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CLERKS TO THE POLICE AUTHORITIES

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Dear Chief Officer

Home Office Circular 37/2001 provided guidance on the application of pension sharing to the Police Pension Scheme. Paragraph 3 of that Circular referred to a guide entitled "Divorce, Annulment of Marriage and Judicial Separation - A Guide to the Implications for Your Benefits Under the Police Pension Scheme". That guide was unfortunately not attached and is therefore being forwarded to forces under cover of this supplementary circular. **It should be brought to the attention of the administrators of the police pension scheme and force personnel officers as a matter of urgency.**

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Police Pensions & Retirement Policy Section

DIVORCE, ANNULMENT OF MARRIAGE, AND JUDICIAL SEPARATION - a guide to the implications for your benefits under the police pension scheme

If you divorce, have your marriage annulled, or are judicially separated, your pension rights could be affected.

In the event of divorce, annulment of marriage or judicial separation a court can issue an "**earmarking order**" in respect of your benefit entitlement under the PPS. This means that, at the time benefits become payable, a portion must be paid directly to your former spouse by the police authority. An earmarking order can be made against your pension, your lump sum by commutation, or your death grant.

In the event of divorce or annulment of marriage (but not judicial separation) a court can issue a "**pension sharing order**" in respect of your benefit entitlement under the PPS. This means that with effect from the date the order is made, the capital value of your benefit entitlement under the PPS is divided between you and your former spouse. Your future pension entitlement is reduced according to the apportionment ordered by the court. Your former spouse becomes a "pension credit member" of the PPS in his or her own right. The portion of benefits deducted from the capital value of your pension entitlement is used to provide a pension - and possibly a lump sum - by way of pension rights for your former spouse.

This Guide explains how earmarking and pension sharing work. It includes -

- an explanation of "earmarking" and "pension sharing"
- model procedural notes
- model forms
- model letters
- GAD guidance notes
- a list of relevant legislation.

The guidance is in line with English/Welsh divorce legislation. If the petition for divorce is filed in Scotland, Northern Ireland or overseas, some of the principles will be different.

Explanation of earmarking and pension sharing

About these notes

These notes cover the action required in matrimonial proceedings leading to divorce, nullity of marriage and judicial separation. For simplicity the expression "divorce" is used to cover all circumstances. Similarly the term "ex-spouse" will be used even though in the case of judicial separation, that person will still technically be your spouse.

The notes highlight a number of key points that you may find helpful. They do not, however, pretend to set out all the legal issues. A police officer should consider seeking professional legal advice; a police authority should have regard to all the relevant pensions/divorce legislation to ensure it is acting correctly.

Before divorce/separation, what pension rights are available from the PPS?

Your own pension entitlement:

if you are not already retired is accruing at the rate of -

- 1/60th of average final pay for each of your first 20 years of pensionable service
- 2/60ths of average final pay for each year after the first 20 years of pensionable service

to a maximum of 40/60ths of average final pay. This would be achieved after 30 years' full time service. Note that any days in excess of a completed year will count as part of a year, e.g. 65 days would count as 65/365ths. On retirement you can choose to "commute" part of the pension to provide a lump sum.

The spouse's ordinary pension:

in respect of a serving police officer is normally half of what you would have received as an ill-health pension on the day you died. It is based on your pensionable service plus (in most cases) an enhancement. If you die after retirement, the spouse's ordinary pension would normally be half of your own pension. If you have service before 1 April 1972 or have married after retirement, the spouse's pension may be less than half rate.

For the first 13 weeks following your death, the spouse's pension (plus any child's pension) would be topped up so that the total amount payable for this period would be equivalent to your pensionable pay (active member) or pension (pensioner member) at date of death.

If your spouse remarries after your death, he/she would lose entitlement to any spouse's pension otherwise payable.

A lump sum death grant:

of twice your pensionable pay at the time of your death would be paid to your spouse if you die in service.

Explanation of earmarking and pension sharing

If I get divorced, will my ex-spouse always be awarded part or possibly all of my pension rights?

Not necessarily. The court may decide that a fair apportionment of assets can be achieved in some other way. If it does decide that pension rights need to be apportioned, it may not be your rights that they look to. If your ex-spouse has substantial pension rights in his/her own right it could be his/her rights that are made subject to a pension sharing or earmarking order.

