 If a member of the Armed Services Pension Scheme 1975 leaves service after the point at which they can take benefits but before age 55, they have the option to take a further lump sum in addition to the automatic lump sum paid by the Scheme. This is known as re-settlement commutation. If they select this option, the pension is reduced between retirement and age 55. It is then brought back to its original amount at age 55. Re-settlement commutation is a feature of the Armed Forces Pension Scheme 1975 alone.

I.28 A further feature of the Armed Forces Pension Scheme 1975 which also occurs in some other public sector schemes (for example the Police Pension Scheme 1987) is that the pension does not increase between retirement and age 55, but at 55 it is increased to reflect inflation since retirement. The effect of the above can mean a very large increase in the pension at age 55, and a pension in payment to a member in their early 50s, in particular, can be a lot less than it is due to increase to once they reach 55, and so on face value at that pre-55 stage, it can appear misleading. Practitioners should therefore be wary where there is a pensioner member of a public sector scheme who is under age 55.

Consumer Prices Index being difficult to deal with through annuity purchase

I.29 Public Sector pensions increase in line with the Consumer Prices Index (CPI). It is often asked how much it would cost to purchase a similar benefit on the open market. But there is not a competitive market at present for annuities that increase in line with CPI, so this question cannot be answered perfectly although most SJEs can make a reasonable approximation.[69]

The effect of pension sharing where there is a pensionable salary cap

I.30 Practitioners should be aware of the potential issues with a pensionable salary cap. For example, suppose the pension holder, a scheme member, has an accrued pension of £20,000 per annum, and there is a PSO against that pension holder for 50%, then the pension debit made against the scheme member's pension (which is calculated by the scheme at the time of the order) is initially £10,000 per annum; if the pension holder remains in service but on a salary-freeze or pensionable salary freeze, this can affect the benefit. If inflation is cumulatively 25% over 5 years and there is no increase in pensionable salary, then the pension debit increases to £12,500 per annum leaving only £7,500 per annum for the pension holder in respect of the pension rights accrued to the time of the order. This occurs because legislation requires that the pension debit is linked to the scheme benefit, which in this case increases in line with inflation, but the accrued benefit for the scheme member will only be linked to salary, which in this case has not increased.

I.31 Although there is not much the practitioner can do about this in many cases, they should be aware of this possibility as it will affect the final outcome for the parties and should be taken into account.

Valuation and discount rate

I.32 Cash Equivalents for public sector pensions are calculated on a basis and tables provided by the Government Actuary's Department (GAD). However, the discount rate for the calculations is prescribed by the Treasury. The rate is higher than most actuaries use for calculations in the private sector schemes. This means that the CEs are lower in the public sector than in the private sector for the same type of benefits.

I.33 For this reason, practitioners should be very cautious before comparing public sector CEs with private sector ones on an equal basis. Currently, the benefits from a public sector scheme are likely to be higher for a given CE than in a private sector scheme with the same CE.

69 This is because there is a very limited market for CPI annuities, only RPI ones are available on a competitive basis

Poor health no enhancements

I.34 The schemes perform calculations using standard actuarial tables prescribed by the GAD. For a pensioner member a different set of actuarial tables is used if the member retired due to ill health instead of normal retirement. The CE of a member who retired due to ill health will be lower than the CE of a member who retired in normal health.

I.35 However, there is only one set of tables for each retirement age for pension credit members. Therefore, if the potential pension credit member (i.e. the pension claimant) is in poor health, pension sharing will result in a loss of the value of the benefits as the pension credit member will receive benefits based on the assumption they will live for average life expectancy. If their life expectancy is in fact reduced, the actual value of what they will receive is less and there is a resultant loss in the value of the combined benefits. This is because the benefits are calculated as being paid for a longer period but will in fact be expected to be paid for a shorter period.

I.36 Depending on the severity of the ill health, the converse may also be true. For example, if the pension holder is in poor health and has reduced life expectancy, then it may be better for the combined wealth of the parties to share the pension 100% (including any State Pensions that can be shared) to a healthy spouse, because the pension holder is unlikely to receive the full value of the benefits if they do not live to normal life expectancy.

I.37 A Pension Attachment Order could then be made against the new shared pension (except for State Pensions) in the original pension holder's favour during their lifetime. A note of caution, however, this requires the co-operation of the pension claimant and the ability for them to be able to take immediate benefits if required.

I.38 A similar approach could also be applied to a private sector scheme. However, it should only be considered when a pension scheme has not indicated it will medically underwrite any pension share before the CE is calculated at the point of implementation. If the scheme will medically underwrite the CE then this will often negate any benefit in doing the PSO in the first place. (See also Part 12 paragraphs 12.5 and 12.6.)

Re-employment after retirement

I.39 In public sector schemes, sometimes members retire and take a lump sum and the pension becomes payable, and then the pension holder resumes employment within the same public sector. This will often lead to a reduction or ceasing of pension payments until the pension holder retires again. There are different rules in different schemes about whether the salary link is removed on re-employment. Practitioners should take care with this issue. They should also take care that information can be misleading because where a pension is brought into payment and then the member resumes service, the pension might be abated due to rules about the maximum amount the individual is allowed to receive. Therefore, a payslip of the pension might give a misleadingly low figure about the value because when they finally retire, the pension will resume at the higher level.

I.40 Practitioners are therefore advised to be alert for the situation where one party has a pension in payment and appears to be working for the same or a connected employer and seek advice.

Appendix J
Underfunding of Defined Benefit schemes and reduced Cash Equivalents (CEs)

Background to scheme underfunding

J.1 Many of the UK's private sector salary related pension schemes are underfunded and could remain so for many years. An employer that sets up a pension scheme for its employees, where the pension payable in retirement is linked to the salary (however defined) that the employee earned while at the company, is then responsible for ensuring that there is sufficient money in the 'pot' to meet that future liability. In other words, they must ensure the pension fund has sufficient money in it to pay the pension of the former employees however long they live.

J.2 Regular valuations of the pension scheme are carried out by the scheme actuary to ensure that the pension fund has sufficient money to meet those liabilities. If there is a shortfall, the employer must make up that shortfall by paying additional contributions over a period of time. A recovery plan will be agreed with the scheme trustees in conjunction with advice from the scheme actuary. If a company goes bust before any shortfall is made up, there is a government 'lifeboat' scheme called the Pension Protection Fund that may step in and take over the running of the scheme (see Appendix K).

J.3 Pension schemes become underfunded for a variety of reasons and often for a combination of these reasons. Examples include insufficient employer contributions or contribution holidays when funds are performing well, poor investment performance or an increase in the cost of providing the pension.

J.4 If a member of an underfunded pension scheme who has not reached retirement wanted to transfer their benefits to another pension scheme, their transfer value may be reduced. This reduction prevents them from taking a greater share of the scheme than the scheme trustees can afford. So, for example, if a scheme only had sufficient funds to meet half of its future liabilities, then one might expect the transfer value to be only half of what the full value would have been had the scheme been fully funded.

Impact of scheme underfunding for pension sharing transfers on divorce

J.5 On divorce, where a pension claimant is to receive a share of the pension holder's Defined Benefit pension scheme, the fact of the scheme being underfunded means that the scheme trustees can reduce the transfer value that is due to be paid to the pension claimant. However, most private sector Defined Benefit pension schemes (underfunded or not) insist on pension claimants taking their pension transfer to a pension scheme in their own name. It would be unfair, in these underfunded cases, if the scheme could insist on a transfer out of the scheme and then reduce the transfer value due to scheme underfunding; by contrast, the pension holder has a choice as to whether to accept a reduced transfer value (which would arise were he or she to leave the scheme) or stay in the scheme. In order to avoid this unfairness, the law requires scheme trustees who reduce transfer values on divorce either:

- to offer the pension claimant an internal transfer option, which would mean no loss of benefit unless the scheme eventually went into the Pension Protection Fund (see Appendix K), or

- to require a transfer out of the scheme but on a *reduced* basis, where an internal transfer on an unreduced basis has been refused.

J.6 The decision for the pension claimant in this situation is a tricky one, especially if there is also a concern the company might go into liquidation. Do they take the internal or shadow membership option knowing the scheme is underfunded (which may not in itself be a problem), or do they risk taking what can often be a substantially reduced transfer value (CE)? It is important for advice to be sought from an appropriately qualified adviser in this situation so that all the relevant factors can be discussed and considered. Lawyers acting in such cases would be well advised not to be drawn into being seen to give guidance or advice. This is a specific situation where the advice around these two options is considered by the FCA to be regulated transfer advice, as opposed to just regulated advice. There are much more stringent requirements for advisers engaged in this type of activity.

Offsetting against reduced transfer values

J.7 A Defined Benefit scheme CE might not be a reliable indication of pension rights for the purposes of divorce, primarily because the cost of securing similar benefits on the open market may be far higher than the CE provided. This makes it incredibly difficult to compare this value with an equivalent amount of cash or, say, the value of the family home. Pension experts are often required to report on a fairer value.

J.8 In cases where final salary scheme CEs are reduced owing to scheme underfunding it is important not to use the lower, reduced value for offsetting purposes: it is the full, unreduced value that more closely reflects the value of the pension holder's pension benefits, although a PODE would still be able to make an assessment of a fairer value. The reduced transfer value simply reflects the fact that there is insufficient money *at present* to allow the trustees to meet all of their liabilities. Unless the company has already gone into liquidation, it is reasonable to assume that the company will have a scheme deficit reduction plan in place to reduce the amount of the funding deficit and transfer values will eventually increase again.

Appendix K
The Pension Protection Fund and Financial Assistance Scheme on divorce

The Pension Protection Fund

Overview

K.1 The Pension Protection Fund (PPF) is a fund of last resort, set up to pay compensation to members of eligible Defined Benefit occupational pension schemes that fail and cannot meet their liabilities where the failure arose after 5 April 2005. (For pre-5 April 2005 failures, see the Financial Assistance Scheme, discussed in the next section.) It should be noted that the PPF is not there to provide compensation for Personal Pensions and other Defined Contribution funds which have fallen in value due to poor fund management.

K.2 Entitlement and payments made by the PPF are referred to as compensation rather than pension entitlements or payments. The PPF provides compensation in situations where there is a (qualifying) insolvency event in relation to the scheme's sponsoring employer and there are insufficient assets in the scheme to provide at least PPF levels of compensation.

K.3 Some very small pension schemes, for example those with fewer than 12 members, all of whom are trustees of the scheme, or those with just one member, are not eligible. Public-sector schemes including the Local Government Pension Scheme are not eligible. In part, PPF compensation is funded by a levy paid by all eligible pension schemes and in part from the funds of schemes that transfer into the PPF. It succeeded the Financial Assistance Scheme, payments under which the PPF now administers.

