

Note,
**CAN'T GET NO SATISFACTION:
PRACTICAL SOLUTIONS TO DIVIDING
AND ENFORCING ALTERNATE PAYEE'S
RIGHTS TO UNITED KINGDOM DEFINED
BENEFIT PLAN DISTRIBUTIONS WHEN
DIVORCED IN THE UNITED STATES**

by
David Salter*

Imagine this increasingly familiar scenario. You have an English¹ client who came across to the United States for work purposes a number of years ago. His wife/her husband is also English. Both parties are not yet of retirement age. One or both of them has significant pension rights² which accrued whilst they were working in England. The marriage breaks down and divorce proceedings are commenced in the United States. You have to consider how the U.S. court will deal with the English pension rights³.

* Mills & Reeve LLP, London, Birmingham, Leeds and Manchester, david.salter@mills-reeve.com, www.divorce.co.uk.

¹ For the purposes of this article, it is assumed that the parties are English. England and Wales are a single jurisdiction for family law purposes. Northern Ireland has a separate legislative framework, which is nonetheless broadly comparable to England and Wales. Scotland is, however, a separate family law system, where pension sharing is available (see below).

² Pension rights, for the purposes of this article, refers to either a defined benefit (or final salary) plan or a defined contribution (or money purchase) plan. Pension rights, for the purposes of this article, refers to [what would be known to a U.S. lawyer as “defined to benefit plans”, but could involve as a matter of English law] either a defined benefit (or final salary) plan or a defined contribution (or money purchase) plan. [It is possible in England and Wales with a few very minor exceptions to make a pension sharing order against any type of pension including those of public sector employees.]

³ This article does not consider how the U.S. court should domestically exercise its jurisdiction over pension rights, but rather looks at solutions to problems of international enforceability. Further, this article does not attempt to consider conflict of laws and related forum-shopping issues; it is assumed that divorce proceedings have already been started in the U.S.

The author's experience is that many U.S. lawyers expect that English pension schemes will implement pension splitting (or pension sharing⁴ as it is called in England) provided for in a qualified domestic relations order (QDRO) without any difficulty. The fundamental point to bear in mind from the outset is that *English pension schemes will only implement pension sharing orders made by an English court.*

What then is the solution to the problem identified above? If the difficulty in implementation is appreciated before the QDRO is made, then so much the better. As an alternative to pension sharing, it may be possible to off-set (or adopt the "cash out" method), i.e. to adjust the non-pension assets to take account of the English pension rights by adopting an actuarially determined process. This approach may not be possible because of the lack of sufficient other assets.

However, if the difficulty only comes to light after the event, all may not be lost, even if off-setting is no longer possible. If therefore you need to go down the pension sharing route, there are particular factors you need to bear in mind.

The English court may be able to make a pension sharing order following a U.S. divorce, but will need to have jurisdiction to do so.⁵ The English court's power to make *inter alia* a pension sharing order is conferred by the Matrimonial & Family Proceedings Act 1984, Part III, which provides for financial relief in England and Wales after an overseas divorce. In other words, Part III seeks to address the hardship that might otherwise arise in the circumstances under discussion. The marriage in question must be recognised as valid in England in accordance with the Family Law Act 1986, Part II. Under the Part III jurisdiction, the range of orders available to the court is practically identical to the range available had the divorce been granted in England.

In the case of a pension sharing order, jurisdiction will need to be founded either on the domicile or habitual residence of *either* party. Habitual residence must be for one year prior to the date of the application to the English court⁶ and will not normally be a viable option where the parties have been living in the United States for some time, unless one party has already re-

⁴ Matrimonial Causes Act 1973, s 21A.

⁵ Matrimonial & Family Proceedings Act 1984, § 15.

⁶ Matrimonial & Family Proceedings Act 1984, § 15(1)(b).

turned to England. More usually, jurisdiction may be founded on domicile which does not necessarily connote any physical presence within the jurisdiction of England and Wales. Domicile may be “of origin,” “of choice” or “of dependency.”⁷ Domicile of origin is acquired at birth and from parents. A domicile of choice places a burden on proof on the applicant, and involves persuading the court that a person’s domicile has changed. “The burden of establishing a change of domicile – from a domicile of origin to a domicile of choice – is . . . a heavy one.”⁸ Domicile might in the circumstances under discussion be established, for example, by reference to the retention of British nationality and an intention to return to England upon completion of a work contract.

Assuming jurisdiction is established, the application to the court in England is to the High Court in London. It is a two-stage process, first involving an application for leave⁹ and then the substantive application.¹⁰ Where the application is made by consent (as is often the case in the circumstances under consideration), it may well be possible to truncate the two stages into one.

An English pension sharing order must be expressed as a percentage¹¹ (usually up to 2 decimal points) of the cash equivalent (this being the approved methodology used in pension sharing in England) of the pension involved. The percentage may be from 1 percent to 100 percent. An order cannot be made by reference to a specific cash amount expressed in dollars or sterling. Further, the order cannot be expressed by reference to a percentage of the marital portion of the fund. The percentage will operate over the fund as a whole. If it is intended, therefore, that only the marital portion of the pension should be shared, and a calculation will be required to convert this into a percentage over the fund as a whole. Such a calculation cannot be achieved by expressing the marital portion as a fraction of the period over which the fund has accrued: actuarial advice will

⁷ Domicile & Matrimonial Proceedings Act 1973, §§ 3 & 4.

