CONTENTS

Acknowledgements vii
The Authors viii
Summary 1

1 Introduction 7
  1.1 Background to the study 7
  1.2 Study design 8
    1.2.1 Use of qualitative research 8
    1.2.2 Sample composition 8
    1.2.3 Conduct of interviews 9
    1.2.4 Analysis 11
    1.2.5 Reporting 11
  1.3 Divorce settlements and the treatment of pensions: the legislative framework 12
    1.3.1 The division of matrimonial property 12
    1.3.2 The treatment of pension rights 13

2 Solicitors’ approach to financial settlements 15
  2.1 Factors and objectives guiding the assessment of a case 15
    2.1.1 Objectives for financial settlement 16
    2.1.2 Factors influencing assessment of a case 17
    2.1.3 Principle of ‘clean break’ 20
  2.2 Assessment of pension rights 21
    2.2.1 Basis of entitlement to pension rights 21
    2.2.2 Attitudes of clients towards pension claims 22
    2.2.3 Importance of pension rights 24
    2.2.4 State Earnings Related Pension Scheme (SERPS) 25
    2.2.5 Knowledge about pensions 27

3 Conduct and process of reaching financial settlements 29
  3.1 Assessment of cases 29
    3.1.1 Use of financial information 29
    3.1.2 Ways of assessing financial circumstances and entitlement 29
    3.1.3 Use of different resources to meet needs 31
    3.1.4 Consideration of pension rights in settlement 32
  3.2 Negotiating a settlement 32
    3.2.1 The style of negotiating 32
    3.2.2 The role of negotiation 33
    3.2.3 Role of the client in the negotiation 34
4 Obtaining financial information and pension valuations 37
4.1 Understanding and use of Cash Equivalent Transfer Value (CETV) 37
   4.1.1 Understanding and use 37
   4.1.2 Concerns about CETVs 38
   4.1.3 The process of obtaining CETVs 39
4.2 Obtaining other information or valuations from the pension scheme 39
4.3 Obtaining actuarial valuations 40
   4.3.1 The use of actuarial valuations 40
   4.3.2 Circumstances where actuarial valuations were sought 41
   4.3.3 Using actuarial valuations 42
4.4 Valuing SERPS rights 42
4.5 Using valuations in negotiating settlements 42
   4.5.1 Systematic use of the CETV 43
   4.5.2 Systematic use of other valuation or assessment 44
   4.5.3 Less systematic use of the CETV 44
5 Earmarking and other methods of dealing with pension rights 47
5.1 Use of earmarking 47
   5.1.1 Ways in which earmarking was used 48
   5.1.2 Use of Attachment Orders 49
5.2 The role of earmarking 50
   5.2.1 Not enough assets to compensate 50
   5.2.2 Capital surplus to immediate requirements 51
   5.2.3 Couple close to retirement 52
5.3 Other advantages of earmarking 52
5.4 Concerns about earmarking 53
   5.4.1 The impact of earmarking on the overall settlement 53
   5.4.2 Uncertainties inherent to the concept of earmarking 54
   5.4.3 Practical difficulties associated with earmarking 55
   5.4.4 Strategies for dealing with problems and uncertainties 56
   5.4.5 Unfamiliarity and anxiety - particularly in Scotland? 57
5.5 The role of compensation methods 58
5.6 Range of compensation methods 59
6 Pension sharing 63
6.1 Perceived advantages of pension sharing 63
6.2 Disadvantages of pension sharing 65
6.3 The role of pension sharing 66
6.4 Uncertainties about the operation of pension sharing 66
6.5 Preparation for the introduction of pension sharing 67
7 Conclusions and implications 69
7.1 Knowledge and understanding 69
7.2 Ways of viewing pension rights 70
7.3 Preferences for ways of dealing with pension rights 70
7.4 Dealing with the client’s objectives 71
7.5 Unevenness in provision 71
7.6 Implications for pension sharing 73

Appendix A Details of research methodology 75
Appendix B Fieldwork documents 79
Other research reports available 83

LIST OF TABLES

Table 1.1 Sample composition 10
ACKNOWLEDGEMENTS

We are very grateful to the 30 solicitors in England and Scotland who agreed to an interview for this study, and spent time discussing their general approach and individual case details with us.

We would also like to thank Julia Field for her help in the design and early stages of the study, and Julia Wheatley for her support in carrying out the interviews.

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SUMMARY

Background and study design (Chapter 1)

The qualitative study reported here is one of three studies commissioned by the Department of Social Security and undertaken in 1998 by Social and Community Planning Research (now the National Centre for Social Research) to monitor the impact of new legislation on the treatment of pension rights on divorce. The study involved 30 in-depth interviews with solicitors in England and Scotland who had taken part in an earlier quantitative survey, and collected more detailed information about one of their divorce cases. Full details of the research design and sample are shown in Appendix A.

