

**A guide for members of the
Firefighter's Pension Scheme**

**Earmarking
&
Pension Sharing**

The following notes give a simple outline of the means whereby a court can order the payment of a pension scheme member's benefits to his or her former spouse.

Divorce, dissolution of civil partnership, annulment, judicial separation

Background

Once upon a time, when deciding how a divorcing couples' finances should be divided, the courts often disregarded the value of pension rights. If they were taken into account, their value would be offset against the value of other financial assets. The court could not order any adjustment of a person's pension rights.

Regulations made under the Pensions Act 1995 changed this. In respect of any petition for divorce, nullity of marriage, or judicial separation filed on or after 1 July 1996, a court had to take pension rights into account and it could make orders in respect of pension rights.

Further regulations made under the Welfare Reform and Pensions Act 1999 extended the courts' powers in respect of petitions for divorce or nullity of marriage filed on or after 1 December 2000.

With effect from 5 December 2005, with the commencement of the Civil Partnership Act 2004, the above regulations were amended to apply in a similar manner in the case of the dissolution or annulment of a civil partnership.

The court looks for a fair division of material and financial possessions. Because pension rights are a valuable asset, sometimes the court will decide that a fair apportionment cannot be achieved unless part of the pension rights of one party are paid for the benefit of the other.

From 1 July 1996 this would be achieved by the court issuing an "earmarking order" (pension attachment order) to the pension scheme manager. In the case of the FPS and NFPS, the pension scheme manager is the fire and rescue authority. The earmarking order would instruct the authority to make arrangements, at the time the benefits become due, for part of the scheme member's pension, lump sum commutation, or both, to be paid to the former spouse or civil partner. The order could also require that, in the event of death in service, the lumpsum death grant should be paid to the former spouse or civil partner.

From 1 December 2000 the court could issue a "pension sharing order". This type of order was introduced because it was felt that, although earmarking could offer a more fair division of assets than available before, there could still be problems. For example, in the case of earmarking –

- the former spouse or civil partner may always be financially linked to, and dependent on, the scheme member – it does not offer a "cleanbreak" solution;
- the former spouse or civil partner will not receive any financial benefit from the order if the scheme member dies before the retirement pension or lump sum comes into payment (unless a death grant has been earmarked);
- any entitlement to earmarked pension would cease (so would any entitlement to an earmarked lump sum if the order so instructs) if the former spouse or civil partner enters into a subsequent marriage or civil partnership.

Divorce, dissolution of civil partnership, annulment, judicial separation

Background (continued)

Consequently the government decided a clean-break solution was needed and the concept of pension sharing was introduced. It differs from earmarking inasmuch as, at the time the pension sharing order is made, a portion of the accrued pension rights are transferred from a scheme member to provide a pension credit for his/her former spouse or civil partner. This means that if the former spouse or civil partner subsequently marries, remarries, forms a civil partnership or a subsequent civil partnership this would not affect the court's award.

So, from 1 December 2000 we have two types of arrangement which the courts can use to adjust pension rights on divorce or dissolution of civil partnership.

About these notes

These notes cover the action required in proceedings leading to divorce, dissolution of civil partnership, annulment and judicial separation.

To make the notes read more simply, the expression "divorce/dissolution" is used to cover all circumstances. Similarly, "former spouse or civil partner" will be used to describe your former husband, wife or civil partner although, in the case of judicial separation, a "former" husband or wife would still technically be your spouse.

The notes highlight a number of key points which you may find helpful. They do not, however, pretend to set out all the legal issues. A firefighter should consider seeking professional legal advice; a fire and rescue authority should have regard to all the relevant legislation relating to divorce and dissolution to ensure they are acting correctly.

On divorce or dissolution will my former spouse or civil partner 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 spouse or civil partner has substantial pension rights in his/her own right it could be his/her rights 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, it is the pension rights of your former spouse or civil partner that are subject to an order, some of the general principles outlined here would apply but, if he/she is not a member of the FPS or NFPS there could be differences in the way in which the order would be worded. Your fire and rescue authority would not be involved in this and if you have any concerns you should discuss them with your legal adviser.

Divorce, dissolution of civil partnership, annulment, judicial separation

Why aren't all orders worded in the same way?

Pension schemes are constructed in different ways. Many cases handled by solicitors and the courts will probably relate to membership of private sector pension schemes. The rules of those schemes are set out in Trust Deeds and the scheme trustees usually have an element of discretion in the application of pension scheme rules. Your pension scheme is different. It is an unfunded, public service scheme; the rules are set out in legislation made under an Act of Parliament. A fire and rescue authority, as Scheme manager, have very limited powers of discretion. The FPS in particular has a number of unusual features, not normally encountered in private sector schemes, which must be understood correctly before an order is made.