K.4 To qualify for entry into the PPF, the scheme's sponsoring employer must be in a situation in which it cannot pay the shortfall in the scheme funding, often because it is insolvent. Therefore, an insolvency practitioner will usually be appointed to deal with the winding up of the employer. One of the insolvency practitioner's responsibilities is to notify the PPF of the insolvency event. If a pension scheme member or any other party makes the PPF aware of the insolvency of an employer, but an insolvency practitioner has not been appointed, the PPF has the power to regard an insolvency event as having occurred.

K.5 When such an insolvency event occurs, the PPF has a period of 28 days in which to decide whether the scheme is eligible. If it is, an Assessment Period commences, an extremely lengthy process that can take many years. During the Assessment Period, the scheme trustees are responsible for paying pensions but at PPF compensation levels.

K.6 If at the end of the Assessment Period an actuarial valuation confirms that the scheme cannot pay benefits at or above PPF compensation levels, it will transfer into the PPF. The transfer process can take around six months to be completed and only when it is completed is the scheme formally regarded as being in the PPF.

K.7 Schemes will not necessarily complete all stages of the PPF process. Some schemes may not proceed beyond the assessment process, for example, if the sponsoring employer is rescued as a going concern or the business is sold and another body takes responsibility for the pension scheme liabilities.

Pension scheme underfunding and insufficiencies

K.8 Pension schemes are under a statutory obligation to meet minimum funding objectives that are designed to ensure that schemes have sufficient funds to meet their current and anticipated liabilities. If an actuarial valuation shows that a scheme cannot currently meet those objectives, it is said to be underfunded. In such circumstances, the trustees are required to work with the sponsoring employer to put a recovery plan in place. That may involve the employer making exceptional / additional contributions over several years and may also include changes to the benefits provided to reduce the liabilities.

K.9 Pension scheme trustees can act to protect an underfunded scheme from members transferring benefits by reducing transfer values. Before they can take that step, the scheme's actuary must have provided an insufficiency report; but trustees are not obliged to reduce transfer values even if such a report is produced.

K.10 Although pension scheme underfunding may be cause for concern, the underlying consideration must be the strength of the employer's covenant and its ability to improve the scheme's funding over time. It would be incorrect to assume that every underfunded pension scheme, even those which are reducing transfer values, are necessarily heading for the PPF.

The PPF on divorce

K.11 Search facilities on the PPF website can be used to establish whether a pension scheme is in the Assessment Period or has transferred into the PPF. Separate searches on the PPF website do have to be made for both schemes in the Assessment Period and Transferred Schemes. Those schemes that have notified the PPF of an insolvency event and those in the Assessment Period are the most problematic in divorce cases owing to the inevitable uncertainty that will exist until the Assessment Period is concluded. During that period, the scheme will still issue CEs and Pension Sharing Orders can still be made and implemented by the scheme, but CEs are likely to be reduced. However, although CEs are likely to be reduced, a scheme cannot insist on an external transfer and must offer the option of an internal transfer too.

K.12 Those who were over the scheme's normal pension age when the Assessment Period started, or in receipt of a dependant's or ill-health pension will usually receive 100% of their pension as PPF compensation. Any PPF compensation relating to service before 5 April 1997 in the original scheme does not increase. In contrast, PPF compensation relating to post-5 April 1997 service goes up at the rate of inflation subject to a cap of 2.5% per year, irrespective of what the original scheme would have provided.

K.13 If a scheme transfers into the PPF, members not in receipt of pension when the Assessment Period commences will receive compensation payments commencing at age 65,[70] again irrespective of the normal pension age in the original scheme. Such compensation is at 90% of the original pension and subject to a cap (at April 2019 of £40,020 which equates to a maximum compensation of £36,018). For those with 21 or more years' service in the original scheme, the cap is increased. Increases in the cap are at the rate of inflation limited to 2.5% per year. Compensation can be taken early, in which case it will be subject to actuarial reduction, or deferred, in which case it will be increased.

K.14 PPF compensation can be shared or attached on divorce by making a compensation sharing or attachment order.[71] The PPF will provide CEs on request. Contrast compensation under the Financial Assistance Scheme (see next section), which cannot be shared or be subject to the Pension Attachment Order.

FAS: Overview

K.15 The Financial Assistance Scheme (FAS) is another compensation scheme for those who have lost out on their pension. Eligibility for the FAS is limited to Defined Benefit pensions schemes which meet all the following criteria:

- The scheme was underfunded and started to wind-up between 1 January 1997 and 5 April 2005,[72] and
- The scheme did not have sufficient funds to pay members benefits, and

either

- The sponsoring employer cannot pay because it is insolvent, no longer exists or is no longer obliged to meet its commitment to pay its debt to the pension scheme

or

- The scheme started to wind-up after 5 April 2005 but is ineligible for compensation from the Pension Protection Fund owing to the employer becoming insolvent before that date.

K.16 The FAS closed to Notification and Qualification of new schemes on 1 September 2016; consequently only those schemes which have already been notified to the FAS will be accepted into the scheme. Some schemes are still under assessment by the FAS and consequently their eligibility has not yet been determined.

K.17 For the scheme to qualify for the FAS, it was necessary for the application process to be started by notifying the FAS of the event. Trustees, scheme managers, professional advisers, a surviving spouse or civil partner of a member of the scheme who has died or members of schemes that met the eligibility criteria were able to notify the FAS of the insolvency event. In the case of fully wound-up schemes, the former trustees, scheme managers or professional advisers of schemes were able to start the application process by notifying the FAS. All schemes that have completed the initial notification are named on the FAS web site and the scheme status (within the FAS process – see next paragraph) is given.

70 Note the PPF rules here are not related to state pension age.

71 See MCA 1973, ss25E-G.

72 For failures after this date, see the Pension Protection Fund, discussed above.

K.18 Once the FAS has been notified of the event, there is a qualification process during which the pension scheme provides the evidence required by the FAS Scheme Manager and eligibility for the FAS is checked. The FAS qualification process could take six months or more. Not all schemes complete the qualification process: some are unsuccessful. There are eight scheme codes ranging from *Notified – Unsuccessful* through to *Acceptable – final data received for all members*. If a scheme successfully completes the qualification process, the members will become entitled to FAS compensation.

K.19 If the scheme is still in the winding-up process, the final amount of FAS compensation due to eligible members can only be calculated once that process has been completed. This can take several years. The FAS Scheme Manager has the discretion to award initial payments to those members of schemes that have successfully completed the qualification process

K.20 Unlike the PPF, the FAS is a top-up arrangement and therefore those entitled to FAS compensation may receive it <u>in addition</u> to the benefits the pension scheme pays or will pay.

The FAS on divorce

K.21 The FAS website lists all schemes which have been notified to the FAS together with the schemes' current status.

K.22 Those schemes that have successfully notified the FAS but have not yet progressed through to Qualification are the most problematic in divorce cases owing to the inevitable uncertainty that will exist until the qualification decision has been made.

K.23 During that period, the scheme will still issue CEs and Pension Sharing Orders can still be made and implemented by the scheme, but CEs are likely to be reduced.

K.24 Those who are eligible for FAS compensation will receive a maximum of 90% of the pension accrued in the original pension scheme, subject to a cap for any one FAS member. The cap applies to the combined total of any pension from the original scheme and the FAS compensation. For members whose entitlement began between 1 April 2019 and 31 March 2020, the cap is £36,103 a year. The cap is revalued each year according to the increase in the Consumer Prices Index.

K.25 Compensation is paid from the normal retirement age of the original pension scheme but not before age 60. From the date the scheme winds-up to the normal pension age, any part of the accrued pension which was entitled to increases in accordance with the original pension scheme rules will increase from wind-up date to 30 March 2011 at the rate of the increase of the Retail Prices Index, up to a maximum of 5% per year. From 31 March 2011 to the normal retirement age, increases are at the rate of increase of the Consumer Prices Index up to a maximum of 5% per year. Once compensation is in payment, only that part of the original scheme pension which accrued from April 1997 increases each year by the rate of increase of the Consumer Prices Index capped at 2.5% per year.

K.26 If a Pension Sharing Order is made and it takes effect before the scheme winding-up is completed or before the scheme has transferred into the FAS, it should be implemented by the original pension scheme trustees. If a Pension Sharing Order is made and it takes effect after the scheme wind-up is completed or transferred to the FAS, the trustees of the original scheme are <u>not</u> required to implement the order by sharing the pension holder's pension rights.

K.27 FAS compensation cannot be subject to Pension Sharing, Pension Compensation Sharing or Pension Attachment Orders but the FAS compensation can be considered when determining the extent of any orders against shareable pension rights and / or PPF compensation or as a resource generally.

Appendix L
Data for a PODE report

L.1 Instructed PODEs will need to satisfy themselves that they have obtained sufficient material to enable them to give an accurate and reliable expert opinion and have identified all information necessary to achieve that aim. Data collection and asking for appropriately detailed data from scheme administrators at the start will enable efficient completion of reports.

L.2 While administrators should always be asked to provide additional information or clarification where this is needed to complete the report, they can be slow to respond. In appropriate cases, taking a reasonable view about what the likely information might be in the absence of actual information might be sensible and proportionate. This will be a matter of judgment for the PODE and should depend upon materiality. Any missing data and such assumptions made should be clearly set out in the expert report together with details of the sensitivity of the assumptions to reasonable variation.

L.3 The following lists identify the sorts of information that a PODE should consider obtaining as a helpful starting point for a PODE Report. The information requested/needed may be subject to variation in appropriate cases. The information sought will depend on whether the pension is Defined Benefit and if so, final salary or career average, Defined Contribution or Hybrid, or whether there is an annuity in payment.

L.4 In a Defined Benefit scheme case the following information is likely to be important:

(i) Accrued pension (and automatic lump sum) or pension in payment including Guaranteed Minimum Pensions (GMPs)

(ii) Accruing pension for an active member

(iii) Current CE and date of CE

(iv) Calculation basis for CE, in so far as this is available

(v) Events which may materially change the CE

(vi) Scheme Retirement Age

(vii) Member specific and Scheme-specific Early Retirement terms and how any factors will be applied for the member

(viii) Late Retirement terms and how any factors will be applied for the member

(ix) Commutation factors for taking cash in place of the pension

(x) Increases in deferment

(xi) Is the pension defined at date of leaving or revalued to date

(xii) If revalued to date, has the GMP been revalued

(xiii) Is GMP revalued by Fixed Rate, s21 or Limited Rate

(xiv) Increases in retirement

(xv) Adjustments to pension at State Pension Age or other age

(xvi) Factors affecting future benefit (pensionable salary restrictions)

(xvii) Options available for Pension Sharing (internal / external)

(xviii) If internal, the terms of the internal option offer

(xix) Fees for Pension Sharing and whether they can be taken from the pension rights

(xx) Whether Scheme has made a statement about underfunding

(xxi) Any material announcements to members

(xxii) Service dates including part time history

(xxiii) Pensionable salaries at significant dates

(xxiv) Accrual rates throughout service

(xxv) Any AVC scheme and, if so, whether there is a requirement for the AVC to be shared identically to main scheme

(xxvi) Details of any Lifetime Allowance calculations (for example – any Lifetime Allowance protection in place or Pension Input amounts for the annual allowance) or percentage of Lifetime Allowance used to date

(xxvii) Whether the scheme requires evidence of health and/or is likely to re-assess the health of either annuitant in recalculating the CE in accordance with regulations

L.5 In a Defined Contribution scheme case the following information is likely to be important:

(i) Current CE and date of CE

(ii) Market Value Adjustment (MVA) / allowance for bonus and how this might change in future (e.g. date when no MVA can apply)

(iii) Penalties for withdrawal

(iv) Contributions made

(v) All inward and outward transactions

(vi) For unit linked cases, history of unit prices at key dates

(vii) Defined benefit for Retirement Annuity Contract

(viii) Guaranteed Annuities Rates or other Guarantees

(ix) GMPs for s32 contracts

(x) Fees for Pension Sharing and whether these can be taken from the pension rights

(xi) Any Additional Voluntary Contribution (AVC) scheme and, if so, whether there is a requirement for the AVC to be shared identically to main scheme

(xii) Details of any transfers into the plan including contribution history and the beginning and end of any pensionable service to which the transfer value relates.