It is assumed in the writing of these notes that it will be your pension rights that the court will consider for sharing or earmarking. If, instead, your ex-spouse's rights are subject to an order, some of the general principles outlined here would apply but there could be substantial differences in the way in which the order should be worded. Your police authority would not be involved in this and if you have any concerns you should discuss them with your legal adviser.

Can I get help from my police authority?

Your police authority must provide all the information, and take all the actions, required under divorce legislation. Pensions staff of the authority can explain to you how the PPS works and the outcome of any proposed course of action but they cannot advise or represent either party to the divorce proceedings. The police authority has a right to object to a court order and possibly attend before the court but this would only be in circumstances where the authority, as Scheme manager, perceive a problem with complying with the terms of any order in the context of the PPS. If you need help with negotiation and representation you should seek qualified legal advice.

How are my pension rights valued?

It is reasonably simple to work out entitlement to an annual retirement pension at any given date. But for the value to be compared with the money value of other assets, e.g. the value of your house or car, your pension rights need to be expressed as a capital sum, not as a future annual amount to be paid for an unknown period. Divorce law therefore requires that the method of calculation should be on Cash Equivalent Transfer Value ("CETV") principles. These are the principles used to work out the sum of money that would be offered to a new pension scheme if you left the police service and asked for your pension rights to be transferred. In some circumstances, e.g. if you have already retired, a transfer of pension rights would obviously not be possible. The expression "Cash Equivalent Value" or "CEV" is therefore used in this Guide.

If required to provide a valuation of your pension rights, your police authority will assess a CEV in accordance with factors and guidance issued by the Government Actuary (included in this Guide).

In the case of a serving police officer who has not reached the point at which a benefit could be paid immediately the starting point for the CEV calculation is the deferred benefits to which you would be entitled if leaving the police service at the date of the calculation.

In the case of a police officer who has reached the point at which a benefit could be paid, the starting point for the CEV calculation is the actual benefits to which you would be entitled if retiring from the service at the date of the calculation.

Explanation of earmarking and pension sharing

How are my pension rights valued (continued)?

In the case of a person who has left the police service, or who has opted out of the PPS, with entitlement to deferred benefits, it is those benefits that form the basis of the CEV calculation.

In the case of a person receiving a retirement pension from the PPS it is the pension that forms the basis of the CEV valuation.

Whichever case applies, the relevant amounts are multiplied by actuarial factors provided by the Government Actuary. These factors take into account financial and demographic considerations such as your age at the date of assessment, possible or actual retirement age, market conditions, inflation and mortality rates (life expectancy). The resultant figure can be very high, possibly tens of thousands of pounds. But remember that it represents the capital value of all your entitlement to benefits under the PPS, accrued to date, and paid for the rest of your life after retirement.

What information must be provided for divorce proceedings?

Normally a police authority will be asked to provide -

- (a) a valuation of pension rights
- (b) certain basic information about the Pension Scheme.

If the request is from you, as the Scheme member, both (a) and (b) will be provided. A court can also order the police authority to provide (a) or (b) or both, in the absence of a request from you. Your spouse, too, is entitled to request (b) but not (a). Solicitors acting for you or your spouse can request information but the appropriate authorisation from you or your spouse will be required by the police authority before the requested details will be supplied.

The court may require both you and your spouse to complete a "Form E: Financial Statement". When you have completed a copy of Form E it will contain details of all the assets and liabilities which the court will need to take into account when deciding an equitable apportionment on divorce. One page of Form E is dedicated to pension matters. If you ask the police authority for a valuation they will provide the information formatted to follow the questions as asked in Form E. The details may also include explanatory notes, i.e. information about the PPS, so that the answers to the questions can be put in their proper context. (You can see a sample - FORM POL DIV 3 - in the model forms included in this Guide. Submit this with Form E rather than transcribing details into the Form E boxes.)

If the basic information referred to in (b) is requested, the police authority will supply all of the details required under pensions legislation. This will include the principles used for the assessment of the CEV and, if a pension sharing order were to be made, the pension rights which could potentially be shared and the benefits which would be available to an ex-spouse member. It would also include a schedule of charges if the police authority propose to charge, as they can do, for pensions administration work associated with divorce.

Explanation of earmarking and pension sharing

What charges would be made?

Under divorce legislation a police authority can charge for the provision of the valuation and/or the basic information, provided it does not have to be supplied free of charge under disclosure regulations. Under disclosure regulations it must normally be supplied free of charge if the information or valuation has not already been provided within the previous 12 months. A police authority can also impose a charge for costs reasonably incurred in the process of pension sharing or in the application of an earmarking order.

