

Written evidence from Professor Debora Price, University of Manchester (PSL0065)

**House of Commons Work and Pensions Committee:
*Protecting pension savers – five years on from the pension freedoms: Saving for later
life***

Measuring and Reporting on the Incidence of Pension Sharing on Divorce

1. This submission concerns the official measurement of pension sharing by Court Order following divorce in England and Wales. I am a Professor of Social Gerontology at the University of Manchester with expertise in the poverty of older people, with a special interest in the situation of older divorced women. I have been researching and publishing on this issue for 20 years. This submission is on a single issue: the measurement in official statistics of the extent to which pension sharing is implemented among divorcing couples in England and Wales. It relates to the Committee's interest in what government could be doing to close the gender pensions gap. Although measurement in and of itself will not close the gender pensions gap, it is a pre-requisite to understanding what is happening in the family courts and why so few divorces include a pension sharing order. Importantly, there is no way to share pensions after divorce other than by Court Order and so measurement of the incidence of pension sharing orders is very important. It is notable though, that at most 40% of divorces will end with any financial order following divorce within 15 years of divorce, so court statistics need to be interpreted in this light.

Background: unequal pensions for men and women within marriage and after divorce

2. The 2021 report by myself and Dr. Jennifer Buckley, *Pensions and Divorce: Exploratory Analysis of Quantitative Data : Report of a MICRA Seedcorn Project supported by the Pensions Policy Institute*¹ demonstrated using data from Round 6 of the Wealth and Assets Survey, (April 2016 to March 2018), with records for 28,969 individuals including 10,408 couples, that despite there being pensions to share within marriage, divorced women's pensions remain much lower than divorced men's. We reported that:
 - i. Men have substantially more private pension wealth than women, with disparities increasing across age groups. For those aged 65-69, median pension wealth for men was just over £212,000 compared to just £35,000 for women.
 - ii. Married men have the most pension wealth. For the age group 45-54, married men had median pension wealth of about £86,000 compared with £40,000 for married women, at 55-64, the disparity was £185,000 compared with £55,800.
 - iii. Divorced men who were not cohabiting in the age group 45 – 54 had median pension wealth of £42,000 compared to similar women's £16,000, and in the age group 55 – 64 the disparity was £100,000 compared with £19,000 for similar divorced women.

¹ Buckley, J., & Price, D. (2021). *Pensions and Divorce: Exploratory Analysis of Quantitative Data: Report of a MICRA Seedcorn Project supported by the Pensions Policy Institute*. University of Manchester, Manchester Institute of Collaborative Research on Ageing.
https://www.research.manchester.ac.uk/portal/files/198615915/Pensions_and_Divorce_Exploratory_Analysis.pdf

- iv. People in second marriages have lower median pension wealth than those in their first but the gender disparities remain. At age 45-54, men in second marriages have median pension wealth of £68,000 compared with women's £30,000, and at 55-64, men in second marriages have median pension wealth of £162,000 compared with women's £50,000.
- v. Divorced women's pensions are much lower than divorced men's. Divorced women not cohabiting in their late 60s have less than 30 per cent of the pension of equivalent men.

Measuring the incidence of pension sharing on divorce orders

3. Given these statistics, it is important to try to understand what has been happening in the court system, and how many divorces end in a pension share. When the government introduced the pension sharing legislation in 2001, a commitment was given to reporting on the use of pension sharing orders to monitor the effectiveness of the policy². An attempt to add a question to the Family Resources Survey in the early 2000s was short-lived due to substantial measurement error being recorded. Until November 2020, monitoring was principally achieved through reporting in the then Tables 15 and 16 of the Quarterly Family Court Statistics by the Ministry of Justice (MoJ).
4. The issue of these Tables likely being wrong came to the fore during of the deliberations of the Nuffield-funded Pension Advisory Group³. The Pension Advisory Group (PAG) – of which I am a member – is an interdisciplinary working group chaired by Mr Justice Francis and His Honour Judge Edward Hess, supported by the Family Justice Council and the President of the Family Division. The purpose of the PAG has been to provide in-depth analysis of how pensions on divorce should be approached. The PAG comprises members of the judiciary, practising solicitors, barristers, a mediator, academics with special expertise in pensions and financial remedies on divorce, actuaries, financial advisers, and industry and other pension experts.
5. The Pension Advisory Group considered that the statistics in the then Tables 15 and 16 of the Family Court Statistics were likely to be incorrect, and that there was a widespread lack of trust among professionals in these statistics. We provided evidence to the MoJ in late 2019. In late 2020 after investigation, deliberation and ongoing discussion, the MoJ decided to withdraw the current statistical series on Pension Sharing Orders as not being of sufficient quality for official statistics.
6. Currently there are no reported statistics as far as I am aware, but the ambition is that the move to online divorces will lead to better collection of data in the future. Whether this is so will depend on technicalities and operational issues as to the way that divorce data is entered and collected in the future (see closing paragraphs of this submission). The PAG has not been party to those discussions. As will be shown below in the discussion of what went wrong with these measures, it will be important to understand exactly what will be measured in future and to understand the operational