Can I get help from my fire and rescue authority?

Your fire and rescue authority must provide all the information, and take all the actions, required under divorce/dissolution legislation. Pensions staff of the authority can explain to you how the FPS and NFPS work and the outcome of any proposed course of action but they cannot advise or represent either party to the divorce proceedings. The fire and rescue 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 FPS or NFPS. 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. Consequently, divorce/dissolution legislation 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 which would be offered to a new pension scheme if you left firefighting 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. Nevertheless, similar principles are used in these circumstances, too.

If required to provide a valuation of your pension rights, your fire and rescue authority will assess a CETV in accordance with factors and guidance issued by the Government Actuary (see Annexe 14D).

In the case of a serving firefighter who has not reached the point at which a benefit could be paid, the starting point for the CETV calculation is the deferred benefit to which you would be entitled if leaving the fire and rescue service at the date of the calculation.

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

Divorce, dissolution of civil partnership, annulment, judicial separation

How are my pension rights valued? (continued)

In the case of a person who has left firefighting, or who has opted out of the FPS or NFPS, with entitlement to deferred benefits, it is those benefits that form the basis of the CETV calculation.

In the case of a person receiving a retirement pension from the FPS or NFPS it is that pension that forms the basis of the CETV valuation.

If you have retired and been re-employed, separate assessments will be made of the pension in payment and the pension rights accruing in the reemployment.

Whichever circumstances apply, 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 FPS or NFPS accrued to date and paid for the rest of your life after retirement.

What information must be provided for divorce or dissolution proceedings?

Normally a fire and rescue 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 authority to provide (a) or (b) or both, in the absence of a request from yourself. Your spouse or civil partner, too, is entitled to request (b) but not (a). Solicitors acting for you or your spouse or civil partner can request information but the appropriate authorisation from you or your spouse/civil partner will be required by the fire and rescue authority before the requested details will be supplied.

The court may require both you and your spouse or civil partner to complete a "Form E: Financial Statement". The purpose of Form E is to provide the court with details of all the assets and liabilities of each party. The court will use the details in Form E to help decide an equitable apportionment. Section 2.13 of Form E as issued since 5 December 2005 requires you to give the name and address of any pension arrangements you may have together with a CETV representing the value of the pension rights held in each of those arrangements.

Form E as issued before 5 December 2005 used to request other details about your entitlement. These details are now contained in a new form "Form P: Pensions Inquiry Form" which you may be required to send to the managers of your pension arrangements.

Your fire and rescue authority will provide the details requested.

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What charges would be made?

Under divorce legislation pension scheme managers 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.

Pension scheme managers 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 fire and rescue authority must issue its schedule of charges at an early stage in the provision of information.

The 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 former spouse or civil partner (although the court can override the authority’s normal means of collection as part of the order).

Current guidance from HM Revenue and Customs 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 fire and rescue authority to –

- pay any death in service grant to your former spouse or civil partner rather than to any later spouse or civil partner (if you entered a subsequent marriage or civil partnership) or to your estate.
- pay a lump sum from your commuted pension to your former spouse or civil partner;
- pay periodical payments from your pension to your former spouse or civil partner.

Death in service grant

Whether or not a death grant payable under the FPS can be paid to a firefighter’s spouse or civil partner has been called into question because of the requirement in the Firemen’s Pension Scheme Order 1992 that it may only be paid to a “surviving spouse or civil partner who qualifies for it” and, in the absence of such a person, to the firefighter’s estate.

However, guidance given by the Lord Chancellor’s Department is that payment of the death grant to a former spouse or civil partner is possible provided the court uses the correct means of achieving it, i.e. by making an order under Section 25C(2)(c) of the Matrimonial Causes Act 1973 or paragraph 26(5) of Schedule 5 to the Civil Partnership Act 2004.

Divorce, dissolution of civil partnership, annulment, judicial separation

How does an earmarking order work? (continued)

Under both Acts there are three routes available to the court to require payment of a lump sum to a former spouse or civil partner. In the Matrimonial Causes Act 1973 these are under Section 25(C)(2)(a) or (b) or (c); in the Civil Partnership Act 2004 these are under paragraph 26(3), (4) or (5) of Schedule 5.

Using Section 25C(2)(a) or paragraph 26(3) would not work because they rely on the fire and rescue authority having the discretion to decide the recipient of the lump sum; the authority do not have this power.

