Pensions on divorce: an empirical study

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Key Findings

- In 20% of the court file cases neither party disclosed any pension other than a basic state pension; in 66% one or both parties disclosed a pension other than basic state (‘relevant pensions’) but no pension order was made and just 14% (31) included one or more pension orders.
- All pension orders were for pension sharing and all but two were in favour of the wife.
- Pension orders were more likely to be made between older parties from longer marriages, with more capital and pension wealth than those with no pension orders.
- Pension orders were significantly more likely to be made when both parties were legally represented.
- Practitioners and judges saw pension sharing as a positive addition to financial remedies on divorce, but offsetting pensions against non-pension assets remains the most common approach to pensions and was said to be popular with the parties themselves, sometimes against legal advice.

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

Pension orders were more likely to be made when the parties had relatively high capital and pension wealth and the husband relatively high income when compared to those cases with relevant pensions but no pension order. Pension orders were also more likely to be made when the parties were older, the average (median) age of both wives and husbands in pension order cases being 51, compared to 42 and 45 respectively in cases with no pension order. The median length of marriage to the date of the final order was also significantly longer in pension order cases at 2.5 years compared to 11 years.

Pension orders were more likely to be made when both parties were legally represented at the date of the final order: 23% of cases in which both parties were represented included a pension order compared to 8% of cases in which only one or neither parties were represented. Practitioners said that the majority of their clients had poor knowledge and understanding of pensions on divorce and that it was an issue which would be difficult to deal with fairly or at all in the absence of legal aid or professional advice.
**The contentiousness of pension issues and the process of settlement**

Just over three quarters of the 369 final orders made were uncontested, 21% were initially contested but settled and just 2% were fully contested. Most draft consent orders were approved as drawn; 17% were only approved following written queries and 6% following attendance at court. Approximately one third of the judgments contained a re-examination of the issues related to pensions, in which judges were either seeking further financial information or questioning the fairness of the proposed order. Cases with pension orders were more likely to involve the issue of proceedings than cases related to the pension issue itself. Practitioners did not see pensions as an especially contentious issue on divorce, although they did see it as one of the most complex.

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

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

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

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

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

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

Arguments also often arose over whether a pension should be ring-fenced for any period that it had been acquired outside of the marriage, and if so, whether a formula could be applied to determine the respective shares. The length of the marriage was an important factor in the argument as well as whether the practitioner happened to be acting for the pension member or spouse. Judges said they might consider ‘ring-fencing’ in bigger money/shirt marriage cases but generally disapproved of a formulaic approach.

**The rationales behind pension orders and pensions in general**

It was difficult to ascertain the rationales behind the treatment of pension issues from the court files. The judges and practitioners shared a clear or consistent view on whether needs, compensation or sharing should determine the pension outcome. The rationale of compensation was hardly ever seen as relevant and in practice needs and sharing rationales, if framed in those terms, often became blurred. Some of the solicitors acting for higher net worth clients saw sharing as more applicable to the pension assets and needs to the non-pension assets.
Pensions and financial disclosure

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

Expert assessment indicated inadequate or unclear pension disclosure in approximately two thirds of the 130 pension cases assessed. Practitioners suggested that more disclosure may have taken place between them than was apparent from the court files. However, in uncontested cases the disclosure shown on the court files was that on which the judges relied to make decisions and in many cases it was difficult if not impossible to work out the net effect of the pension orders or the orders as a whole.

Pension experts

There was clear evidence in only ten cases that pension experts had been instructed although it is likely that more had been involved than was apparent from the court files.

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

Methodology

The research design included four components, both quantitative and qualitative. The first consisted of a survey of 369 randomly selected divorce files in three courts in the North, South and West of England and Wales, in which a petition for divorce had been issued on or after 1 April 2009 and a final financial remedy order had been made on or before 31 December 2010. The second consisted of one-to-one interviews with 32 family solicitors, purposively selected from the Resolution and Law Society websites to include a range of practice experience, specialisation and size of family team, and spread fairly evenly across the three geographical areas in which the court file survey had taken place. The third consisted of four meetings with a total of seven district judges from the three courts in which we had conducted the file survey. The final limb consisted of a pension expert’s assessment of the data from 130 of the court files which were broadly representative of those which had disclosed any relevant pensions.

The fieldwork was conducted between March 2011 and September 2012. The quantitative data were analysed with the help of SPSS software and the qualitative with Atlas Ti.

Pension sharing is a positive but rarely used addition to financial remedy orders. Although practitioners indicated that they were taking pensions into account in the majority of cases, how they were doing so, even in pension order cases, was often unclear from the final orders or supporting documents in the court files.

The complexity of pensions and the lack of a requirement to spell out the rationale or intended net effects of final orders have masked a continuing imbalance in outcomes which the introduction of pension sharing was intended to help address, resulting in wives losing out on the pension and income terms of the final orders and husbands on the capital terms.

In addition, pension orders appear to have remained the prerogative of a relatively privileged minority.

This situation is likely to worsen with the reduction in the scope of public funding for family proceedings and an increase in litigants in person. Public understanding and interest in pensions is generally weak and pension orders are hard to achieve fairly or at all without legal and/or expert advice. Even family lawyers and judges benefit from expert help on pensions except in the simplest of cases.

Policy implications

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

Conclusion

I think there’s a lot more people trying to do things on a budget and do it themselves, and I think if you didn’t know a pension sharing order existed, you’re not necessarily going to make the connection.

I think there’s going to be a black hole appearing here between what I call the small cases and the bigger money cases where I use actuaries.

“...it always helps to have somebody telling you what the effect is of what you’re going to do. But the bulk of what you’re doing, when they don’t have actuary reports, is back to gut instinct; it’s back to, ‘does this feel about right’. And if you’re honest about it, you probably don’t really know what the effect is in detail in relation to a pension. [District Judge]”
The full report and further information

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

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