² <https://publications.parliament.uk/pa/cm200001/cmselect/cmliain/321/321v216.htm>

³ <https://www.nuffieldfoundation.org/project/pensions-on-divorce-interdisciplinary-working-group> . The groups has which has produced research, reports and a lay guide to pension sharing in collaboration with Advice Now: <https://www.advicenow.org.uk/guides/survival-guide-pensions-divorce>

issues with that, if there is to be confidence in official measures of pension sharing on divorce.

7. It is not the case that in and of itself, moving to an online system will fix these problems.

What went wrong: the problems of collecting data

8. Three problems were identified:
 - i. Some data entry errors in some regional centres
 - ii. Much more importantly, it transpired that financial remedy orders were not in fact being recorded. What was being recorded was that an application had been made and it had been somehow disposed of – an order could have been made but could equally have been dismissed. It thus transpired that the reporting of orders made in official statistics had never represented orders made, but rather applications made, an unknown proportion of which resulted in dismissal rather than orders. It became clear that it was not currently feasible to collect data on court orders made.

At this point we thought we might be able to interpret the Table 16 figures, which had suggested that 12% of divorces resulted in a pension share, as an *upper bound* – i.e. that in 12% of divorces there is an application for a pension order, and of these an unknown proportion are granted (necessarily less than 12%).

- iii. However the third problem was then identified which was that the information coming to Table 16 was being drawn from Form A.

Form A

9. We discovered that the input data comes from Form A. Form A purportedly sets out all financial remedies applied for that might be granted or dismissed. However, in many courts no Form A is ever filed for consent orders, so that if you are relying on Form A for “disposal” numbers, these will be markedly wrong. This is a highly unsatisfactory source of data. Indeed, family justice researchers on the Pension Advisory Group told us it is so unreliable that they disregard it entirely in their research and had needed to use court papers or other sources to work out what had meaningfully been applied for and how that application had been dealt with by the court order.
10. These are the problems:
 - i. Form A is often not filled in when consent orders are filed (most court orders are consent orders), and many courts do not insist on it, so they will just make the order without it. The orders made in these courts (whether dismissal or order) will not correspond at all to Form As filed.
 - ii. Some solicitors will fill in Form A by simply ticking all the boxes, even if some forms of relief are not being sought, to make sure all loose ends are tied up by either order or dismissal
 - iii. But litigants in person – who are increasingly conducting their own cases and now account for a high proportion of court users – will almost certainly not do that, and may only tick a box or two for the things they want; some solicitors will be doing this too.

iv. Sometimes Form A boxes ticked do not correspond to orders made (i.e. orders are made for things not applied for on Form A).

So the correspondence between Form A and orders is really patchy and in many cases meaningless.

11. After a very helpful and somewhat technical discussion about whether Tables 15 and 16 could be fixed by better labelling, and some comparison with the only known study to have attempted to estimate the prevalence of pension sharing orders (see para 14 below), it was decided that because of the problems above which carried the risk that Form A was redundant in practice, the only appropriate course of action was to withdraw the statistical series.