L.6 If there is an annuity in payment the following information is likely to be important:

(i) Confirmation whether it is a pension annuity or a Purchased Life Annuity (PLA)

(ii) Any rate of pension increase to the annuity

(iii) Whether there is a second annuitant

(iv) Whether the second annuitant would remain following a divorce

(v) Whether, and if so on what terms, the annuity choice is reversible, or whether the annuity provider insists on some or all of the annuity being reconstituted following a PSO

(vi) Whether the annuity contains any unusual features (for example, With Profits)

(vii) Whether the annuity provider requires evidence of health and/or is likely to re-assess the health of either annuitant in recalculating the CE in accordance with regulations.

L.7 Although in specific cases it might be important and justifiable, a PODE will not ordinarily be expected to conduct an overall review of the scheme rules or of the funding position of the scheme.

Appendix M
Format and content of PODE reports

M.1 Some standardisation of the content and format of PODE reports would be helpful for parties, lawyers, and judges. All reports need to be compliant with paragraph 9.1 of Family Procedure Rules, Practice Direction 25B.

M.2 The suggested content and structure of a PODE report (taking into account the contents of Appendix L and Appendix N) is as follows:

i) An introduction setting out the detail of the instruction and some basic background information including the parties' ages

ii) An executive summary which should be included after the introductory paragraphs

iii) A detailed description of the disclosed pension benefits including Cash Equivalents, dates of membership, accrued pensions (or any underlying guarantees), retirement ages (including any early/late retirement terms), pension increases, options, and any adjustments or assumptions regarding the pension benefits made in the calculations

iv) Tabular summary of CEs and pension income pre and post sharing

v) Pension Sharing (and Pension Attachment if relevant) information including case specific issues, options for the ex-spouse and charges

vi) Calculation results including an explanation of how they are reached and illustrations of the expected outcome of any Pension Share for both parties

vii) Where a conclusion or opinion as to which of the different options or methods used appears more favourable in a case is expressed, it is important for the expert to report issues of fact and calculation rather than purporting to determine the appropriate outcome in the case

viii) Self-certification endorsed with a Statement of Truth (Appendix D)

ix) Appendices to include key data, key information used together with the sources, CV for the expert

Appendix N
PODE report content on income or capital equalisation

A PODE report on income equalisation or capital equalisation should include the following:

An explanation of methodology which should include the following features:-

(i) a valuation basis which is fair and neutral without bias towards either party

(ii) a valuation basis consistent pension-to-pension based on the individual benefits and features of each pension

(iii) approach taken regarding any discretionary benefits

(iv) economic data and assumptions utilised including for indexations, tax rates, pre-retirement investment return, pre-retirement increases for active members, demographic assumptions, mortality tables used (including improvements applied), how gender differences are taken into account pre-retirement and post retirement

(v) in relation to personal pensions, assumptions about expenses, new contributions and existing arrangements

(vi) in relation to annuity rates, information about the rates' source, the date sourced/captured, annuity features (i.e. assumed age at annuitisation, escalation rate, guaranteed period, spouse's benefits, frequency and whether rates used are best available, average of available rates or modified average of available rates) and

(vii) in relation to mortality assumptions, how these are derived, assessment if less than average for age and gender, basis of assessment and how any known health issues have been taken into account.

A recital of information should include the following features:-

(i) names/identities of pensions to be shared to achieve objective

(ii) percentage of each pension share required to achieve objective

(iii) as at-date of the valuations and report, for each pension:-

a) name of pension

b) type of pension

c) normal pension age

d) automatic pension commencement lump sum

e) revaluation rates (in deferment and payment)

f) annual pension on retirement, accrued to date

g) spouse's benefits

h) death benefit post retirement

i) pensionable salary (if active)

j) accrual rate (if active)

k) assumed date of leaving (if active)

l) assumed increases in pensionable salary (if active)

m) approach adopted to deciding which pension(s) to share to meet objective

n) known or foreseeable events which could affect the valuation (e.g. pensionable service milestones, imminent retirement foreseeable etc.)

It is appreciated not all this information will always be available. Information not available should be disclosed. Where information is missing and assumptions are made, the impact on the figures should be highlighted in a PODE report.

A PODE report on income equalisation should include the following in addition:

(i) estimated pre-share pension income (and lump sum where appropriate)

(ii) estimated pension credits and pension debits from the calculated percentage pension shares

(iii) estimated post-share pension income (and lump sum where appropriate)

(iv) assumed retirement ages for each pension included in the calculation

(v) demonstration of how equality of income is achieved (including explanation of any adjustments made as necessary).

A PODE report on capital equalisation should include the following in addition:

(i) calculated capital value for each pension with applicable retirement pension

(ii) total pre-pension share capital values of each party's pensions

(iii) post-pension share capital values of each party's pensions

(iv) increase or reduction in total capital value because of pension sharing.

Appendix O
Seeking a consistent basis of valuation: demographic, economic and financial assumptions

O.1 As discussed in Part 6 above, where there is (i) a Pension Sharing calculation for equality of income, (ii) a Pension Sharing calculation for equality of capital other than the CE, or (iii) an offsetting valuation defined as the DCFE (see Part 7, paragraph 7.24 above and Appendix Q paragraph Q.5 below), the PODE must cater for different pension features such as pension increases, commutation, the effect on accrued benefits for active members and the effect of drawing benefits earlier or later than the Normal Retirement Age (NRA). In addition, the PODE needs to make demographic, economic and financial assumptions.

O.2 There is disagreement among experts as to appropriate financial, economic and demographic assumptions to be used in the preparation of PODE reports. Differences in assumptions and approaches lead to a lack of consistency for clients and potential 'expert shopping'. However, assumptions considered appropriate in the opinion of a competent PODE would meet the requirements of FPR 2010 Part 25, even if these varied from PODE to PODE.

O.3 An external source that has high credibility and that is frequently updated should be used as a starting point for the financial, economic and demographic assumptions when determining equality of income and equality of capital value. The FCA Transfer Value Comparator basis, combined as appropriate with market annuity rates, is a reasonable starting point for pension valuations. An outline of the FCA Transfer Value Comparator basis is set out in Appendix Q. However, when considering the basis appropriate for any particular report, PODEs should take into account the following:

- When the basis was last updated (for example the change in market annuity and interest rates since the most recent published basis would typically be relevant).
- The TVC basis does not take into account the default risk in Defined Benefit pensions. When using the TVC basis the PODE should consider such risk and adjust if appropriate.
- The FCA Transfer Value Comparator basis is a recommended starting point. However, in individual cases, alternative assumptions may be appropriate. PODEs should state in their report their opinion that the methods and assumptions they have used in their calculations have been determined as appropriate after taking into account the range of methods and assumptions shown in this document, with reasons.

Equalisation of Income

O.4 There is a range of methods and assumptions that may be reasonable for an equality of income calculation. An acceptable range of approaches to the calculations is set out in Appendix P below. In all cases, a PODE report should show awareness of that range, and set out clearly the method (and assumptions) used in the calculations explaining the reasoning behind the approach adopted. This must be in sufficient detail for another PODE to understand and broadly check the results, and if it becomes material, to be able to illustrate how a different approach might impact the valuation.

O.5 In equalisation of income reports, the date to which calculations are targeted must be specified in the letter of instruction. An array of dates is discouraged. Choice of date may depend on NRA in a relevant scheme, ages of the parties and age differences, income gap issues, and the stated future work intentions of both parties. If the parties do not agree on a date, the PODE can be asked to provide calculations for more than one date (noting that this will increase costs). The PODE should, pursuant to their overriding duty to the court, comment on the choice of date if she or he feels this is warranted, for example if it is a date prior to relevant benefits being payable without discount, or if the choice of date seems to be advantaging one or other party inappropriately.

O.6 The PODE will need to consider the expected starting age for the pensions if different from the age specified. This could be done in a few acceptable ways. Some acceptable methods are set out in Appendix P.

O.7 Equal income sharing calculations need to take account of the pensions increase provisions on the various pensions in retirement. It would be appropriate to adjust pensions to a single pension increase provision standard. Alternative methods might include giving enough information about the provision and the effect of the different provisions on the value of the pension for the parties to understand any difference in value of the two parties' pensions after the equal income sharing calculated in the report.

Equalisation of capital

O.8 In some cases, a PODE made be asked to provide a calculation for equalisation of 'true capital value', also sometime called 'fair value', 'realistic value', 'open market value' and 'consistent capital value'. A consistent basis of valuation of a pension is variously sometimes referred in all these ways, but there is no standard definition of the value of a Defined Benefit pension. As noted above, the CE of a Defined Benefit scheme might not be a reliable value for the purposes of divorce. Indeed, some experts feel that asking a PODE to use CEs may conflict with their professional obligations.[73]

O.9 Placing a capital value on a Defined Benefit pension scheme is not the same as seeking the retail cost of providing an equivalent benefit from a market-purchased annuity product. Such products do not generally exist; they cannot be adjusted for gender-differentials in life expectancy; and mortality assumptions of retailers are not known. They also cannot take into account the many characteristics of Defined Benefit schemes.

O.10 As with equalisation of income reports, there is a range of assumptions that may be reasonable for an equality of capital calculation. In all cases, a PODE's report should set out clearly the assumptions used in the calculations and explain the reasoning behind the assumptions adopted, in sufficient detail for another PODE to understand and broadly check the results, and if it becomes material, to be able to illustrate how a different approach might impact the valuation.