Using Section 25(C)(2)(b) or paragraph 26(4) would not work because they rely on the firefighter having the power to nominate the recipient of the lump sum; FPS members do not have this power.

Using Section 25(C)(2)(c) or paragraph 26(5) could work because they state 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/civil partner instead of to the person to whom apart from the order, it would be paid.” So an order made under Section 25(C)(2)(c) or paragraph 26(5) could require the fire and rescue authority to disregard the requirements of the Firemen’s Pension Scheme Order 1992 and make payment to your former spouse or civil partner rather than – if you have not entered a subsequent marriage or civil partnership – to your estate, or – if you have entered a subsequent marriage or civil partnership – to your new wife or husband or partner (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 fire and rescue authority complied with an order requiring the death grant to be paid to a former spouse or civil partner and then, if the FPS member had remarried, his/her surviving spouse or civil partner took the fire and rescue authority to Crown Court by making an appeal under Rule H3 of the Firemen’s Pension Scheme Order 1992, claiming that the death grant should have been paid to him/her. “Where a person claims that he is entitled to an award or to any payment in respect of an award and the fire authority do not admit the claim at all, or do not admit the claim to its full extent . . . he may appeal to the Crown Court which may . . . make such order or declaration in the matter as appears to it to be just.”

The situation in the NFPS is slightly different. There the fire and rescue authority has absolute discretion as to whom the death grant should be paid (even though the NFPS member can nominate a recipient). Section 25C(2)(a) of the Matrimonial Causes Act 1973 or paragraph 26(3) of Schedule 5 to the Civil Partnership Act 2004 would have to be the route used to enable the death grant to be paid to the former spouse or civil partner.

Divorce, dissolution of civil partnership, annulment, judicial separation

How does an earmarking order work? (continued)

Payment of lump sum by commutation

Payment to a former spouse or civil partner 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 or paragraph 26(5) of Schedule 5 to the Civil Partnership Act 2004. This would be the case whether you are a member of the FPS or NFPS. The fire and rescue authority does not have a discretion to pay it to anyone other than yourself, nor can you nominate an former spouse or civil partner as a recipient. But by use of a direction under Section 25C(2)(c) or paragraph 26(5) the court could order the payment to be made to your former spouse or civil partner.

However, the fire and rescue 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 1973 or paragraph 25(5) of Schedule 5 of the Civil Partnership Act 2004 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" and "If the civil partner with pension rights has a right of commutation under the arrangement, the Part 1 Order may require that civil partner 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 fire and rescue authority under Section 25B(4) of the Matrimonial Causes Act 1973 or paragraph 25(2) of Schedule 5 to the Civil Partnership Act 2004 to make periodic payments to your former spouse or civil partner, 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 former spouse or civil partner.

If this type of order is to be made, you should be aware that HM Revenue and Customs 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 former spouse or civil partner 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% of gross pension to be paid to your former spouse or civil partner, the £500 would be deducted from the net pay of £800. Your former spouse or civil partner would receive £500 each month and you would receive £300. If the order instructs payment of 50% of your net pay to your former spouse or civil partner, you would both receive £400 a month. Bear this in mind if periodic payments are discussed.

Divorce, dissolution of civil partnership, annulment, judicial separation

How does an earmarking order work? (continued)

What about benefits for a surviving spouse or civil partner?

These are payable only to a legal spouse or civil partner. Once the divorce or dissolution has been finalised, your former spouse or civil partner would no longer have entitlement to dependant's benefits under the FPS or NFPS.

There is no provision in the Matrimonial Causes Act 1973 or the Civil Partnership Act 2004 for the surviving spouse's or civil partner's benefit to be paid to a former spouse or civil partner and so this should not feature in an earmarking order.

There is no provision in the FPS, in the absence of a spouse or legal partner, for you to nominate a recipient of the spouse's or civil partner's pension. Consequently, if you remain single after divorce/dissolution, no spouse's or civil partner's pension will be paid under the Scheme. If you enter a subsequent marriage or civil partnership, your new spouse or civil partner has entitlement to any spouse's or civil partner's benefits due.

There is provision in the NFPS for death benefits to be paid to a "nominated partner" subject to the qualifying conditions being met. If you enter a subsequent marriage or civil partnership, or nominate a partner, it will be your new spouse or civil partner or nominated partner that will have entitlement to the appropriate death benefits.

What happens to the earmarking order if I enter a subsequent marriage or civil partnership?

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

What happens if my former spouse or civil partner enters a subsequent marriage or civil partnership?

Your former spouse or civil partner will be obliged to tell the fire and rescue authority if he/she enters a subsequent marriage or civil partnership.