To be able to charge, the police authority must issue its schedule of charges at an early stage in the provision of information.

The police authority can decide whether charges may be collected "up-front" or by deductions from benefits. They can also decide whether to collect them from the Scheme member or from the ex-spouse (although the court can override the authority's normal means of collection as part of the order).

Current guidance from HM Customs and Excise is that VAT would be chargeable on the sums quoted.

How does an earmarking order work?

If the court decides that an earmarking order should be made, it may require the police authority to -

- pay any death in service grant to your ex-spouse rather than to your current spouse (if you have remarried) or to your estate i.e. personal representatives (if you have not remarried);
- pay a lump sum from your commuted pension to your ex-spouse;
- pay periodical payments from your pension to your ex-spouse.

Death in service grant

Guidance given by the Lord Chancellor's Department is that payment of the death grant to an ex-spouse is possible - despite the restrictions of the Police Pensions Regulations - provided the court uses the correct means of achieving it. That is, the court makes an order under Section 25C(2)(c) of the Matrimonial Causes Act 1973. Under this Act there are three routes available to the court to require payment of a lump sum to an ex-spouse - Section 25(C)(2)(a) or (b) or (c).

Using Section 25C(2)(a) would not work because it relies on the police authority having the discretion to decide the recipient of the lump sum; the police authority do not have this power.

Using Section 25(C)(2)(b) would not work because it relies on the police officer having the power to nominate the recipient of the lump sum; you do not have this power.

Section 25(C)(2)(c) could work, however, because it states that the court may "in any other case, require the person responsible for the pension arrangement in question to pay the whole or part of that sum, when it becomes due, for the benefit of the other party instead of to the person to whom apart from the order, it would be paid."

Explanation of earmarking and pension sharing

How does an earmarking order work (continued)?

An order made under Section 25(C)(2)(c) could, therefore, require the police authority to disregard the requirements of the Police Pensions Regulations 1987 and to make payment to your ex-spouse rather than - if you have not remarried - to your estate, or - if you have remarried - to your new wife or husband (to whom, in the absence of any order, it would otherwise be made).

The strength of such an order has not yet been tested. It would be tested if the police authority complied with an order requiring the death grant to be paid to your ex-spouse and then, if you had remarried, your widow(er) took the police authority to Crown Court by making an appeal under Regulation H5 of the Police Pensions Regulations 1987, claiming that the death grant should have been paid to him/her.

A death grant is payable only in respect of a police officer who dies in service. Once you have retired, no death grant is payable to any party.

Payment of lump sum by commutation

Payment to your ex-spouse of all or part of your entitlement to lump sum by commutation would be achieved by an earmarking order referring again to Section 25C(2)(c) of the Matrimonial Causes Act 1973. The police authority does not have a discretion to pay it to anyone other than yourself, nor can you nominate an ex-spouse as a recipient. But by use of a direction under Section 25C(2)(c) the court could order the payment to be made to your ex-spouse.

However, the police authority would not be able to make the payment if you chose not to commute a portion of your pension. For this reason, an order under Section 25C(2)(c) can only operate if the court, under Section 25B(7) of the Matrimonial Causes Act, also orders you to give a valid notice of commutation upon retirement. ("...where the party with pension rights has a right of commutation under the arrangement, the order may require him to exercise it to any extent".)

Periodic payment order

It may be that the court decides to leave your lump sum payments alone, but issues an order to the police authority under Section 25B(4) of the Matrimonial Causes Act 1973 to make periodic payments to your ex-spouse, i.e. deductions from each instalment of your pension. For example, if on retirement you become entitled to £1,000 of pension a month, the order may instruct that, say 50%, i.e. £500 a month should not be paid to you, but instead should be paid directly to your ex-spouse.

If this type of order is to be made, you should be aware that Inland Revenue requires the periodic payment to be deducted from your net pay (i.e. after tax). You would pay tax on the full monthly instalment of pension and your ex-spouse would receive the deduction made under the earmarking order tax-free. For example, suppose you received £1,000 gross pension each month and pay £200 in tax. Your net pay would be £800 a month. If the order instructs payment of 50% to your ex-spouse, the £500 would be deducted from the net pay of £800. Your ex-spouse would receive £500 each month and you would receive £300. Bear this in mind if periodic payments are discussed.

Explanation of earmarking and pension sharing

How does an earmarking order work (continued)?

What about spouse's benefits?