O.11 Where a PODE is instructed to carry out calculations based on equalisation of capital, the PODE will need to consider the likely retirement ages for each party from each pension, which can substantially affect the value of some pensions. This affects both deferred Defined Benefit pensions where early and late retirement terms are significantly different from normal actuarial terms, and active members of Defined Benefit schemes where the age at which the member leaves service and/or retires can significantly affect value.

73 In particular Financial Reporting Council, Technical Actuarial Standard 100 ('TAS 100')

Equalisation of income and equalisation of capital

O.12 Whether a PODE is requested to consider equalisation of income or equalisation of capital, the PODE will need to consider several possible features of the pension schemes and issues as follows:

a. In some Defined Benefit schemes, there is a significant difference between the retirement age options for active members and deferred members. For example, the right of some police, firefighters and armed forces scheme members to an immediate pension if they stay in service up to their 25-year (policemen), 30-year (firefighters) or 22-year (armed forces) point. These are specialist cases and where a uniformed service member's retirement date is uncertain a PODE is expected to provide a range of figures looking at the different options based on the member remaining active as well as leaving. The calculations provided will depend on the individual circumstances of the case. The reasoning and approach taken should be clearly explained.

b. Pension revaluation before retirement is discussed at Appendix R. Any differences in revaluation (for Defined Benefit pensions, different from the standard of CPI/5% or CPI/2.5% revaluation) should be taken into account in the calculation (e.g. a pension with RPI inflation linking in deferment, or a GMP with fixed or earnings-related revaluation up to GMP age, should be taken into account as a higher 'real' income at retirement).

c. For active members, where there is a final-salary link or a career average Defined Benefit scheme, an appropriate assumption needs to be made about revaluation before retirement. This is discussed in detail in Appendix R. A suitable starting point for a PODE report for an active member of a Defined Benefit scheme would be to assume increases before retirement in line with increases granted to a leaver (or deferred) member. Any other assumptions considered or used in a PODE report should be disclosed with reasons for the approach taken and the effect on the calculations.

d. Changes in the pension after retirement, such as GMP step-ups at GMP age, or cessation of temporary pensions, or cumulative inflation increase at age 55 with restoration of resettlement commutation for Armed Forces pensions. One method agreed to be appropriate is to take such changes into account by adjusting the pension amount at retirement to allow for the value of the changes.

e. Lump sums and commutation. Any difference in terms, such as below-actuarial-value commutation rates for Defined Benefit pensions compared to taking more favourable lump sums up to 25% of the fund from Defined Contribution pensions should be noted. Whether allowances should be made in the calculations is at the discretion of the expert. Any assumptions made regarding lump sums need to be disclosed in the report, with reasons.

f. Value-significant features of Defined Contribution or former Defined Contribution pensions (such as annuity rate guarantees, or annuity re-profiling).

g. Where a Defined Benefit pension is being compared with a Defined Contribution (Personal Pension) sharing credit, assumptions need to be made that are inevitably imperfect but which compare both pensions on a like for like basis, as closely as possible. The Personal Pension offers more flexible benefits and there are possible market distortions with certain types of annuity (where assuming a pension share is used to buy an inflation proofed annuity). If allowance is made for such flexibilities and distortions, any assumptions made need to be disclosed in the report with reasons.

h. Adjusting pensions with different pension increase provisions, e.g. comparing Defined Benefit pensions with Limited Price Index (LPI) increases, discretionary increases, and other types of increase.

O.13 Reports should normally identify and comment on loss of value from sharing both in terms of the difference in value between pension debits and pension credits and/or loss of value to both parties. These can be significant.

Appendix P
Range of methods for pension sharing equality of income

P.1 It is recognised that there are several different reasonable approaches for the calculation method to achieve equality of income. Some accepted methods are set out below. The PODE report should make clear what method is used and the implications for each party if a different method were adopted.

P.2 Calculate sharing for equal income at the age the last pension actually comes into payment (e.g. State Pension Age (SPA)) and provide information sufficient for the parties to understand the value of any pensions and pension differences at earlier ages. Where a pension (e.g. a Police or Armed Forces pension) is expected to be in payment before the equality age specified, one method agreed to be appropriate is to describe and provide a calculation of the value of the 'pre-retirement' pension to accompany the sharing calculation.

P.3 In conjunction with the method above, recommend lump sum or periodical payment orders to compensate where significant differences arise as to the date when different pensions will be in payment.

P.4 Allow for the actual retirement age of the different pensions but assume the pension payments before the equality age specified are reinvested with the fund at the equality retirement age converted into extra retirement income. However, beware of the Money Purchase Annual Allowance (MPAA) if this has been triggered.

P.5 Adjust the value of the pension to a pension equivalent starting at the age specified. For example, reducing the value of State Pensions starting at State Pension Age (SPA) to an income equivalent starting at an earlier retirement age. In such cases the report should make clear the income actually available to the parties at each age and whether in practice the parties can actually achieve level retirement income such as by drawing on personal pensions at a higher level before SPA, which may not be available to a party with an occupational Defined Benefit pension.

Appendix Q
Financial Conduct Authority (FCA) guidance on pension transfers

Q.1 A starting point for a set of assumptions for equality of income pension sharing calculations and Defined Contribution Fund Equivalent (DCFE) is to broadly follow the FCA guidance on pension transfers. PODEs should consider adjustments to this starting point as appropriate, some of which we discuss below. Please note the information given below is a broad summary and will not be updated. The table below is based on PAG's understanding and has not been verified by the FCA or any other organisation. PODEs should refer to the FCA website and documents for full details of the most recent assumptions and method.

Background

Q.2 Since 1985 occupational pension scheme members have had a statutory right to transfer their pensions from one pension arrangement to another pension arrangement unless the pension is in payment or within one year of being put into payment. The value put on the pension for transfer to another pension arrangement is the Cash Equivalent Transfer Value or CETV. For pension sharing the CETV is now called the Cash Equivalent or CE.

Q.3 Following the introduction of Personal Pension Plans in 1988, many members of Defined Benefit schemes were ill-advised to transfer their Defined Benefit pension into a Defined Contribution arrangement (usually known as a Personal Pension). This led to the mis-selling of Personal Pensions review in the 1990s. Following the review, advising on pension transfers has been a heavily regulated activity and the adviser has to show the transfer is in the client's best interest, with the default presumption being that it is likely not to be. Where a pension share is implemented, there is an FCA exemption where no advice is being given over whether a transfer should take place or not and these cases do not fall under the regulated transfer rules. The only advice normally given is where the monies from the share should be placed. However, where a scheme offers the option of an internal or external transfer and advice is required as to which option is most favourable to the pension claimant, this would be deemed regulated transfer advice.

Q.4 For non-pension sharing (or voluntary) transfers, new guidance was issued by the FCA in March 2018 (see - https://www.fca.org.uk/publication/policy/ps18-06.pdf). One element of the new mandatory advice is a requirement to undertake appropriate analysis of the client's options (known as an Appropriate Pension Transfer Analysis or APTA). Part of the process includes a prescribed CETV comparator indicating the value of the benefits being given up - the Transfer Value Comparator or TVC.

Transfer Value Comparator (TVC)

Q.5 The TVC is a discounted value of the benefits being given up in a Defined Benefit scheme on a prescribed set of assumptions.

Q.6 Bearing in mind the purpose of the TVC is to ensure individuals are given good advice regarding whether to voluntarily transfer or not, there are many aspects of the TVC which are not particularly relevant to divorce work. The TVC basis represents what PAG considers a reasonable starting point for a set of assumptions, with suitable adjustments such as allowing for expected investment returns before retirement. We have set out what we believe are the relevant assumptions that have been proposed for the TVC below together with some notes.

Variable	Recommended FCA Assumption (with effect from 6 April 2019)	Note
Pre-retirement mortality	No guidance given	1
Retail Prices Index:	3.0% p.a.	
Consumer Prices Index:	2.0% p.a.	
Pre-retirement Limited Price Indexation revaluation rate	For benefits linked to RPI = 3.0% p.a. For benefits linked to CPI = 2.0% p.a.	
Pre-retirement discount rate	The rates of return for valuing future income benefits between the date of calculation and the date when the future income benefits would normally come into payment must be based on the fixed coupon yield on the UK FTSE Actuaries Indices for the appropriate term.	2
Pre-retirement expenses	0.75% p.a.	
Post-retirement mortality:	Based on year of birth rate derived from the Institute and Faculty of Actuaries' Continuous Mortality Investigation tables PFA08 and PMA08 and including mortality improvements derived from each of the male and female annual mortality projection models in equal parts. For any year commencing 6 April, the male and female annual CMI Mortality Projections Models in the series CMI (20YY-2)_M_[1.25%] and CMI (20YY-2)_F_[1.25%], where YY-2 is the year of the Model, should be used.	3

Variable	Recommended FCA Assumption (with effect from 6 April 2019)	Note
Post-retirement interest rate to be used in calculating the annuity rate	Currently a rolling annuity interest rate averaged over 3 months. Proposal is to use an interest rate on a single recent monthly yield. Y is defined as 50% of the sum of the FTSE Actuaries Government Securities Index-Linked Real Yields over 5 years assuming: • 5% inflation; and • 0% inflation Minus 0.5%, rounded to the nearest 0.2% with exact 0.1% rounded down. Where the pension does not increase in payment or increases at a fixed rate, annuity interest rate is Y plus 3.5%. Where the pension increases in payment at RPI or LPI, annuity interest rate is Y Where the pension increases in payment at CPI, annuity interest rate is Y plus 1.0% There are also procedures laid down for Limited Price Indexation (LPI) and cases where there are minimum and maximum rates – for example: Where the pension increases in payment at LPI based on RPI with maximum pension increases less than or equal to 3.5% or with minimum pension increases more than or equal to 3.5%, the annuity interest rate is Y allowing for the maximum pension increases. Where the pension increases in payment at CPI with maximum pension increases less than or equal to 2.5% or with minimum pension increases more than or equal to 3.5%, annuity interest rate is Y allowing for the maximum pension increases. Where the minimum pension increases are more than equal to 2.5% but less than 3.5% the annuity interest rate is Y allowing for increases at the minimum rate of pension increase.	
Post-retirement expenses	4% annuity expenses	
Proportions married	N/A	4

Notes to table:

1. There appears to be no reference to pre-retirement mortality in the FCA basis. It is suggested pre-retirement mortality is ignored and assumed to be nil.

2. There are a number of considerations when choosing an appropriate basis including that many Defined Benefit pension arrangements have a risk of default. PAG suggests that the discount rate is based on the findings of the FCA document "Rates of Return for FCA prescribed projections" dated September 2017 which can be found at https://www.fca.org.uk/publication/research/rates-return-fca-prescribed-projections.pdf. These are from an external source and have been independently peer reviewed. PODEs would use as a starting point, the mid-rate asset class assumptions for a 50/50 portfolio where 50 is invested in stable assets and 50% in volatile assets. PODES may choose to adopt higher risk assumptions for longer term investment time horizons and lower for short term.