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 former spouse or civil partner entering a subsequent marriage or civil partnership unless a provision has been included in the earmarking order providing for it to lapse in this event.

Divorce, dissolution of civil partnership, annulment, judicial separation

**How does an earmarking order work?
(continued)**

What happens if the fire and rescue authority are unable to trace my former spouse or civil partner?

Your former spouse or civil partner will be obliged to keep the fire and rescue authority informed of any change of name, address and payment details. If he/she does not keep the 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 former spouse or civil partner subsequently re-appears and claims those payments, the claim would have to be made against you rather than against the fire and rescue authority.

What happens if my former spouse or civil partner dies?

If your former spouse or civil partner dies, the fire and rescue 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 fire and rescue authority or to some other pension scheme?

If you transfer to another fire and rescue authority your pension rights will normally transfer with you to the FPS or NFPS as administered by your new authority. Consequently, your former fire and rescue authority would send your new authority a copy of the earmarking order and relevant papers, and the name and address of your former spouse or civil partner. The new authority will have responsibility for complying with the order.

If you leave the fire and rescue service or opt out of the FPS or NFPS and transfer your pension rights to some other pension arrangement, your fire and rescue 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 former spouse or civil partner.

The fire and rescue authority must also tell your former spouse or civil partner 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 fire and rescue authority must inform your former spouse or civil partner if an event occurs which is likely to cause a significant reduction in benefits payable. In the case of a firefighter this is most likely to happen if your benefits are reduced or withdrawn under the FPS or NFPS, e.g. withdrawal of pension on re-employment as a regular firefighter or cancellation/reduction/reassessment of an ill-health pension.

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

Divorce, dissolution of civil partnership, annulment, judicial separation

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 fire and rescue 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 former spouse or civil partner 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 the former wife of a firefighter is to receive 40% of his benefit entitlement. At the date the order is made he is a serving firefighter with 15 years’ pensionable service, his average pensionable pay is £30,000 and he would be able to complete 30 years’ service by normal pension age.

His CETV would be based on the deferred benefits to which he would be entitled if he 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 CETV, after applying actuarial factors to the deferred benefits, would be £100,000.

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

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

Suppose he retired at compulsory retirement age after 30 years’ service and with average pensionable pay of £48,000.

His 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 he retires (i.e. after allowing for inflation) is £6,000 a year. The pension debit is now deducted from his pension. $£32,000 - £6,000 = £26,000$. After reduction to take account of the pension sharing order the pension 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 Annexe 14D).

Divorce, dissolution of civil partnership, annulment, judicial separation

How does a pension sharing order work? (continued)

What happens to the pension credit?

Some pension schemes require or allow the former spouse or civil partner 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 FPS and NFPS, because they are not funded pension schemes in the normal sense, a transfer of pension rights is not allowed. All former spouses and civil partners who are entitled to a pension credit as a result of a pension sharing order will become “pension credit members” of the FPS or NFPS.

What rights and benefits does a pension credit member have?

- A pension credit member will draw his/her pension at age 60 from the FPS, from age 65 from the NFPS. There is no option for voluntary earlier or later payment, nor provision for early payment on ill-health grounds. The date at which the firefighter (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 certain limits and the firefighter 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 (or to a nominated recipient in the case of the NFPS).
- No spouse's or civil partner's benefits will be payable in respect of the pension credit.
- No children's benefits will be payable in respect of the pension credit – they remain attached, in full, to the FPS or NFPS 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 HM Revenue and Customs) 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 or civil partner of a Scheme member and he/she has the same bankruptcy protection as a Scheme member.
- A pension credit member's benefits cannot be combined with any other benefit to which the former spouse or civil partner may be entitled under the FPS or NFPS.

If the firefighter dies it has no effect on the pension credit member's benefits.

Divorce, dissolution of civil partnership, annulment, judicial separation

How does a pension sharing order work? (continued)

- If the firefighter transfers to another fire and rescue authority, the pension credit responsibility remains with the authority which had responsibility for the pension credit benefits at the date of the pension sharing order.
Like Scheme members and dependants, a pension credit member has appeal rights.

What effect does a pension sharing order have on the Scheme member's cover for children's and spouse's or civil partner'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 pension no account is taken of the pension sharing order.

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

What happens if the former spouse or civil partner enters a subsequent marriage or civil partnership?

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

Can I rebuild my pension rights?

There is no special provision for this but you could use the standard method of "buying" additional pension rights in the FPS or NFPS, e.g. by the payment of additional contributions. This would, however, be subject to the limits applied by the Scheme and it may not be possible to make up the full portion of rights transferred.

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 independent financial adviser.