⁸ *Cramer v. Cramer* [1987] 1 FLR 116 at 120 (Brown, J.).

⁹ Matrimonial & Family Proceedings Act 1984, § 13.

¹⁰ Matrimonial & Proceedings Act 1984, § 12.

¹¹ Matrimonial Causes Act 1973, § 21A(1)(b); *H v H (Financial Provision: Pensions)* [2010] 2 FLR 173, Baron J.

normally be required to determine the marital percentage as a part of the whole fund.

The percentage expressed in the pension sharing order will not operate over the fund at a specified date prior to the date of the English order. Instead, the order is implemented against the value of the fund on a date chosen by the pension scheme during the four month implementation period following the making of the order¹². This means that the value of the pension share transferred by the pension sharing order will inevitably be different (up or down) to the figure contemplated in negotiations. However, in this way, the parties share the rise or fall in value of the fund up to the date of implementation. It is critical therefore to understand that the cash figure realised by the adopted percentage may on implementation differ radically from the figure used in negotiations. The delay inherent in international implementation necessarily gives scope for more dramatic fluctuations in values.

The position in Scotland (which is a separate jurisdiction from England and Wales) is slightly different. A pension sharing order in Scotland may be expressed as a fixed sum in sterling or as a percentage. However, Scottish pension providers act in exactly the same way as their English counterparts in declining to implement a U.S. QDRO including pension splitting. Scotland does have a comparable jurisdiction permitting the making of a pension sharing order following a U.S. divorce.

U.S. lawyers should ensure that they know of all the relevant English pension rights when reviewing a case, which may include deferred rights arising from former employment. If there is more than one pension, either an order may be made against each (although this may have disadvantageous consequences in respect of pension sharing charges: see below) or, alternatively, a single pension sharing order may be made against, say, one pension scheme, which factors into account the value of all the available pensions. Furthermore, the Additional State Pension in England should not be overlooked as it can be of considerable value (over \$200,000). The value of an individual's English additional state pension can be found out by submitting Form BR20 online: visit

¹² Welfare Reform & Pensions Act 1999, § 29.

http://www.direct.gov.uk/prod_consum_dg/groups/dg_digitalassets/@dg/@en/@over50/documents/digitalasset/dg_180317.pdf

The client needs to be aware that, in addition to legal charges in the United States and England, the English pension scheme (other than the Additional State Pension) will impose charges of its own. These can range from US\$1,500 to US\$3,750. An agreement needs to be reached as to how these are to be met. In the absence of agreement, the party with the pension rights bears the pension sharing costs.

If the parties do not agree a division of the English pension either by off-setting by the U.S. court or by a pension sharing order made by an English court, there are several possibilities. If either spouse returns to England with the other remaining in the United States where divorce proceedings are filed, any order under a QDRO attempting to split the English pension will be unenforceable in England, but the English court may have jurisdiction to make a pension sharing order.¹³

If both spouses return to England after obtaining a divorce in the United States, the English court will be able to make a pension sharing order once jurisdiction has been established¹⁴ regardless of whether the U.S. court adjudicated on the pension provision.

If both spouses remain in the United States and one files for divorce in the United States, it may be possible for the English court to make a pension sharing order basing its jurisdiction on domicile because any order under a QDRO attempting to divide the English pension will be unenforceable.

If both spouses remain in the United States and it is not possible to establish jurisdiction for a pension sharing order under the Matrimonial & Family Proceedings Act 1984, Part III based on domicile, the English pension(s) will fall into something of a black hole unless it is possible to reopen the U.S. order/agreement. A fallback option may be to consider transferring (part of) the English registered pension to a U.S. pension arrangement against which the QDRO could be implemented. There are a number of overseas pension arrangements recognised by English law including a Qualifying Recognised Overseas Pension

¹³ Matrimonial & Family Proceedings Act 1984, Part III.

¹⁴ *Id.*

Schemes (QROPS),¹⁵ a Qualifying Non-UK Pension Scheme (QNUPS),¹⁶ and an Off-Shore Employer Finance Retirement Benefit Scheme (EFBRS). All of these pensions are suitable for those who have accrued English pension rights, but plan to be non-resident in retirement. However, not all English pensions are amenable to a foreign transfer. Any such transfer will require specialist financial advice and will clearly have significant implications for the pensioner which go beyond the implementation of a QDRO.

English law continues to make enforcing a state or federal court QDRO in England impossible. It is therefore critical that U.S. family law attorneys continue to advise their clients with interests in English pensions to retain a specialist English family lawyer with experience in this field to represent them in the division of English pensions. This is a prudent course also because of the difficulties inherent in obtaining information about pension benefits and adequately valuing them.

¹⁵ Finance Act 2004, §§ 150 (8), 165 and 169 and the Pension Schemes (Categories of Country and Requirements for Overseas Pension Schemes and Recognised Overseas Pension Schemes) Regulations 2006, SI 2006/206.

¹⁶ Inheritance Tax (Qualifying Non-UK Pension Schemes) Regulations 2010, SI 2010/51.