3. It is suggested any reasonable post retirement mortality basis is acceptable for PODE reports.

4. PAG suggests the starting point for any PODE report is that no allowance should be made for any spouse's pension.

Appendix R
Defined Benefit scheme with final salary linking or revaluation above inflation for active members

R.1 The traditional Defined Benefit final salary scheme provides benefits which are based on the pensionable service completed and the salary paid at retirement or earlier leaving service. The newer Defined Benefit career average scheme provides benefits based on the actual salary earned over the pensionable service plus revaluation at a rate typically in excess of inflation between the date of the earnings and retirement.

R.2 The Cash Equivalent (CE) is calculated using benefits based on pensionable service up to the date of the CE and the salary at the date of the CE with statutory revaluation only (broadly inflation) between the date of the CE and the date of retirement.

R.3 Hence the CE for an active (contributing) member of a Final Salary or Career Average scheme only allows for inflation increases between the date of CE and retirement whereas in practice, if the member remains in service, the accrued pension will actually be higher.

R.4 One way of determining which approach to use for a Final Salary Scheme with promotional salary increases is to consider whether future promotional salary increases should be apportioned to the marriage or not. For example:

- Using the accrued pension from the CE with inflationary increases only effectively gives the **future** promotional salary increases on **pension accrued during the marriage** to the **member** (i.e. the husband in most cases).
- Making an adjustment for future promotional salary growth effectively apportions some or all of the **future** promotional salary increases on **pension accrued during the marriage** to the marriage to be **split between the parties**.

R.5 If allowance is to be made for future promotional salary increases or for additional revaluation in a Career Average scheme then assumptions regarding future membership and the level of additional increases have to be made. The approach used and the assumptions made can have a significant effect on the calculations.

R.6 A reasonable starting point for a PODE report for an active member of a scheme would be to assume increases before retirement in line with increases granted to a leaver (or deferred) member; any other assumptions considered by the PODE to be appropriate should be disclosed with reasons in the report.

R.7 Future promotional or real salary increases should not be assumed unless there are specific instructions to do so or better information available justifying such an approach. In cases where it is agreed future promotional or real salary increases should be considered, the PODE report should clearly explain the approach taken and the effect on the calculations.

R.8 For an active member of a Career Average Defined Benefit scheme, the benefit for accrued service paid on future leaving or retirement will typically be based on a higher revaluation rate than that applied for a deferred member. The starting point for a PODE report would be to assume increases in line with those given to deferred members; any other assumptions considered by the PODE to be appropriate should be disclosed with reasons in the report.

Appendix S
Apportionment of final salary pension rights

S.1 There are a number of ways to deal with pension rights accrued prior to the marriage or co-habitation and four are set out here, although it is essential to remember that in adjudicated cases this is a matter of judicial discretion.

No apportionment

S.2 The first method is to assume that all pension rights are included in the calculations and make no apportionment at all.

S.3 This is the most appropriate for cases to be decided based on needs in retirement and for long marriages.

'Deferred Pension' method

S.4 The second method would be to consider the pension rights that had been accrued to the date of either cohabitation or marriage (or whatever date is chosen for the starting point) and allow for increases that would have been made to a deferred pension during the period to the present date (the practitioner might exclude the difference of increases between GMP and inflationary revaluation). This would then be compared to the accrued pension at present and that proportion of the pension rights would be excluded. This allows for what could be termed as the 'passive growth' of the pension rights accrued prior to the relationship. This allows the assets applied to the marriage to include, for example, the effect of any promotions earned during the marriage on the pension rights accrued at the start of the relationship. Such an approach may more fairly reflect the respective contributions (in Matrimonial Causes Act 1973 terms) of the parties to the pension and involve less discrimination between the earner and the home-maker.

S.5 The rationale behind this is that sometimes the non-member spouse will say, for example, that during the marriage, they did the school runs, the shopping, washing, ironing and household chores and maintenance, paid the bills and ran the house so that the member spouse was able to be out between 7am and 9pm concentrating on their career to earn those promotions. The non-member spouse may have sacrificed their career to do this.

S.6 In such cases, it is a 'marriage of equals' and the non-member spouse has not been able to demonstrate achieving 'similar success as the home maker' to the member-spouse, but this method allows for the effect of the promotions to be kept within the marital assets. Thus, if the marriage has been successful in creating security in retirement and procreation, those successes are reflected in the settlement.

S.7 The Deferred Pension method requires details of the pension accrued as at the date of marriage, but this information is usually available if requested and if for any reason it is not available, it will be possible for the parties to obtain their gross income from HM Revenue and Customs so that a reasonable approximation can be made.

Cash Equivalent (CE) method

S.8 This method takes the CE as at the date of marriage with no adjustment, compares that with the CE now and simply allocates that proportion of the benefits to the member with the pre-accrued rights and defines the rest according to whatever decision is made. This is what was done in the *Martin-Dye* case.[74]

S.9 This will, in many cases, lead to a very small amount of assets being allocated in respect of the pre-marital period but it is nevertheless a possibility.

74 *Martin-Dye v Martin-Dye* [2006] EWCA Civ 681

S.10 Although providers are expected to be able to provide historic CEs (as they are required in Scottish cases) these may be difficult to obtain and possibly costly. In *Martin-Dye*, the Court accepted the evidence of an actuary tasked with giving his estimate of what it would be.

Straight-line method

S.11 This is where the benefits are simply divided up assuming they all accrue evenly over the period. Therefore, if the member has 30 years' service and ten of those are pre-marriage, then a simple 20/30ths of the total benefits would be included in the calculations. This is an easier calculation to do than many of the other methods.

S.12 It will usually be the method that favours the member spouse most.

Appendix T
Fees and costs

T.1 The provision of Pension on Divorce expert reports is market-driven, where fees, speed of work, qualifications, reputation, and scope and depth of work all play a part in selection of experts by clients. Fees are determined by market forces.

T.2 As a matter of good practice clear questions should be addressed to the PODE and the PODE should ensure they are clearly answered in the report. A draft letter of instruction is at Appendix E. If there is uncertainty about the questions to be raised, seek the assistance of a suitably qualified expert.

T.3 In the current market, fixed fees tend to be preferred by clients. In providing a fixed fee quotation, PODEs should not be expected to give an estimate until they have had the opportunity to consider the complexity of the instructions and the likely work required. This means that solicitors or parties in person need to carry out all the steps required by FPR 2010, PD25D well in advance of any court hearing likely to direct the obtaining of a PODE report.

T.4 It is appropriate for a PODE, in assessing the case and preparing to provide a fee for quotation, to consider the following factors:

a. A standard report might involve basic equality of income calculations arising out of one or two Defined Contribution or Defined Benefit pension schemes and will include an assessment of State Pension entitlements and a full explanation of relevant matters

b. The following factors will generally make a case more complex:

(i) The existence of a larger number of schemes, particularly if they are Defined Benefit schemes

(ii) The requirement of an additional apportionment calculation (e.g. one excluding pre-marital pensions), save (possibly) if it is to be carried out by straight timeline discounting

(iii) The requirement of an additional calculation for offsetting if full calculations are required (i.e. the recommended best practice)

(iv) If a report involves considering a PSO of State Pension entitlements

(v) If a specific analysis is required of the effect on pension sharing of a party's health issues

(vi) Where an equalisation of income calculation is required at two or more different age combinations

(vii) The answering of post-report additional questions where it is reasonable that these were not addressed in the initial report

Appendix U
A future approach to pension valuation? The potential for development of Ogden-style Tables

U.1 In the course of the project from which this Guide has been developed, consideration was given to whether Ogden tables might have a use as a means of valuing the future benefit from the pension at today's date, noting that they have not been conventionally adopted in family cases. However, they do benefit from pension-specific tables which take into account an income in deferment, i.e. starting at a future date. They also have a range of discounting options which would allow for the adoption of what is arguably an appropriate discount rate in the pension context. As the holder of pension rights has a guaranteed right to receive income which is not subject to life's vicissitudes, the rate applicable to discounting for an offset against such an asset should be lower than the real rate of 3.75% p.a. suggested by Duxbury. Ogden also does not include State Pension receipt, which makes it easier for a 'clean' capital value of a pension arrived at without the adjustment required if undertaking the same exercise with Duxbury.

U.2 While not directly comparable (and there are many arguable points of difference), the *Presidential Guidance for Employment Tribunals: Principles for Compensating for Pension Loss*,[75] describes a seven-step process for valuing pensions using Ogden Tables. Should parties wish to advance an argument for alternative calculations, it is noted that the process does not have the force of law, but Tribunals are expected to have regard to the Principles when calculating compensation for pension loss. The noted advantages of using this kind of guidance is that it may be cheaper than instructing an expert (although this will depend), but also that:

> *If the parties were unable or unwilling to fund expert evidence, the tribunal would have to do its best with the available material using the broader brush of the Ogden Tables. This would produce a figure which while less precise, should still be just and proportionate.*[76]

U.3 While employment and family cases are not comparable proceedings – having different parameters, different considerations, and different law – it is worth exploring in principle whether there might be some suitable way, using Ogden-style tables, of reaching a better and more appropriate value than provided by the CE in cases where parties do not instruct an expert.

U.4 For example (using the example set out at paragraph 3.7 of this Guide), suppose that W, aged 55 has NHS pension, CE £156,300. Preserved pension of £7,500 p.a. and lump sum of £22,500. Payable at age 60. H aged 58 has a SIPP [Defined Contribution], CE £200,000. Using Ogden in relation to W's pension:

a. Table 20 (Multipliers for loss of pension commencing at age 60 (females)), using a reasonable discount rate of say 0.5%, the factor is 25.82.

b. Therefore, the capitalised value of the pension is £7,500 x 25.82 = £193,650.

c. Turn to table 27 to find a discount rate for the lump sum of 0.9754 (0.5% discount again with a 5-year term) and say the lump sum of £22,500 has a value of £21,947.

d. Thus, the total capitalised value of this pension, according to Ogden, is £215,597.

75 www.judiciary.uk/wp-content/uploads/2013/08/presidential-guidance-pension-loss-20170810.pdf (August 2017)

76 *Employment Tribunals: Principles for Compensating Pension Loss. Fourth Edition. August 2017.* GAD memorandum. Paragraph 5.68, page 77.

Based simply on the CEs in that example - W: £156,300, H: £200,000 - the direction of travel of any PSO / Offsetting was from H to W, whereas this valuation suggests it should be from W to H.

U.5 There are some drawbacks to the use of Ogden. Most of these are to do with the refinement of capitalised values. For example, Ogden does not cater for distinction between a level (non-increasing) pension, a CPI pension and an RPI pension. Ogden does not cater for retirement ages of 66, 67, and 68, which are becoming more prevalent, although presumably interpolation can be used.

U.6 This idea was not taken any further in the context of this Guide, due to timing and resource implications. However, the following paragraphs discuss, with examples, how Ogden-style tables could work in the context of a family law case.