Our best guess at current rates

12. We can say with some confidence that only about 30% – 40% of divorces ever get a court order for finances at all, even up to 15 years later, even if it just to formally record an agreement or settlement or just to say no claims will be made against each other. Within 5 or 6 years of divorce, only 33% have registered any kind of financial order. It is unlikely that any more than that will get real legal advice (e.g., beyond perhaps an initial meeting offered free by a solicitor's firm) since lawyers would generally register an agreement with the court. The statistic derives from Family Court Statistics Table 13⁴, and these have proven stable over time.
13. Pension sharing orders require a court order. From the statistics that we now know to be flawed (which were in Table 16 before 2019), it looked like in about a third of *court* cases, a pension sharing order was *either made or dismissed* - we don't know which, but it would mean that it was not in more than a third of c. 33%, i.e. about 11% of divorces, that it was considered at all. So that looked like an upper bound. If the ratio of being made to dismissed was, say, 50:50, that would mean 5 – 6% of divorces had a pension sharing order. But (a) we now can't rely on this figure of a third of court cases for the reasons associated with the Form A problems above and (b) the 50:50 is a complete guess.
14. As far as we know there has only been one attempt empirically to estimate pension sharing orders by random sampling of three court files from different regions to see how pensions were being dealt with, and this was by Hilary Woodward in her study of pensions on divorce⁵. Woodward is the CEO of the Pension Advisory Group. She went back to her data to check estimates. The files were randomly sampled with the assistance of HMCTS, resulting in 369 files examined. In that study, data from 2012-2014, 10.8% of the Northern court sample had a Pension Sharing Order; 23% of the Southern; and 18% of the Western; on average this was 14% of concluded cases (note, no Pension Attachment Orders were made at all). This is in turn a much smaller percentage of divorces since orders are only ever made in at most 40% of divorces, suggesting then that pension sharing orders were being made in around 5% of divorces.

⁴ <https://www.gov.uk/government/statistics/family-court-statistics-quarterly-january-to-march-2022>

⁵ <http://orca.cf.ac.uk/56700/1/14%2002%2011%20Pensions%20on%20divorce%20final%20report.pdf>

The Future and the Digital System

15. A new digital system is being implemented for court statistics and so we are hoping in due course to get more reliable statistics on this issue.
16. However, this will depend entirely on the what the data being entered into the system is designed to capture, how it is entered, the quality of data entry, and what it does in fact capture. Given the historical problems, we would like to see some methodological research verifying this on the ground from application to disposal to data entry and capture.
17. There are numerous tricky and technical issues arising, for example, how to record consent orders (whether issued digitally or on paper) that are for dismissal-only purposes which no consideration of the issues, and how to record applications made for substantive disposal and the outcome: whether granted or dismissed. Issues also arise with how litigants in person – an increasing part of the family justice system, interact with the online system.
18. Accurately tracking the way pension sharing on divorce evolves is at a crucial point. Steve Webb, former Pensions Minister, and Rhys Taylor, barrister, author and member of the Pension Advisory Group⁶ have warned that new divorce laws and the move to an online system is likely to disadvantage parties who might benefit from the active consideration of pension sharing in their divorce. The writers argue⁷:

... several things need to be done in order to remove the risk that an already flawed system gets worse when the new divorce law comes into force:

- a) The Ministry of Justice should monitor the number of divorces that involve financial settlements before and after the changes and, in particular, assess the extent to which there is any change in the number of financial orders involving pensions. With the advent of the new Form D81 (referenced in footnote 11 above), the form which has to be submitted to court by both parties when they want the court to approve a financial settlement reached out of court, much more data will be available to the Ministry of Justice which it is hoped will be able to be deployed to provide more meaningful statistics about court use in this context;
(See: <https://www.familylawweek.co.uk/site.aspx?i=ed228603> regarding the new Form D81)
- b) As the online contested financial remedy application system is developed for use by litigants in person, the Ministry of Justice should keep in mind the need for effective prompts or ‘nudges’ to the parties to give due weight to pensions, for instance with clear explanations of how the system works and signposts to sources of assistance, such as the Advice Now guide;
- c) The Ministry of Justice should evaluate the outcomes currently being achieved by those who handle their own divorce, whether through the court process (‘litigants in person’)

⁶ <https://www.lcp.uk.com/media-centre/2022/03/on-point-paper-you-ve-got-mail-the-new-divorce-law-and-its-potential-impact-on-the-sharing-of-pensions-in-england-and-wales/>

⁷ <https://insight.lcp.uk.com/acton/attachment/20628/f-021f1fff-f51c-4d90-872b-1284578bba27/1/-/-/-/%E2%80%9CYou%E2%80%99ve%20got%20mail%E2%80%9D%20%E2%80%93%20the%20new%20divorce%20law%20and%20its%20potential%20impact%20on%20the%20sharing%20of%20pensions%20in%20England%20and%20Wales.PDF>

or without using the court system at all (in which case there can have been no pension sharing) and the relative fairness of the financial outcomes achieved by these individuals. If there is evidence of seriously poor outcomes, it should review the case for the wider provision of legal aid in certain circumstances.

19. I fully endorse these views.

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