These are payable only to a legal spouse. Once the divorce has been finalised by the issue of decree absolute, your ex-spouse would no longer have entitlement to spouse's benefits under the PPS. There is no provision in the Matrimonial Causes Act 1973 for the spouse's benefit to be paid to an ex-spouse and so this should not feature in an earmarking order.

There is no provision in the PPS for you to nominate a recipient of the spouse's pension. Consequently, if you remain single after divorce, no spouse's pension will be paid under the Scheme. If you remarry, your new spouse has entitlement to any spouse's benefits due.

What happens to the earmarking order if I remarry?

The terms of the earmarking order remain in force after your marriage. A further claim could be made against your pension rights by your new spouse if the new marriage were to fail.

What happens if my ex-spouse remarries?

Your ex-spouse will be obliged to tell the police authority if he/she remarries.

On remarriage any periodic payment order would cease. However, an order made in respect of a lump sum payment (whether in respect of the death grant or commuted lump sum) would not cease on your ex-spouse's remarriage unless a provision has been included in the earmarking order providing for it to lapse in this event.

What happens if the police authority are unable to trace my ex-spouse?

Your ex-spouse will be obliged to keep the police authority informed of any change of name, address and payment details. If he/she does not keep the police authority informed and, as a result, the authority cannot make the ordered payments to him/her, the authority will make the payments to you instead.

If your ex-spouse subsequently re-appears and claims those payments, the claim would have to be made against you rather than against the police authority.

What happens if my ex-spouse dies?

If your ex-spouse dies, the police authority cannot comply with the terms of the earmarking order and the payments would be made to you instead.

What happens if I transfer to another force or to some other pension scheme?

If you transfer to another force your pension rights remain in the PPS but your new authority would become the "scheme manager".

Explanation of earmarking and pension sharing

How does a pension sharing order work (continued)?

- No children's benefits will be payable in respect of the pension credit - they remain attached, in full, to the Scheme member's own benefits.
- The pension derived from the pension credit attracts Pensions Increase.
- If the pension derived from the pension credit is very small (as defined by Inland Revenue) it may be commuted to a single lump sum payment.
- A pension credit member's benefits are subject to similar forfeiture rules as apply to a Scheme member or the spouse of a Scheme member.
- A pension credit member's benefits cannot be combined with any other benefit to which the ex-spouse may be entitled under the PPS.
- If the police officer transfers to another force, the pension credit responsibility remains with the police authority which had responsibility for the pension credit benefits at the date of the pension sharing order.
- If the police officer dies it has no effect on the pension credit member's benefits.

Like Scheme members and dependants, a pension credit member has appeal rights under the PPS and Internal Dispute Resolution Procedures.

What effect does a pension sharing order have on the Scheme member's cover for children's and spouse's benefits?

Children's benefits are "attached" in full to the Scheme member's pension rights. If it becomes necessary to assess a child's ordinary pension no account is taken of the pension sharing order.

In the case of a spouse's ordinary pension, *however*, account must be taken of the order and the level of award is reduced accordingly.

What happens on remarriage?

Your pension and that of your ex-spouse following the implementation of a pension sharing order would not be detrimentally affected should either of you remarry. However, if that subsequent marriage should break down your pension rights could again be subject to a pension sharing order as could those of your ex-spouse.

Can I rebuild my pension rights?

This may be done in certain circumstances. The extent to which it can be done depends upon Inland Revenue rules and whether you are classed as a "moderate" earner or a "higher" earner. The test of your status depends upon how much your earnings were in the tax year before the tax year of divorce and the level of the so-called "Earnings Cap" in the tax year of divorce. (As guidance, the Earnings Cap for the tax year 2001/2002 is £95,400.)

Explanation of earmarking and pension sharing

How does a pension sharing order work (continued)?

If your earnings in the tax year before divorce are higher than one quarter of the Earnings Cap figure, you are considered a "higher earner" for this purpose. If you wish to improve your benefits by paying additional contributions under the PPS you may do so, but only to the extent that you could have done before the pension sharing order was implemented. In other words, when testing your capacity to purchase benefits against Inland Revenue limits, account must be taken of your benefit level before your ex-spouse's pension credit is deducted.

If your earnings in the tax year before divorce are lower than one quarter of the Earnings Cap, you are considered a "moderate earner" for this purpose. If you wish to improve your benefits by paying additional contributions under the PPS, subject to Inland Revenue rules it may be possible for you to build back at least part of the benefits you have lost through pension sharing.