Possible operation of Ogden-style tables in pension on divorce cases

U.7 The remainder of this Appendix explores the potential for Ogden-style tables for use in pension on divorce cases by reflecting on the potential composition, underpinning assumptions, ownership, method of delivery, and format of the input data (details of the current preserved pension) which will need to be gathered by the solicitor / LIP to enable a value to be cast.

U.8 The goal is to find an approach to pension valuation which will be more robust than reliance on the CE but has the capacity to be used and therefore improve fairness of outcomes in the vast majority of cases where currently experts are not involved.

U.9 In its simplest form, the tables could be very similar to Ogden in terms of presentation, see Ogden, Tables 20 and 27.[77]

U.10 If we revert to the example in paragraph U.4 above, from Ogden Table 20, the factor we need to convert a pension of £x pa for a female aged 55, with retirement age of 60, and assuming a discount rate of 0.5% is 25.82; and likewise from Table 27, we can see that to convert a lump sum payable at age 60 of £y, a factor of 0.9754 is required.

U.11 These Ogden tables are simple in that there is no option to vary the factors, dependent upon whether the pension will increase by RPI / CPI (with or without caps) a fixed rate, or not at all. There is clearly a trade-off to be had between accuracy of outcome of tables and simplicity of use. On the one hand we want tables which are going to be easy to use for most lawyers, but on the other hand, we need the tables to produce relatively accurate outcomes.

77 www.gov.uk/government/uploads/system/uploads/attachment_data/file/245859/ogden_tables_7th_edition.pdf

U.12 There are currently 13 Ogden tables for producing capitalised values of pensions:

- Assuming retirement at age 50, x 2 (one for male and one for female)
- Assuming retirement at age 55, x 2 (one for male and one for female)
- Assuming retirement at age 60, x 2 (one for male and one for female)
- Assuming retirement at age 65, x 2 (one for male and one for female)
- Assuming retirement at age 70, x 2 (one for male and one for female)
- Assuming retirement at age 75, x 2 (one for male and one for female)
- Plus a table for discounting any automatic lump sums

U.13 These tables cater for one type of pension in terms of rate of increase. If we were to adopt the Ogden layout, and also seek to refine the accuracy of the capitalised values to cater for level, fixed rate, CPI, RPI rates of return (with possible variations on each), we would have at least 3 more variants to the above tables, taking us up to 37 tables. If we then recognise within the most common pensions dealt with (public sector) retirement ages of 66, 67, and 68, were becoming more prevalent (and we want to avoid people having to interpolate factors (to reduce complexity of use)), we could very soon be up to a most unwieldy set of tables, in excess of 50 pages.

U.14 The challenge is to produce a set of tables, with (i) the ability to cater for pensions increasing at different rates (ii) the ability to cope with 5 different retirement ages (60, 65, 66, 67, 68 would cover most Defined Benefit schemes) and yet not produce an unwieldy and off-putting tome. This will require a fundamentally different approach to that adopted by Ogden.

U.15 There is an issue as to whether there should be separate tables for men and women, or whether the tables should be unisex. Unisex tables would halve the number of tables.

U.16 The second major change from Ogden would be across the ‘x’ axis:

- Ogden has one page for each assumed retirement age. On the ‘y’ axis, we have the current age of the member. On the ‘x’ axis we have the discount rate to be used. The discount rate was set in 2001 at +2.5%, changed in 2017 to -0.75%, and will probably change again in 2019 to c. 0% to +1%. It is relatively stable, and if a discount rate could be generally agreed, then the x-axis could be used for another variable.

- Along the ‘x’ axis of the proposed tables, we could therefore change the variable from discount rate to rate of pension increase in retirement. In so doing, it is accepted that as and when the discount rate does change, a new set of tables will need to be released, but this should be a relatively straightforward exercise.

U.17 So in its simplest format, the tables might comprise something like the following:

Table 1	Unisex, retirement age 60
Table 2	Unisex, retirement age 65
Table 3	Unisex, retirement age 66
Table 4	Unisex, retirement age 67
Table 5	Unisex, retirement age 68
Table 6	Discount for automatic lump sum

U.18 To show a worked example, taking the suggested Table 1, it could look something like the following. The factors chosen here are just for illustration and for showing the format of the Table - ***the assumptions underpinning the tables would need to be agreed***:

Current age of Member	Level	3% pa fixed	CPI max 3%	CPI max 5%	RPI max 3%	RPI max 5%
25						
26						
27						
28						
29						
30						
31						
32						
33						
34						
35						
36						
37						
38						
39						
40						
41						
42						
43						
44						
45						
46						
47						
48						
49						
50						
51						
52						
53						
54						
55	19.69	29.532	30.551	32.217	32.814	35.439
56						
57						
58						
59						
60						

U.19 Using this example, if someone aged 55 had a revalued, preserved pension of £10,000 p.a., of which £1,000 p.a. would not increase, £2,000 p.a. would increase by CPI max 3%, and the balance, £7,000 p.a. would increase by CPI max 5%, the calculation would be:

(£1,000 x 19.688) + (£2,000 x 30.551)
+ (£7,000 x 32.217) = £306,310

This would be the gross capitalised value of the pension which then needs to be adjusted for tax and, if thought appropriate, utility.

U.20 In summary, such a portfolio of 6 tables would:

- Produce a consistent valuation for all Defined Benefit pensions (remember if scheme (a) and scheme (b) have a liability to pay an identical pension of say £10,000 p.a. each at age 60, whilst the value of the pension to the member is identical, the CEs (upon which currently everyone relies) could differ by as much as £100,000, dependent upon the assumption of each scheme actuary)
- Produce a value for all Defined Benefit pensions which can be compared to Defined Contribution fund
- Cater for pensions increasing at different rates
- Cater for current prevalent retirement ages
- Be capable of use by most if not all family lawyers
- Be capable of revision from time to time for changes in assumptions
- Produce a gross value, leaving the adjustment for tax and, if appropriate, utility, within the preserve of the court (see Part 7, paragraphs 7.30 to 7.42)
- Be capable of being issued in electronic format, if felt appropriate, with online functionality to ensure most recent assumptions being incorporated
- In essence, be significantly more accurate than CEs (which currently is the only resource available in the vast majority of cases) but without significantly increasing the costs or complexity

U.21 There would potentially be other factors to consider:

- How do we adjust for GMP issues?
- What happens if the scheme only issues pension at date of leaving, not revalued?
- If valuation of deferred pension is issued, how do we cater for different approaches of schemes, with say scheme 1 revaluing GMP as excess and scheme 2 providing interim revaluation of GMP based on fixed rate?
- Temporary / State Pension reductions

U.22 There is always going to be a fine line to be struck between refinement of calculations and ease of use, and the output of the tables will only be as good as the input (making sure the right preserved pension is input). But the alternative is continued reliance on CEs by parties who do not instruct experts, which as shown in the report will not only get the quantum wrong, but also potentially the direction of flow wrong. This means that tables such as these are worth exploring as scalable solution to some of the problems of valuing pensions on divorce. This is an endeavour for another day, perhaps with the assistance of a commercial or social enterprise.

Appendix V
Issues beyond the Pension Advisory Group remit for the attention of responsible bodies

V.1 The primary purpose of the Pension Advisory Group has been to produce a good practice guide to pensions on divorce for the benefit of judges, divorce practitioners, experts, mediators and ultimately the divorcing public. PAG has no authority to change the law. However, in the course of its discussions, PAG has encountered various issues which, although outside its remit in that they require changes to primary or secondary legislation or court forms, it considers could help improve practice if addressed by the responsible bodies, such as government departments, pension providers and professional organisations. These issues are summarised below.

Primary legislation

Pensions and enforcement

V.2 On 15 December 2016, the Law Commission published its report on the Enforcement of Family Financial Orders (Law Com No 370). On 23 July 2018, the Government's full responses indicated that it would take forward three recommendations which did not require primary legislation. Amongst the Law Commission's recommendations were a number that impact upon issues being considered by the Group. It was recommended that the court should be able to obtain information from, *inter alia*, the Department of Work and Pensions and pension providers. The inclusion of pension providers was deemed necessary given the Law Commission's recommendation that enforcement should be possible against a debtor's pension assets. Chapter 9 of the Law Commission report states that pension orders (Pension Sharing Orders and Pension Attachment Orders) may provide an effective means of enforcement where there are no other assets available and may ensure that the creditor receives what is owed, albeit possibly at a later date. The current inability to enforce against a pension is viewed as undesirable because a pension may be one of the most significant assets held by a debtor. It is, therefore, recommended by the Law Commission that a pension order should be available on a general enforcement application rather than only on a standalone enforcement application for a pension order. The Law Commission's view is that this approach strikes the correct balance between the interests of all those who would be affected by the making of pension orders for enforcement purposes without restricting their use to cases where no other assets are available.

V.3 The Group endorses the Law Commission's conclusion but expresses no detailed commentary as this area is outside the remit of the Group.

Pensions and International Issues: implications for domestic enforcement of overseas orders

V.4 Paragraphs 9.58-9.69 of the Law Commission's Report on Enforcement of Family Financial Orders (Law Com No 370) are devoted to giving effect to foreign orders against pensions administered in this jurisdiction. The Report recommends (para 9.66) the introduction of a new ground of jurisdiction under the Matrimonial and Family Proceedings Act 1984, namely, that one of the parties has an interest in a pension arrangement situated in this jurisdiction. In such circumstances, it is proposed that the court's powers under the 1984 Act be limited to making an order against that party's pension. It is recognised in the Report that, in contested cases, or where one party only seeks an order here, caution will be required to ensure that the foreign court has not already taken into account the lack of provision from the English pension (for example, by way of offsetting). It is to be noted that the additional ground of jurisdiction is by way of amendment to s15(1) of the 1984 Act, inserting a fourth ground. It will, therefore, only be of relevance in pension sharing cases which do not involve a maintenance obligation, where the wider grounds of jurisdiction currently contained in s15(1A) and the EU Maintenance Regulation may apply, subject to changes brought about by Brexit.

V.5 Where the circumstances are reversed, i.e. the divorce proceedings are in this jurisdiction but the pension is administered abroad, it is not currently possible to make a Pension Sharing Order or Pension Attachment Order against the overseas pension: see *Goyal v Goyal [2016]* EWFC 50. It is recommended that it should be possible to do so, subject to the application of the *Hamlin* principle (*Hamlin v Hamlin [1986] 1 FLR 61, CA*) that the overseas pension scheme has confirmed that it is able and willing to implement the order.

Pension Attachment Orders and Qualifying Recognised Overseas Pension Schemes (PAOs and QROPS)

V.6 Legislation is needed to prevent the transfer of a pension which is subject to a PAO to a QROPS.