The main objectives of the study were to explore the nature of financial settlements arising from divorce, the role of pension rights within them, and the different ways in which pension rights are treated. The study also aimed to explore solicitors’ experiences of obtaining and using valuations of pension rights. A particular focus of the study was to explore the circumstances that led to the use of Attachment Orders and Section 12A Orders, introduced by the Pensions Act 1995, Sections 166 and 167, which come into effect in 1996.

In this study, the sample of solicitors was purposively selected from survey respondents, using information generated by the survey to ensure suitable composition. In the final sample, there were 13 cases that had involved earmarking, nine of which had used an attachment or Section 12A Order. Full details of the sampling approach and the composition of the final sample are shown in Appendix A.

Solicitors’ approach to financial settlements (Chapter 2)

Solicitors’ early assessment of a case is a complex mixture of their own views and judgements, the circumstances of the case and the wishes and priorities of their client. Some solicitors used general principles which guided their approach, for example seeking a fair or an equal division of assets, and others said their assessment was purely driven by the circumstances of the case or the wishes of the client. There was a widespread sense of the importance of solicitors’ discretion and the need for creativity in reaching solutions to complex cases.

Working out the appropriate way to resolve a financial settlement was said to be dependent on a range of variable circumstances. The factors which were on the whole emphasised by respondents were: length of marriage; ages of parties; ages and needs of children; needs of parties for income and housing; income, earning capacity and other resources.

Respondents described the importance of assessing immediate needs, for housing and for income, and also future needs. Future needs generally
appeared to be given lower emphasis than current needs, except in cases where the couple were nearer to retirement age.

An important principle which respondents generally said underpinned their assessment of the options in a case was the desire to achieve a 'clean break'. Solicitors in Scotland mentioned the Scottish legislation as the basis for this principle. Respondents said that in their experience clients also often sought a clean break.

There was a widespread understanding among respondents that pensions should be taken into account in the financial settlement. Respondents also, on the whole, recognised the value of pension rights. However, there were very mixed views about what a claim on a pension was based on: fairness; compensation; or needs.

Both partners in a couple were said by solicitors to have a low awareness that pensions should be taken into account. There was a general belief that husbands can be possessive about their pension rights. Solicitors also felt that some wives can be reluctant to claim against a husband's pension rights. It was said that this was due to a number of factors: a lack of awareness of the pension value; being persuaded by husbands not to claim; and a concern about their more immediate financial situation, rather than future needs. Reflecting this, solicitors said they approached pension rights in a different way depending on whether they were representing the husband or the wife.

On the whole respondents said that they would usually look at any pension rights and get an initial valuation. Pension rights were generally not considered worth pursuing for: a young couple with no children; a couple who were a long time off retirement; a short marriage; equivalent pension rights between husband and wife; and small pension rights (either absolute or relative to other assets). State Earnings Related Pension Scheme (SERPS) rights were seen as of low importance and rarely valued or taken into account in financial settlements.

Solicitors generally emphasised the importance of full financial disclosure and expressed concern about proceeding in any negotiations without it. In the cases under discussion, it was not always clear how systematic the process involved in surveying all the financial resources and reaching a negotiating position was.

A number of factors shape solicitors' consideration of the different types of assets and how they might meet objectives. Some respondents said that they considered the pension in a different way from other assets, because of the fact that it is a future, non-realisable resource.

Solicitors on the whole advocated a style of working which was non-adversarial and conciliatory, seeking to achieve an outcome which was fair and in the best interests of both parties. However, there were
occasional stark contrasts between respondents’ stated approach and their practice in the case under discussion.

In some of the cases, reaching the settlement had been very straightforward; in others there were ongoing disputes and disagreements. Some cases were driven by a specific need for one of the assets or for a clean break. A client’s decision not to continue with negotiations was influenced by: avoiding conflict and acrimony; a low expectation of entitlement or little interest in the available financial resources; and the cost of legal fees.

It was generally recognised that the Cash Equivalent Transfer Value (CETV) is the form of valuation provided for in pension legislation and required by the courts. Although descriptions of it varied and there seemed to be confusion among some solicitors, it was generally understood to be a measure of the current value of the pension.

Solicitors described applying to the pension scheme for a CETV as a matter of course at an early stage and it was generally seen as a straightforward procedure. The length of time between request and receipt of the CETV seems to vary, but in practice the time involved was not generally problematic. There was very little experience of obtaining valuations of SERPS rights.

Because the CETV is a measure of the current value only, it was seen as an inadequate measure of the non-member’s actual loss, and this led to a preference among some solicitors for valuations based on the projected value of the pension fund. Although there was some lack of clarity about precisely how this differed from a CETV, it was generally seen to take into account the future growth in the value of the fund, and to provide a valuation for the different elements of the pension.

