

# PENSION SHARING ORDER

by Christopher Hames QC

A pension administered in England and Wales requires a pension sharing order from a court of England and Wales. Since the end of the transition period on 31 December 2020 following the UK's exit from the European Union, it is going to be far more difficult for an international couple who live abroad to obtain such an order.

This may leave them with having to deal with any inequality of pension rights on divorce by other means – for example by sharing their capital unequally and requiring the spouse with more capital to pay a lump sum to the other. This is usually referred to as 'off-setting' and would mean that following divorce the pension – and all of the benefits it provides – will remain with the spouse whose pension it is. This may not be fair or practical. It may not be what either spouse wants. There may be unforeseen tax consequences depending on the taxation laws of the country in which the couple are living. It will be particularly difficult if a lot of the couple's wealth comprises of valuable rights in pensions administered in England and Wales.

One obvious solution is for the international couple to try to arrange for one of them to issue a petition for their divorce to be made in England and Wales. This will usually require at least one of them to be habitually resident here. However, even if neither them live here, it may be possible for divorce proceedings in England and Wales, if one of them were domiciled here. This is not the same as having British nationality or even necessarily where the couple are domiciled for tax purposes but is the country where English law treats someone as having their permanent home. It usually requires either one of the couples to have been born here or to have lived here with the intention of making this country their permanent or indefinite residence. So for example an 'ex-pat' individual who may have lived abroad for most of their working life may still be domiciled here, if they intended ultimately to retire to this country.



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If a divorce in England and Wales is neither possible nor desirable the only other option presently available is for one of the couple to make an application for an order following an overseas divorce under Part III of the Matrimonial and Family Proceedings Act 1984. However the same problem would still be met: there is a requirement of habitual residence or domicile which may not be met. In addition to make an application under Part III requires leave to be sought from the court which, depending on the connections of the couple to England and Wales, may not be achievable.

Under the old EU Maintenance Regulation it was possible for the court to make a needs-based pension sharing order even where neither spouse was habitually resident or domiciled in this country relying on the necessity for the English court to make the pension sharing order. However that is no longer the case as the power under the Maintenance

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Regulation has not been replicated under the law of England and Wales. The Law Commission has recommended that there should be a limited, but distinct, power for the court to make pension sharing orders for pensions administered in this country even if the couple are neither habitually in residence or domiciled here and would therefore not able to divorce here or to invoke Part III of the Matrimonial and Family Proceedings Act. Unfortunately the Government has yet to legislate.

The only other potential remedy available to the international couple who can't obtain an order from the English Court is outside the scope of this article. It may be possible, depending on the terms of the pension arrangement, either to invite the administrators either to transfer the pension benefits into a pension fund administered abroad in a country where it could be shared on divorce or for a party to take the pension rights as a one-off capital payment, or as income payments or a mixture of both. Consideration would have to be given to the parties' ages, retirement plans and their overall financial circumstances. There would probably be taxation considerations. Advice would need to be sought from an expert pension or financial adviser.

Incidentally the same issue arises in reverse. An international couple who are able to divorce here and have their financial affairs settled by an order of the English court will not be able to seek a pension sharing order from the English court in respect of a pension administered abroad: so they will face similar difficulties and may need to apply to the courts of the country where the pension is administered.

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