V.7 Alternatively, there could be a requirement that a notice be given to the former spouse/ pension claimant under the Divorce etc (Pensions) Regulations 2000 reg 4 prior to the transfer so that an application can be made, if appropriate, under MCA 1973 s37. Currently, notice only has to be given to the ex-spouse within 21 days after the transfer. However, this alternative would be problematic if the pension provider did not have up to date contact details for the former spouse. In this case, the former spouse might find the transfer had gone ahead by the time it was discovered, unless some further provision provided for them to have to confirm their current contact details or acknowledge receipt before a transfer to a QROPS could proceed.

Pension attachment: commutation

V.8 It is suggested that consideration be given to amending MCA 1973, s25B(7)-(7A) as the word "commutation" suggests a power restricted to Defined Benefit schemes and arguably does not provide the same power to the court where there is an option for the pension member to take a Pension Commencement Lump Sum (PCLS) or tax free lump sum under a Defined Contribution scheme.

V.9 Further consideration might also be given to how to deal with the non-taxable element of an Uncrystallised Funds Pension Lump Sum (UFPLS), which is not a PCLS.[78] It is believed that the power to make an order against UFPLS benefits is contained within MCA 1973 s25B (4), but the current version of the Pension Attachment Annex does not reflect this (see paragraph V.38 below).

Pension attachment – death benefits – children of the family

V.10 It is recommended that MCA 1973, s25C is amended so that it is possible to make a Pension Attachment Order in relation to death benefits in favour a child of the family.

Pension attachment – allow conversion to a Pension Sharing Order for pre-2000 petitions

V.11 See paragraph V.26 below.

78 Taxation of Pensions Act 2014 Schedule 1 s57 (4A)(1)(d)

The Pensions Ombudsman

V.12 Could provision be made requiring The Pensions Ombudsman to consider complaints in respect of PODEs by way of amendments to the Pension Schemes Act 1993 Part X and regulations made under that Act?

MCA 1973, s28(3): The remarriage trap

V.13 This subsection prevents applications for a financial provision order or property adjustment order being made following remarriage. A Pension Attachment Order is included within the definition of a financial provision order. However, a Pension Sharing Order is outside this provision and it is, therefore, possible for an application to be made for a Pension Sharing Order following remarriage unless there is some other impediment to a Pension Sharing Order being made. There is no logical reason for pension sharing to be excluded from the remarriage trap. It is believed that the omission of pension sharing by way of amendment from the subsection may result from an oversight on the part of the draftsman.

Secondary Legislation

Pension Sharing (Valuation) Regulations 2000

V.14 Regulation 4(2) of the Pension Sharing (Valuation) Regulations 2000 is at odds with the drafting of WRPA 1999, s29(4) which states that "Where the relevant arrangement is an occupational pension scheme and the transferor is in pensionable service under the scheme on the transfer day, the relevant benefits for the purposes of subsections (2) and (3) are the benefits or future benefits to which he would be entitled under the scheme by virtue of his shareable rights under it had his pensionable service terminated immediately before that day."

V.15 Regulation 4(2) of the Pension Sharing (Valuation) Regulations 2000 states that "Where a person with pension rights is continuing to accrue rights to benefits in the category of benefits to be valued, paragraph (1) applies as if the person had ceased to accrue rights in that category of benefits on the valuation day." It is recommended that regulation 4(2) is amended to read "transfer day" in place of "valuation day".

WRPA 1999, s29(1) and (3): Where benefits to be subject to a PSO include Additional Voluntary Contributions (AVCs)

V.16 WRPA 1999, s29(1) states that "the transferor's shareable rights under the relevant arrangement become subject to a debit of the appropriate amount"; WRPA 1999, s29(2) states that "Where the relevant order or provision specifies a percentage value to be transferred, the appropriate amount for the purposes of subsection (1) is the specified percentage of the cash equivalent of the relevant benefits on the valuation day." WRPA 1999, s29(4) goes on to say that "Where the relevant arrangement is an occupational pension scheme and the transferor is in pensionable service under the scheme on the transfer day, the relevant benefits for the purposes of subsections (2) and (3) are the benefits or future benefits to which he would be entitled under the scheme by virtue of his shareable rights under it had his pensionable service terminated immediately before that day" and WRPA 1999, s29(5) states that "Otherwise, the relevant benefits for the purposes of subsections (2) and (3) are the benefits or future benefits to which, immediately before the transfer day, the transferor is entitled under the terms of the relevant arrangement by virtue of his shareable rights under it."

V.17 The net effect of the above is that the percentage PSO applies as a pension debit equally to each individual benefit across the scheme, including contracted out rights, non- contracted out rights and AVCs. It would be enormously useful to all concerned if legislation could be amended to allow for AVC rights to be subject to a separate PSO from the main scheme benefit, which is often Defined Benefit in nature. The ability to first transfer what can often be significant AVC benefits can help limit the destructive nature of a private sector Defined Benefit pension share. Some schemes do allow this facility but it is rare.

V.18 WRPA 1999, s29(6) states that "The Secretary of State may by regulations provide for any description of benefit to be disregarded for the purposes of subsection (4) or (5)." It is recommended that a new paragraph is inserted into the Pension Sharing (Valuation) Regulations 2000 stating that where the relevant arrangement is an occupational pension scheme that includes an AVC scheme, the AVC scheme may be treated as a separate relevant arrangement and subject to a PSO in its own right. The Pension Sharing (Provision of Information) Regulations 2000 would also need to be amended to provide for the scheme being required to provide two separate CEs, one for the main scheme and one for the AVC. Currently the AVC scheme needs to be a separate legal scheme to allow this.

Set Aside regulations

V.19 New rule FPR 9.9A requires an application to be made for set aside where there is a supervening (e.g. *Barder*) event and no error by the court. Previously this would have been dealt with by way of appeal. The Pension Sharing (Implementation and Discharge of Liability) Regulations, reg 4 requires that where a scheme has been notified that an appeal has been started the implementation period must be postponed until the outcome of the appeal (regs 4(1) (a) and (b). No such provision has been made for the situation in which a set aside application has been made. The Regulations need to be amended to include a requirement for implementation to also be postponed pending the outcome of a set aside application.

V.20 Although the standard route of challenge since 3 October 2016 has been to set aside a financial remedy order,[79] there are two exceptions for PSOs where an 'appeal out of time' remains the appropriate route. The first is where an error of the court is alleged and the second is where the scheme has acted to its detriment. In the case of the latter an application would be made to appeal out of time under MCA 1973, s40A or s40B.[80] The above recommendation is therefore an addition, not a replacement, to the existing regulation 4.

79 Family Procedure (Amendment No 2) Rules 2016 (S.I.2016/901).

80 FPR 2010 PD 30A, para 4.1B.

Pension Attachment Orders and pension freedoms

V.21 Need for new regulation/ guidance for pension providers in cases where pension holder/ member seeks crystallisation under the pension freedoms provisions and a Pension Attachment Order has been made.

V.22 The drafting of some attachment orders, especially those that were incorporated into the main body of the court order in the late 1990's, often conflicts with current options for those taking pension benefits after the age of 55. There is often confusion among those responsible for administering pension schemes as to how to interpret old attachment orders, especially in the wake of the pension freedoms legislation where there is often a mismatch between what the order intended and the options now being taken. This has led to some scheme members taking advantage of this uncertainty to their own advantage and the non-member spouse only discovering what has happened when it is too late to do anything about it.

V.23 The FCA consulted on this issue in CP15/30 which concluded with PS16/12 (4.27 – 4.35). No substantive action was taken to further protect the interests of the non-member spouse, leaving it to the DWP. The DWP also consulted on this subject (November 2015) and responded in March 2016 where it concluded "Due to the complexity of the issues, the government has decided that it will delay the introduction of the notification requirement until a later date, in order to allow more time to consider these complex issues, balancing the expectations of both members and former spouses, and explore the possibility of guidance, including who would be best placed to issue it."

V.24 It is hoped that the government will not delay too long in introducing suitable protections for non-member spouses.[81]

V.25 Other changes in legislation, such as the introduction in 2006 of the Lifetime Allowance, have also led to unintended consequences. Some scheme members with significant pension benefits have and will continue to find themselves genuinely conflicted when it comes to determining the order in which pension benefits are crystallised. Those who are less well intentioned could favour themselves over their ex-spouses by first crystallising pension schemes that are not subject to the Attachment Order and causing the ex-spouse's pension perhaps to be subject to a 55% Lifetime Allowance charge.

V.26 While minor amendments could be dealt with by miscellaneous amendments by way of secondary legislation, it is recommended that the time has also come for a change to primary legislation to enable those individuals (member spouses and non-member spouses) to discharge their attachment orders, thus allowing a Pension Sharing Order to be made, even where petitions were issued before 1st December 2000.

81 www.gov.uk/government/uploads/system/uploads/attachment_data/file/505678/government-response-misc-regs-consultation-23-nov-2015-and-call-for-evidence-on-gar-valuation.pdf

Requirement for Pension Sharing Orders to be checked and approved by pension providers before an order is made

V.27 It is already a requirement for Pension Attachment Orders to be approved by the pension scheme, but not for Pension Sharing Orders. It has been suggested that a change should be made to secondary legislation to require Pension Sharing Orders (as well as Pension Attachment Orders) to be checked and approved by the pension scheme administrators prior to being filed with the Court. This would help reduce the number of errors that have to be corrected subsequently under the slip rule which increases legal fees and wastes valuable court time. The onus should not be on the Trustees to confirm at the draft stage as this could increase costs if additional legal advice has to be taken and when further amendments may subsequently be made. However, the point has been made that when a settlement or order is made at court, this change could cause serious delay, unless the order can be made by the court, subject to approval by the scheme of the 'scheme specific' detail (name, address etc.) to be entered in the annex. Currently, we recommend, as good practice, checking scheme approval with the scheme administrators in advance whenever possible.

Practice Direction

V.28 Practice Direction 30A is currently inaccurate as it refers to the court's power to extend time for appealing but not to shorten it. Abridging time to appeal may be particularly important if one party is close to death. PAG recommends that PD30A paragraph 11.2 be amended to read (addition in italics and underlined):

"30A In appeals to which this paragraph applies, the court may extend *<u>or shorten</u>* the time set out in rule 30.4 for filing and serving an appellant's notice in accordance with rule 4.1(3)(a) (court's power to extend or shorten the time for compliance with a rule, practice direction or court order) or rule 30.7 (Variation of time), even if the Pension Sharing Order or pension compensation sharing order has taken effect…."

Court forms

C. 1. Form P

V.29 Although it is regarded as best practice to obtain a Form P in relation to every pension under consideration,[82] and that Form P may be very useful in some cases, this best practice is widely ignored by practitioners and courts.