There seemed to be a particular conceptual tension between using the CETV and earmarking, with some concern about the non-member’s entitlement being calculated on the basis of the current value of the fund if it is not to be paid until some point in the future. This sometimes led solicitors to seek valuations from actuaries or further information about the pension entitlement to help them assess how much should be earmarked.

Solicitors also reported seeking actuarial valuations, where the scheme was thought to be particularly valuable or complex. These were said to take more account of the individual circumstances of the case and to include future growth in the fund. Again, however, there seemed to be a high level of confusion about actuarial valuations; solicitors acknowledged that they were heavily reliant on the expertise of their actuary.
Solicitors in England and Scotland on the whole used the general term ‘earmarking’ to refer to earmarking with or without Attachment or Section 12A Orders. Similarly, the term ‘earmarking order’ was used as a general term that encompassed Attachment or Section 12A Orders. Solicitors did not generally distinguish between earmarking without and earmarking with Attachment Orders. In the reporting of solicitors’ views and practices, we have used the terms in the same way, unless referring specifically to Attachment or Section 12A Orders.

There were two distinct strategies which solicitors described for taking pension rights into account. The first was to give the non-pension holder a direct entitlement to a share of the pension through earmarking. The second was to compensate the non-pension holder for her loss of pension rights, through offsetting it against other assets or a lump sum, or both. There was a very clear preference among the solicitors interviewed for dealing with the pension rights by compensating for their loss rather than through earmarking.

Solicitors reported having earmarked pension income (in England only), the lump sum on retirement, and the death-in-service benefit. Sometimes just one of these elements had been earmarked, and sometimes two or all three, and sometimes a proportion, or a fixed sum, or the whole of one element of the pension had been earmarked. In some cases earmarking of pension income or of a death-in-service benefit had been used to secure maintenance payments that would otherwise no longer be paid when an ex-spouse retired or in the event of their death.

Not all earmarked cases in England involved Attachment Orders. Where Attachment Orders had not been made, this seemed to be because the solicitor interviewed did not know of the existence of Attachment Orders, or the wife’s solicitor had not requested one.

There was a high level of consistency in respondents’ views about the circumstances where they would use or consider using earmarking provision: where the value of other assets is insufficient to compensate the non-pension holder; where there are substantial assets, either in absolute terms or in relation to immediate needs; and in the case of an older couple close to retirement. However, these circumstances do not automatically lead to earmarking.

There were said to be other advantages to earmarking: first, to counter the injustice where the non-pension holder receives compensation immediately but the pension holder will only receive the right in the future; second, that an earmarked portion of a pension scheme would provide far greater return than an invested lump sum; the third advantage identified was the value of a threat of earmarking as a negotiating tactic.
A wide range of concerns about earmarking and reasons for not using it were identified. These related to the impact of earmarking on the settlement; uncertainties seen as inherent to the concept of earmarking; and practical difficulties raised by earmarking. Although solicitors identified a range of strategies for dealing with these problems, there remained a high degree of anxiety about using earmarking. This appeared to be underpinned by, but also to reinforce, solicitors' unfamiliarity with earmarking. It was said that courts and pension schemes are also unfamiliar with earmarking in general, with inconsistencies in their practice.

The major problem that respondents perceived with earmarking was that it does not create a clean break situation. A related concern was the fear that an earmarking order might jeopardise the ability to meet a non-pension holder's current needs because her share of other available assets might be less. There seemed to be much anxiety about the future, contingent and thus uncertain nature of an earmarked pension.

A number of practical difficulties were also identified. First, it was noted that earmarking requires a court order. Second, there was much concern about the need for a couple to remain in contact with each other or with the pension scheme. Third, some solicitors reported finding pension companies very cooperative in dealing with Attachment Orders and Section 12A Orders; others found them less willing to cooperate.

The overwhelming preference for compensating the non-pension holder by offsetting the pension against other assets seemed also to be underpinned by the priority of ensuring that the parties' immediate needs are met – particularly a secure home and a secure way of funding living expenses. This was seen to reflect the wishes of the client. Solicitors noted that future needs could be met without earmarking, through the future sale of the home or through investment of a lump sum, perhaps in a pension or an annuity.

Respondents were generally aware of pension sharing proposals, and seemed broadly to understand the concept. In general, solicitors anticipated its key role as being in cases where earmarking is currently considered appropriate, although there were also some suggestions that it might be used more widely. It seemed to be positively received by solicitors as another option for dealing with pensions that should be available as well as, rather than instead of, other mechanisms. Although pension sharing was generally thought to be a distinct improvement on earmarking, there remained a preference for dealing with pensions through compensation methods if possible.

By comparison with earmarking, a key advantage of pension sharing is seen as the ability to create a clean break, and give the non-pension holder control of their share of the pension. The clean break aspect of pension sharing was seen to have both practical and psychological advantages.
However, there was concern about the administrative cost of pension sharing. The uncertainty associated with pensions as an intangible future asset was again identified in relation to pension sharing. There was also concern that pension sharing would be disadvantageous if it meant that a non-pension holder was provided with future resources at the expense of current needs.