There are, of course, other means of saving for retirement through investment. To explore these, you should seek the guidance of a suitably qualified and registered financial adviser.

Explanation of earmarking and pension sharing

How does an earmarking order work (continued)?

Consequently, your former police authority would send your new authority a copy of the earmarking order and relevant papers, and the name and address of your ex-spouse. The new authority will have responsibility for complying with the order.

If you leave the police service or opt out of the PPS, and transfer your pension rights to some other pension arrangement, the same would apply. The police authority would send your new pension scheme trustees or managers a copy of the court order and relevant papers, and the name and address of your ex-spouse.

The police authority must also tell your ex-spouse about the transfer and the date on which it took place, the name and address of the trustees or managers of your new pension scheme, and that the order is to have effect as if it had been made in respect of the new scheme.

What if there is a reduction in the level of my benefits?

The police authority must inform your ex-spouse if an event occurs which is likely to cause a significant reduction in benefits payable. In the case of a police officer this is most likely to happen if your benefits are reduced or withdrawn under Part K of the Police Pensions Regulations 1987 e.g. withdrawal of pension on re-employment as a regular police officer or cancellation/reduction/reassessment of an ill-health pension.

Reduction in rank and therefore pay could also have a similar effect.

How does a pension sharing order work?

Unlike an earmarking order, which does not come into effect until your benefits are payable by the Pension Scheme, a pension sharing order has immediate effect. The order would direct the police authority, as pension scheme manager, to -

- reduce your benefits by a pension "debit", expressed as a percentage of those benefits at the date the order is made
- give your ex-spouse a pension "credit" equal in value to the debit.

How is the pension debit assessed?

In simple terms an example of the debit assessment would be as follows:

The court issues a pension sharing order instructing that your former spouse is to receive 40% of your benefit entitlement. At the date the order is made you are a serving police officer with 15 years' pensionable service, your average pensionable pay is £30,000 and you would be able to complete 30 years' service by compulsory retirement age.

Your CEV would be based on the deferred benefits to which you would be entitled if you were to leave the service at the date of the assessment. The deferred pension would be assessed as $15/30 \times 40/60 \times £30,000 = £10,000$ a year.

Suppose that the CEV, after applying actuarial factors to the deferred benefits, would be £100,000.

Explanation of earmarking and pension sharing

How does a pension sharing order work? (continued)

Your former spouse's pension credit would be 40% of this, i.e. £40,000. This would be used to provide him/her with benefits.

As a percentage of your deferred pension, 40% would be £4,000 a year. This, revalued at the time of your retirement, would be the pension debit applied to your pension.

Suppose you retire at compulsory retirement age after 30 years' service and with average pensionable pay of £48,000.

Your full pension entitlement before the pension debit is applied would be assessed on normal age retirement principles as $40/60 \times £48,000 = £32,000$.

The value of the pension debit at the time the order was made was £4,000 a year. Suppose its value at the time you retire (i.e. after allowing for inflation) is £6,000 a year. The pension debit is now deducted from your pension. $£32,000 - £6,000 = £26,000$. So your pension entitlement after being reduced to take account of the pension sharing order will be £26,000 a year.

This is a very simple explanation of the process to give you an idea of the principles involved. Details of the full process which in most cases will be far more complex than this, are given in the Government Actuary's notes of guidance (see later in this Guide).

What happens to the pension credit?

Some pension schemes require or allow the ex-spouse to transfer the pension credit to an alternative pension arrangement, some offer membership of the pension scheme from which the pension credit is derived. In the case of the PPS, because it is an unfunded pension scheme, it will not allow a transfer of pension rights to be made. All ex-spouses who are entitled to a pension credit as a result of a pension sharing order will become "pension credit members" of the PPS.

What rights and benefits does a pension credit member have?

- A pension credit member will draw his/her pension at age 60. There is no option for voluntary earlier or later payment, nor provision for early payment on ill-health grounds. The date at which the police officer (from whose benefits the credit is derived) retires and the terms of his/her retirement, have no effect on the pension credit member's entitlement.
- Commutation of pension to provide a lump sum is possible, subject to Inland Revenue limits and the police officer not having already commuted at the date of the pension sharing order.
- There is no provision to allocate a portion of the pension.
- In the event of the pension credit member's death before being eligible to draw benefits, a death grant of two and a quarter times the uncommuted pension is payable to his/her estate.
- No spouse's benefits will be payable in respect of the pension credit.