V.30 PODEs would like to see schemes required to provide more information in Form P, which might encourage Form P to be used more frequently than it currently is. Further information requested includes:

a. the latest annual benefit statement for Defined Benefit scheme active members

b. for deferred pension rights in Defined Benefit schemes, ask at B (3) for the revalued pension at the date of leaving

c. for Defined Contribution pensions, add in section C, "Does the policy contain any form of guarantee?"

d. the date of the latest triannual valuation

e. whether any material changes to the CE valuation basis are anticipated

f. current commutation factors at Scheme Retirement Age

82 See Thorpe LJ in *Martin-Dye v Martin-Dye* [2006] EWCA Civ 681

g. details of early retirement options and factors

h. clear definition of rate of inflation used e.g. CPI, RPI, LPI etc.

V.31 Pension scheme administrators would like to see 'member' specific information added to the top of the form under the pension scheme details by way of a member specific identifier. Information requested includes:

a. National Insurance number

b. Date of Birth

c. Previous address (to allow address change updates).

V.32 The PAG recommends that the FPR Rules Committee and/or the MOJ should be invited to review the Pensions on Divorce etc (Provision of Information) Regulations 2000 SI 1048/2000 and Form P in accordance with the above recommendations.

Form E

State Pensions

V.33 State Pensions can often be one of the most valuable assets in a divorce and should not be overlooked. Estimates of pension entitlement can be obtained by completing Form BR19. Valuations of shareable rights on divorce can be obtained by completing Form BR20. Completing both forms is the most reliable way of obtaining a full picture of an individual's State Pension entitlement. To this end, Form E should be changed to require provision of both BR19 and BR20 information.

Pension in payment or drawdown

V.34 The question on page 2.13 that asks "Is the pension in payment or drawdown? (please answer Yes or No)", should be amended to "Has any of the pension been taken as a lump sum, or is it in payment or drawdown (please answer Yes or No and provide details)". This change allows for the additional flexibility available following pension freedoms.

Self-Invested Personal Pensions (SIPPs)/ Small Self-Administered Pension Schemes (SSASs)

V.35 The current pension section of Form E is inadequate to deal with SIPPs/SSASs where information is required about the underlying asset base (e.g. property, investments or insurance policies) with an indication as to the date of last valuation.

Form D81 statement of information to support draft consent order

V.36 A number of improvements could be made to D81, including on income and capital. However, the quality of financial disclosure on pensions is particularly poor[83] and could be improved by a requirement to:

a) provide the information from State Pension forecast (BR19)

b) list all other pensions separately

c) specify the name of the pension provider in each case

d) specify the type of pension in each case

e) say whether the pension is in payment or not

83 See Woodward HD with Sefton M, Pensions on Divorce 2014 Ch 4, in which inter alia it was found that pension disclosure was inadequate or unclear in more than two thirds of the 130 cases assessed by the expert.

f) provide the CE of each pension and the date of the CE

g) provide the capital value of any Additional State Pension or Protected Payment (BR20)

h) say whether an expert has been involved; if so, and if the expert has provided a Defined Contribution Fund Equivalent (DCFE), state the DCFE.

V.37 The value of assets that are being offset against pension benefits are rarely if ever recorded in documents before the courts. We recommend that a requirement be introduced for:

- the D81 to state the pre- and post-implementation income, capital and pension positions of the parties;

- the D81 to include a brief explanation of the nature of expert advice, if any, which has been taken in assessing the value of the assets to be offset against the pension benefits;

- the D81 to include as far as is practicable at least a narrative or textual explanation as to how the settlement was reached, which includes some reasonable indication of values taken into account. See Paragraphs 7.10 to 7.14.

Form P2 Pension Attachment Annex

V.38 In order to address the potential ambiguities which have arisen in relation to Pension Attachment Orders since the introduction of pension freedoms, we recommend amending 5A(i) of the Form P2 to read: "To be completed where an Order is made under s25B(4) of the Matrimonial Causes Act 1973", and in place of the remainder of that paragraph, put:

> *"The specified percentage of any income payment due to the party with the pension rights that is to be paid for the benefit of the other party:*
>
> *The specified percentage of any Pension Commencement Lump Sum payment due to the party with the pension rights that is to be paid for the benefit of the other party:*
>
> *The specified percentage of any Uncrystallised Funds Pension Lump Sum payment due to the party with the pension rights that is to be paid for the benefit of the other party"*

5A. (ii) could remain as it is, as it reflects the separate power the court has under s25B(7).

Form P1 Pension Sharing Annex

V.39 Relating to Pension Sharing Orders in respect of Additional State Pension benefits, PAG recommends amending paragraph C (vi) by adding the words '*percentage of*', to read as follows:

> *"Where State Pension is to be shared, if the transferor reaches his/her state pension age on or after 6 April 2016 and divorce or dissolution proceedings start on or after that date, then insert **the percentage of** shared weekly amount of State Pension which is payable. For the definition of the shared weekly amount of State Pension please see s49A(3) of the Welfare Reform and Pensions Act 1999."*

and add '%' by the box to make it clear that a percentage amount is required.

V.40 The MOJ online version of Form P1 should be amended to allow the proposed cost share to be inserted for all pension shares.

V.41 Consideration should be given to the removal of discretionary section F. It requires either the lawyer or the non-member spouse to tick the box to inform the pension scheme whether, upon the making of the Pension Sharing Order, the non-member spouse (transferee) receives an internal or an external transfer, where both options are available. Given the complexity of this issue, the availability of internal transfer options generally and the pension scheme's legal obligation to offer an internal transfer if a scheme reduction factor is imposed, which could be after the annex has been sent to the court for approval, then the non-member spouse couldn't possibly be in an informed position to make this decision, nor could their lawyers without breaking the law.

V.42 There is an FCA dispensation for regulated Financial Advisers dealing with Pension Sharing Orders where schemes insist on an 'external transfer only' option in that the Pension Sharing Order transfer is not deemed a regulated transfer. However, where an internal transfer option is available then the full, regulated transfer advice rules apply with the adviser first having to undertake an analysis of the client's options and compare these with the benefits being given up.

V.43 If a family lawyer ticks the external or internal transfer box on behalf of their client then they may inadvertently give regulated transfer advice, which they are not authorised to do. Family Lawyers would be well advised in the meantime not to tick either boxes in section F to avoid that trap.

V.44 The situation could in any event have changed by the time the Pension Sharing Order takes effect and the implementation commences. At this point a regulated Financial Adviser is likely to be involved who would need to check the options available at the point of advice. It is suggested this section is removed from the annex as this is not the time to be making that decision.

Post-order implementation issues and miscellaneous

Better training for scheme administrators

V.45 We recommend that scheme administrators be better trained in Pensions and Divorce law and practice and larger firms (insurers/administrators) be encouraged to set up specialist Pensions and Divorce units to ensure consistency across firms. Pension providers or administrators should be encouraged to invest in more training for those administrators involved in this particularly complex area. In the PAG's experience, mistakes are common and it is also a concern that mistakes may often go unchecked. It is also common to see good practice from one department and poor practice from another of the same organisation. Some examples are given above in Appendix F, paragraph F.33. Those organisations that have established national or centralised pension on divorce teams should be applauded and other large organisations encouraged to follow suit.

Appendix W
The Pension Advisory Group and Acknowledgements

The President of the Family Division and the Family Justice Council

PAG are indebted to the President of the Family Division and the Family Justice Council for their support of this project.

Pension Advisory Group members

The Pension Advisory Group was co-chaired by Mr Justice Francis and His Honour Judge Edward Hess.

Hilary Woodward (former family solicitor and mediator, currently Honorary Research Associate with Cardiff University and co-author with Mark Sefton of Pensions on Divorce: an empirical study (2014, funded by the Nuffield Foundation, administered by Cardiff University), acted as the group's CEO.

Other members are listed below in alphabetical order:

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>
> **Philip Way, family lawyer, Mills and Reeve**
>
> **Clive Weir, CW Pension Consultants**
>
> **District Judge Barbara Wright, Hastings County Court; representative of Association of District Judges**

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Association of Pension Lawyers

Family Law Bar Association

Institute and Faculty of Actuaries

Society of Pension Professionals

Individual Consultees and Respondents

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Sir Steve Webb, Royal London

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Paul Windle, Actuaries for Lawyers, West Yorkshire

Focus group and survey participants

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Appendix X
Other useful resources

In addition to this guidance, readers may wish to refer to the following:

- The Pensions Policy Institute, *The Pensions Primer: A Guide to the UK Pensions System, updated June 2019*: https://www.pensionspolicyinstitute.org.uk/research/pensions-primer/
- Family Procedure Rules 2010, Part 25 and Practice Direction 25
- State Pension Forms:
  - Form BR19: www.gov.uk/government/publications/application-for-a-state-pension-statement
  - Form BR20: www.gov.uk/government/publications/application-for-a-state-pension-forecast-on-divorce-or-dissolution-br20
- Find pension details: a government service to find contact details for workplace and personal pension schemes, and lost pensions: see https://www.gov.uk/find-pension-contact-details
- Check National Insurance contribution history:

  https://www.gov.uk/check-national-insurance-record

  https://www.gov.uk/national-insurance-credits

  https://www.gov.uk/national-insurance-credits/eligibility
- Law Society, Family Law Protocol: https://www.lawsociety.org.uk/practice-areas/f/family-children/family/family-law-protocol-part-1
- Resolution, Guidance Note on Instructing Expert in Financial Remedy Proceedings: http://www.resolution.org.uk/site_content_files/files/guidance_note_instructing_experts_applications_financial_orders.pdf
- The Pensions Advisory Service, When relationships end: pension sharing www.pensionsadvisoryservice.org.uk/about-pensions/when-things-change/when-relationships-end/pension-sharing [Note, the Pensions Advisory Service becomes the Money and Pensions Service from April 2019 and this url is likely to change]
- Pensions Ombudsman decisions, at www.pensions-ombudsman.org.uk/our-decisions/
- Family Justice Council, Guidance on Financial Needs (2nd edition, 2018) www.judiciary.uk/wp-content/uploads/2018/04/guidance-on-financial-needs-divorce-2nd-edition-april-2018.pdf
- For the lay readers' equivalent document, see Advice Now, Sorting out your finances when you get divorced (regularly updated) www.advicenow.org.uk/guides/survival-guide-sorting-out-your-finances-when-you-get-divorced
- HMRC Pensions Tax Manual, at www.gov.uk/hmrc-internal-manuals/pensions-tax-manual
- Money and Pensions Service annuity calculator [https://moneyandpensionsservice.org.uk/]
- For detailed textbook treatment of pensions on divorce, see Hay, Hess, Lockett and Taylor, Pensions on Divorce: A Practitioner's Handbook (3rd edn, 2018)
- There are several valuable articles in Family Law on pension-related issues, including:
  - 'Apples or Pears: pension offsetting on divorce' [2015] Fam Law 1485
  - 'Comparing "apples and pears"' [2016] Fam Law 500
  - 'Pension Offsetting' [2017] Fam Law 204
  - 'Critical Timing of Decree Absolute: Unexpected Death' [2017] Fam Law 871

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