There were some areas of uncertainty about precisely how it would operate, including confusion about whether the non-pension holder’s share would have to remain in the same scheme, and, conversely, a belief that the non-pension holder would have to have an existing scheme into which her share would be transferred.

Solicitors identified some particular aspects of preparation for the introduction of pension sharing that would be helpful to the profession: clear guidelines about how pension sharing should be structured and how it would operate; clarity about the date of implementation and ample advance notice of implementation; and preparatory work with the pensions industry. Apart from this, there was a general view that the legal profession will be able to educate itself through courses and seminars, textbooks and journals, and the law societies and other associations within the profession.
INTRODUCTION

1.1 Background to the study

There has been growing concern over the past decade or so about adequacy of pension provision, particularly in the light of increasing longevity. Among these concerns has been the treatment of pension rights in divorce cases, and the extent to which the treatment of pension rights might leave one or both parties with inadequate provision for old age. New legislation enacted in 1995 (described in more detail in Section 1.3 below) was intended to ensure that pension rights were taken into proper account in divorce settlements.

In 1998, the Department of Social Security (DSS) commissioned Social and Community Planning Research (now the National Centre for Social Research) to undertake three studies to monitor the impact of the new legislation: a survey of pension schemes, a survey of solicitors, and a qualitative study of solicitors, reported here.

The qualitative study involved 30 in-depth interviews with solicitors in England and Scotland who had taken part in the earlier survey. The objectives of the study were:

• to explore the nature of financial settlements arising from divorce and the role of pension rights within them;
• to identify the different ways in which pension rights are treated in divorce settlements and the factors underpinning decisions about their treatment, and particularly to explore the use of provisions introduced by the new legislation;
• to explore solicitors’ experiences of and views about obtaining and using valuations of pension rights;
• to identify procedural problems relating to the current arrangements for dealing with pension rights and to obtain suggestions for improvements;
• to explore solicitors’ understanding of, and views about, proposed legislation introducing a new method for dealing with pensions (pension sharing - see further below). The legislation has now been enacted.

The Pensions Act 1995 introduced a new method for dealing with pensions, known as Attachment Orders (in England and Wales) or Section 12A Orders (in Scotland). The new provisions came into force in July 1996 (England and Wales) and August 1996 (Scotland). Evidence from the quantitative survey indicated that these provisions have been used

very little and a particular focus of the study was to explore the circumstances where they are used and why they seem to have little appeal.

1.2 Study design

1.2.1 Use of qualitative research

The study was a follow-up to the survey of solicitors, which had involved telephone interviews with just over 500 solicitors in England, Wales and Scotland about their most recent divorce case involving pension rights.

The study involved collecting more detailed information about that case from a sample of 30 solicitors, exploring the role of the pension in the financial settlement and the factors underpinning its treatment. In-depth qualitative research interviews were used because the open-ended, probing and responsive questioning techniques of qualitative research would allow full exploration of the treatment of the case.

Qualitative research does not use samples that are statistically representative. However, it is possible to draw wider inference from the findings of qualitative research if samples are systematically selected to reflect the range of relevant characteristics in the research population. In this study, the sample of solicitors was purposively selected from survey respondents, using information generated by the survey to ensure suitable composition.

The survey explored four key ways in which pensions were dealt with in divorce cases:

- off-setting: where one party’s pension rights are balanced against asset(s) in the hands of the other party;
- lump sum: where one party’s pension rights are balanced against a cash lump sum paid to the other party;
- earmarking: where an order is made requiring one party to make lump sum or periodical payments from the pension when it comes into payment to the other party;
- attachment: where an order is made additional to earmarking requiring pension trustees or managers to make lump sum or periodical payments from the pension direct to one party on behalf of the other.

The primary sampling variable for the qualitative research sample was therefore how the pension had been treated, with selection ensuring coverage of all four categories. A fifth category consisted of cases where none of the pension rights had been taken into account in any of the above ways in the settlement. The survey of solicitors showed that the two main reasons why pensions were not taken into account were:

- the low value of rights; and
- a decision that each party should keep their own pension.

It was therefore decided that cases included from this fifth category should only be ones where there were higher value pension rights, and/or a significant disparity between the parties’ rights.
Secondary sampling variables were:

- the solicitor:
  - size of firm;
  - degree of specialism in matrimonial work;
  - location;

- the case:
  - the nature of pension rights;
  - the size of pension rights;
  - whether the solicitor had acted for the husband or wife, and for a party with or without pension rights;
  - the ages of the parties;
  - the duration of the marriage;
  - whether there were dependent children.

