Pension sharing: issues with the practical mechanics

By John West, Solicitor, SKO

The past year has brought about significant reform to pensions. From April 2015, it will be possible for individuals to drawdown their pensions as they see fit (no longer being required to purchase annuities). This could have a significant impact on family law: will this give rise to arguments about resources if a large cash sum is potentially available? Will this lead to more or less pension sharing? With the spotlight on pensions, a review of pension sharing is sensible.

Pension sharing, which is one way to draw financial relationships to an end on dissolution or divorce, has existed for nearly 15 years. Yet as practitioners know, provision for pension sharing doesn't feature regularly in separation agreements despite pensions often being substantial. This may be because parties prefer to 'offset' the value of their pensions against other assets. It may also be because pension sharing is seen as expensive and complex to implement. Over the past year we have received an increasing number of instructions from pension trustees seeking advice about whether they can (and should) implement orders and agreements providing for pension sharing. This suggests that the practical mechanics of pension sharing continue to create difficulties notwithstanding that we are now half way through their second decade in existence.

The provisions of the Welfare Reform and Pensions Act 1999 and associated regulations are well-known to family lawyers. However, the regulations can be tricky to navigate and contain requirements and time limits which, if not met, can be fatal to the intended pension share.

There are two ways to pension share in Scotland. One way is to seek a pension sharing order from the court under the Family Law (Scotland) Act 1985. The other, more common way, is for parties to enter into a qualifying agreement (usually incorporated into their separation agreement). These are two distinct mechanisms; they are not two parts of one process. If you have a qualifying agreement you should not ask the court to grant a matching pension sharing order (or indeed any pension sharing order): the order would be incompetent (s.8(5) of the 1985 Act).

A qualifying agreement must contain certain information relating to the parties and their pensions as specified in Regulation 2 of the Pensions on Divorce etc. (Pension Sharing) (Scotland) Regulations 2000. Most family lawyers will be familiar with these provisions and will have a style qualifying agreement for completion.

Before divorce/dissolution, if your client wishes to share their pension, notice must be given to the pension trustees that a pension share, either by agreement or order of court, might be sought. Pension trustees will often treat a request for a CETV of the client's pension as intimation, even if not specifically part of the request.

Within 21 days of receiving this notice, the pension trustees must provide certain information prescribed in Regulation 4 of the Pensions on Divorce etc. (Provision of Information) Regulations 2000. That information includes, if appropriate, confirmation that they require additional information, beyond that in Regulation 5, to implement the pension share, should it go ahead. Regulation 5 sets out the information which the pension trustees must receive, in every case, before implementation of a pension share. At first glance this looks identical to the usual Regulation 2 qualifying agreement information. It might be tempting therefore to assume that if you use your style qualifying agreement, you will have complied with the information requirements. However, tucked away at the end of Regulation 5 is the requirement to provide "any information requested by the person responsible for the pension arrangement in accordance with Regulation 4".

Whichever method is used, the pension share can only take effect on the granting of decree of divorce/dissolution. The pension trustees must receive, by way of intimation, certain documents within two months from the date of the extract (the "two month window"). If these are not provided, the order or agreement "shall be deemed never to have taken effect". A copy of the parties' extract decree will require to be intimated, along with the pension sharing order or qualifying agreement and the information in terms of Regulation 5.

Here arises a trap for the unwary. You cannot assume that simply because you send your usual style qualifying agreement that you will have provided all the information required for implementation. If the trustees indicated in their response to your letter advising of an intention to pension share that further information was required, failure to provide that within the two month window is fatal to the pension share. The lesson here is simple – always examine the initial letter from the trustees. Always double check and, if in doubt, query it with them.

While there is the option of applying to the court to extend the two month window, best practice is to ensure that internal systems are sufficient for monitoring pension share progress. Don't assume that you know what the trustees will require for implementation, or that your style qualifying agreement will be sufficient in all cases. Make sure that pension intimation/implementation deadlines are well-diarised and adhered to. Clear and regular communication is key: we have found that pension trustees are much more willing to adopt a pragmatic approach to implementation when you have already built a relationship with them.

Another issue that has been something of a running sore is the question of what constitutes the "period of membership" in terms of apportioning the pension's value for the period of marriage. There has been some recent judicial guidance about this in **TCM v AFMM (2014 Fam LR 11)** but an appeal has been marked and so 2015 may bring about further developments. Watch this space.

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