An initial selection of around 50 cases was made from the survey data. The solicitor who had taken part in the survey was contacted by letter (reproduced in Appendix B) and then telephoned to explain the purpose of the study, seek their agreement to participate, and if appropriate arrange an appointment for a researcher to visit to carry out the interview.

In the final sample, there were 13 cases that had involved earmarking, nine of which had used an Attachment or Section 12A Order. There were only three cases where a Section 12A Order had been used in Scotland. The composition of the final sample is shown in Table 1.1. Full details of the sampling approach are shown in Appendix A.

### 1.2.3 Conduct of interviews

Interviews were conducted in solicitors’ offices. They were exploratory and interactive in form, based on a topic guide which listed the key themes to be explored and relevant sub-topics within each (reproduced in Appendix B). The interviews generally began with exploration of the solicitor’s approach to financial settlements at a general level, and of the role and treatment of pensions. The case explored in the survey was then discussed in more detail, particularly investigating the factors influencing the terms of the settlement overall and the treatment of the pension within it. Finally, views about different methods for dealing with pensions were discussed.

The interviews lasted between an hour and an hour and a half. They were tape-recorded, so they could be transcribed verbatim for analysis and to allow full concentration on the respondent’s account. Verbatim transcripts of all interviews were obtained.
### Table 1.1 Sample composition

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<td>Scotland</td>
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<td>5-19</td>
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<td>20 or more</td>
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<td>51% - 75%</td>
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<td>Acted for party without pension rights</td>
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| Total | 30 |

*In one interview case details were not collected (see Appendix A for further details)

Solicitors were paid £50 in acknowledgement of their time. This payment was made because it was recognised that these solicitors, having already taken part in a survey interview, might be reluctant to give more time to this research. This would have been particularly problematic where a selected solicitor had handled a type of case of which there were very
few examples among the survey sample, such as those involving earmarking and Attachment or Section 12A Orders. It was therefore decided that an incentive payment should be offered to all solicitors approached, to encourage participation.

The interviews generally took place several months after the solicitor’s involvement with the case had ended, and it was sometimes difficult for respondents to recall the circumstances of a case, and their handling of it, in full detail. Although they generally had the case file to hand, in practice referring to it in detail was unhelpful for the flow of the interview.

1.2.4 Analysis The analysis of the data was undertaken using Framework, a qualitative research content analysis method developed at SCPR. It involves summarising the verbatim material and charting it within a thematic matrix. Full details are given in Appendix A.

1.2.5 Reporting This chapter concludes with a brief overview of the legislation which frames financial settlements in divorce and the treatment of pensions. Chapter 2 explores solicitors’ approach to financial settlement, and the following chapter their conduct of cases and the process of reaching a settlement. Chapter 4 explores their use of valuations. Chapter 5 looks at the role of different methods for dealing with pensions, including earmarking, and Chapter 6 looks at the potential role of pension sharing. The final chapter draws key conclusions from the study, and their implications for pension sharing.

In the cases selected from the survey and others discussed by solicitors, it was almost invariably the case that the husband’s pension rights and access to other financial resources was much greater than that of the wife. Although solicitors acknowledged that this is not always the case, they generally described wives as being, to varying degrees, financially dependent on husbands. It has therefore proved difficult to use gender neutral language in the report, without loss of clarity or ease of reading.

The respondents who took part in the study were sometimes partners in the firm, and sometimes solicitors. In a few cases, the person who had responded to the original survey was a legal executive and this person was therefore re-contacted for the follow-up. Throughout the report respondents are referred to as solicitors, but where a verbatim quotation from a partner or a legal executive is used, this is indicated in brackets after the quote. Quotations are also labelled with the country where the solicitor is based (Scotland or England). Where quotations are used as an illustration of a specific divorce case, there is an indication of whether the solicitor was representing the wife or the husband in that case. Where quotations are illustrating a more general point, an indication of whether they specialise in matrimonial work is given.
The evidence presented in this report provides an in-depth analysis of the treatment of pensions, and of the factors and features that influence solicitors' approaches. Every attempt has been made to convey the range and diversity of practices, views and explanations. However, qualitative research cannot be used to measure the extent to which practices are adopted or views held. Qualitative research samples are small and not designed to be statistically representative, and this prohibits statements about incidence or prevalence. Similarly, qualitative research cannot be used to identify statistically discriminatory variables. When patterns or associations are described in this report, the purpose in doing so is to present explanations identified by respondents themselves, and hypotheses for further research.

Applications can be made for a range of ancillary relief or financial orders, including:
- periodical payments (in England and Wales) or periodical allowance payments (in Scotland);
- child support (in England and Wales) or aliment (in Scotland);³
- lump sums;
- property adjustment or transfer;
- earmarking and Attachment Orders (in England and Wales) and Section 12A Orders (in Scotland) relating to pensions—discussed further below.

Orders for periodical payments or periodical allowance payments may be indefinite or for a fixed period only, and may take effect immediately or be deferred to take effect on a specified date or event. Similarly, orders for lump sum payment or property transfer may take effect immediately or be deferred.

There are some differences between legal provisions in England and Wales, and in Scotland. In England and Wales, the Matrimonial Causes Act 1973 requires courts to take the following factors into account in dealing with the division of assets:
- the income, earning capacity, property and other financial resources of each party;
- the financial needs, obligations and responsibilities of each party;
- the standard of living they enjoyed before the breakdown of the marriage;
- the age of each party and the duration of the marriage;
- any physical or mental disability of the parties;
- the contributions each has made to the welfare of the family (including by looking after the home and children);
- the parties' conduct, if it would be inequitable to disregard it;
- the value of any benefit the party will lose the chance of acquiring;
- the needs and resources of children of the marriage.

³ These are now less common because of the role of the Child Support Agency.
The Matrimonial and Family Proceedings Act 1984 requires courts to give first consideration to the welfare of any dependent children, and to encourage moves towards financial independence of the parties (or a ‘clean break’) where possible.

In Scotland, the Family Law (Scotland) Act 1985 requires the following principles to be taken into account:

- that matrimonial property should be fairly shared (usually interpreted as meaning equally);
- that contributions to, or disadvantages suffered from, the marriage should be recognised where they have resulted in economic inequality;
- that the economic burden of childcare should be fairly shared;
- that fair provision should be made for adjustment to independence, usually for not more than three years;
- that grave financial hardship should be relieved;
- that orders should be reasonable in relation to the parties’ resources.

Again, the needs of children are of primary importance. The emphasis on adjustment to independence means that periodical payments are rarely ordered, and even more rarely for longer than three years.

In England and Wales, matrimonial property includes all the parties’ rights and assets at the time the settlement is made. In Scotland, matrimonial property is more strictly defined as property acquired between the date of marriage and the date of separation or commencement of proceedings (known as the relevant date). However, a family home and its contents acquired before the marriage may be included as matrimonial property.

Finally, in England and Wales the divorce decree may be granted before arrangements for division of property have been finalised, but in Scotland it cannot be. Financial settlements in England and Wales are generally regularised by a consent order; in Scotland, settlements are finalised in a Minute of Agreement if made before proceedings have been issued, and in a Joint Minute of Agreement if proceedings have been issued.

1.3.2 The treatment of pension rights

Again, there are some differences in legislative provision in England and Wales and in Scotland.

In England and Wales, the Matrimonial Causes Act 1973 requirement to look at the value of any benefit lost was reinforced by an amendment under the Pensions Act 1995. This Act emphasised the specific duty to take pension rights into account, to ensure England and Wales were brought into line with the situation that had pertained in Scotland for many years. In Scotland, pensions have been required to be taken into account since the Family Law (Scotland) Act 1985; before that date, they
could be included at the discretion of the court but in practice very rarely were.  

The Pensions Act also introduced a new way of dealing with occupational and personal pensions. It had been possible for many years to deal with pensions by earmarking – an order which was deferred, to coincide with the pension holder’s retirement, for periodical payments or a lump sum payment. The Pensions Act introduced Attachment Orders (in England and Wales) and Section 12A Orders (in Scotland). These impose an obligation on the pension scheme trustees or managers, rather than the member, to make the earmarked payments direct from the pension when it falls due. (Attachment is not available for the State Earnings Related Pension Scheme (SERPS)).

In England and Wales, pensions can be earmarked either with or without an Attachment Order, and attachment can relate to both periodical payments and lump sum payments. In Scotland, a Section 12A Order must always be sought - earmarking without one is impossible - and can only relate to lump sum payments.

The Pensions Act 1995 also prescribed the method for valuing pension rights as the Cash Equivalent Transfer Value (CETV). This is the sum that would be paid if a member wished to transfer their pension rights into a new scheme – in other words, a measure of the current value of the future pension. Before this, there had been no prescribed valuation method, and valuations that took some account of future contributions, future growth and the anticipated final salary were commonly used. However, there remains discretion for courts to take into account other information about the future value of a pension. For State Earnings Related Pension Scheme (SERPS), the DSS Benefits Agency provides a quotation based on the notional capital value of projected net entitlement.

Finally, a new method for taking pensions into account following divorce was introduced by the Welfare Reform and Pensions Act 1999 which replaced provisions in previous legislation.

The Welfare Reform and Pensions Act 1999 provides for pension sharing (or splitting), a procedure which allows a share of the value of some or all of a member’s pension rights to be transferred to a pension arrangement for the other party, either within the same scheme or in a different scheme. When the procedures come into force the legislation will apply throughout Great Britain.

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4 In England and Wales, the Attachment of Earnings Order 1971 covered pensions so it could be assumed that England and Wales law also required pensions to be considered prior to the Matrimonial Causes Act.
Chapters 2 and 3 provide the background to the solicitors’ decision-making about pensions in a financial settlement. Section 2.1 describes how solicitors approached a divorce case, and gives an overview of the factors which influenced their assessment of the case. The links between solicitors’ attitudes to, and knowledge of, pensions and their judgements about the role that the pension can play in a settlement are reported in Section 2.2. Chapter 3 focuses on their method of establishing the circumstances of a case and their style of negotiating a settlement.

The attitudes and objectives of each divorcing partner can also have a critical impact on the outcome and solicitors’ discussion of these are reported within each of the chapter sections. In talking about the case in question, there was a distinction between solicitors who spoke about advising their client, and others who appeared to have taken a slightly more directive role.

These two chapters draw on solicitors’ general approach and their approach in the case under discussion in the interview. Factors influencing the decision about the best way to deal with the pension in the financial settlement are explored in more depth in Chapter 5.

Respondents were asked in the interview about how they assessed a new case and what their objectives were. There was considerable variety in the response to this question, with some solicitors drawing out general principles which guided their approach and others who said their assessment was purely driven by the circumstances of the case or the wishes of the client. Standing back and describing the way in which they make decisions and judgements in their role as legal adviser was not easy for some respondents:

‘It’s difficult to say, isn’t it, because when you do something that’s sort of reasonably automatic it’s like driving a car, if you actually had to sort of try and describe to somebody what you do, you’d have to stop and think.’

(Solicitor, England, over half of time spent on divorce work)

At the same time, there was a widespread sense of the importance of solicitors’ discretion and the need for creativity in reaching solutions to complex cases. This was seen as necessary because in most cases there is ‘not enough to go round’. Respondents spoke about the need for a ‘very fine balancing act’, and that reaching a settlement was ‘not an exact science’. This creativity was sometimes seen as being distinct from a legal process in
that it was not driven primarily by legal principles or provisions:

‘It’s not really legal, it’s more a question of, well, use your imagination to do what you can.’

(Partner, England, over half of time spent on divorce work)

On the whole, there was only a very broad sense among respondents about the sort of financial settlement that they would generally look for. A good outcome for some respondents was one which met the client’s needs, or reflected the client’s wishes; for others it was one which led to a fair or sometimes an equal division of assets.

Among respondents in Scotland, it was said that a ‘fair’ division of matrimonial property, as laid down in Scottish matrimonial legislation, is interpreted as ‘equal’ unless ‘special circumstances’ apply. An example which solicitors often gave as justifying special circumstances was a situation where a wife had become financially dependent on her husband because of giving up work to raise children, and would therefore be entitled to more than half. There was a variety of opinion and experience about how flexible the use of special circumstances was in practice.

There seemed to be less of a consistent view of what a fair division of assets might be among respondents in England. English matrimonial law does not have the same basic principle of ‘fair sharing’ as the Scottish law. An equal, or 50/50, division was described instead as ‘a starting point’. However, some respondents described their objective as equalising the impact of divorce or as parity rather than equality, in other words reaching an outcome that achieves an equivalency in the post-marriage situation between husband and wife, not one which allocates equal shares. The use of these different concepts appears to reflect an understanding that a husband and wife often do not have the same financial potential (because of different positions in relation to the labour market). In these circumstances an equal division of assets will not therefore lead to an equal outcome and the wife may need to have more than half the assets to achieve parity. To illustrate the relative financial positions of wives and husbands, it is worth noting the financial circumstances of the cases discussed by respondents in the quantitative survey. Only one in five (19 per cent) of wives had net monthly earnings of £1,000 or more, compared to nearly four-fifths (78 per cent) of husbands. Similarly, in this qualitative study, in only one case was the wife earning more than half of the husband’s salary. Wives were therefore in far weaker financial positions than their husband, as measured by earnings (and therefore saving and borrowing potential).

In addition, respondents generally said they looked for outcomes that were workable as well as fair. In other words, what they were able to do in terms of the practical distribution of the financial resources in the case was sometimes an important factor in determining their assessment.
Solicitors generally said that they adopted a different approach to the settlement overall, including pension rights, depending on whether they were acting for a husband or wife in a case. This appears to be based on their experience or belief that husbands are normally in the stronger financial position, so that husbands were perceived as giving and wives as receiving in the financial aspects of a divorce case. Achieving a successful outcome for a male client was described as ‘easing the burden’ and ‘minimising the loss’.

At the same time, respondents talked about the principle of a client’s entitlement. This was described as the entitlement or claim of the party with the lower earning potential (invariably, in our cases, the wife) to the assets in the case. The basis of the entitlement was described in a number of ways, which were not always conceptually distinct from each other. The three main elements of entitlement were:

- compensation for loss of past earnings and loss of future benefit because of not being married;
- current and future financial needs as a result of financial dependency;
- recognition of the contribution (non-financial or financial) to joint resources; there was said to be a general assumption that this would be equal in a long marriage (30 years or more).

The different views about the basis of an entitlement to a claim appeared to underpin solicitors’ method of dealing with different assets in the settlement. This is explored further in the following chapters.

The principles described above underpinned solicitors’ assessment of a case. Working out the client’s entitlement or the appropriate way to resolve a financial settlement was said to be dependent on a range of variable circumstances. Sometimes solicitors just listed the factors detailed in matrimonial legislation, the Matrimonial Causes Act 1973 and the Family Law (Scotland) Act 1985, or ‘how the Court would view it’. The factors which were on the whole emphasised by respondents were:

- length of marriage;
- ages of parties;
- ages and needs of children;
- needs of parties for income and housing;
- current and future income, earning capacity and other resources.

The first two of these factors can be seen as indicators of entitlement, while the others are indicators of the needs and the available or potential resources of each partner.

One of the main principles on which respondents said they made decisions about a case was on the basis of their client’s needs. Indeed, this was stated by some solicitors as the basis of their overall approach. Where
solicitors saw the overall division of assets as being grounded in a principle of equality, the way in which the different resources were distributed was nonetheless based on needs.

'The first few interviews are principally spent listening to the client to gauge where they’re coming from. I mean the law, you can explain the law to them but obviously it’s fitting it to their particular circumstances and needs.’
(Solicitor, England, less than half of time spent on divorce work)

'The basic premise is, well, what do these parties need to adequately re-house themselves and live, and so often percentages go out of the window because you’re just looking at needs.’
(Partner, England, more than half of time spent on divorce work)

Respondents described the importance of assessing immediate needs, for housing and for income, and also future needs, especially for an older couple to ensure provision in retirement. In assessing needs, the ability of a client to meet their own financial needs was seen as critical, for example through their current or future earnings, their savings and borrowing potential. For a wife, this can be severely curtailed by past or current caring responsibilities for children. The assessment of a client’s ability to meet their own financial needs involved establishing:

• working history: how long they had been out of the labour market, their training and experience, the scope for retraining or re-entry into the labour market;
• age of wife: determining her capacity for returning to work;
• ages of children: indicating how long they would need to be cared for.

One factor which respondents said they considered as very significant in their early assessment of a case was the existence of any dependent children and the need to ensure their position was secure. This led directly to a priority of ensuring adequate housing for children, and normally therefore housing for wives too, as the children’s primary carer. In these sorts of circumstances, it appeared that immediate needs were viewed as far more significant than future needs.

Respondents said that housing was usually seen by their female clients as a priority, and that women often wanted to stay in the matrimonial home to ensure stability for their children. Although described in this way in terms of an emotional and practical imperative, it was also sometimes seen as a financial imperative, where women need the security of a mortgage-free house when they do not have the earning capacity to raise a mortgage in their own name. In the cases under discussion, housing did appear to have been an important factor for the wives (especially those with young children), although this did not always mean wanting to stay in the matrimonial home. However, securing housing was also an important factor for husbands.
Some respondents felt that the need to provide for dependent children was one common situation where an unequal (needs-driven) division of assets or resources would be justified (in favour of the wife and children). Conversely, a case where there was a long marriage, with a couple in their fifties and no dependent children, was cited as a situation where a 50/50 split would be anticipated, partly on the basis of the wife’s contributions to the marriage. Where respondents worked on a more fixed principle of an equal division of assets, however, they viewed the existence of children as not having an impact on the settlement, apart from assessment for child support.

Other factors that were described as influencing the assessment of a case (but generally of less relevance than the factors above) were:

- new partners: on the whole solicitors said that being in a new relationship did not influence the case, although the wife’s claim to maintenance might be affected if living with a new partner. Solicitors also said that they encouraged clients not to place too much weight on a new and unestablished relationship. Their practice in the cases sometimes appeared to contradict this and indicated that the existence of a new partner may affect the distribution of assets because of less immediate need, particularly in relation to housing;

- standard of living: generally it was felt to be not realistic to sustain the standard of living of both parties, on the basis that the same resources were being split between two. However, some decisions were made on the basis of achieving an acceptable standard of living, given the previous standard of living, in terms of income needs and property value. In one case, standard of living was used to argue against a wife getting more than was felt to be acceptable; the husband’s solicitor felt that the cost of a property in London was not an acceptable amount to pay if the wife chose to buy a property in an affluent area of Newcastle.

When solicitors are acting for husbands, as has been described above, they tend to see their role as a defensive one, or a damage limitation exercise. On the whole, therefore, it seemed that solicitors representing husbands did not do any assessment of needs, although where resources were very limited or where the husband had a specific objective of not paying maintenance, then these were the determining factors.

Future needs generally appeared to be given lower emphasis than current needs, except in cases where the wife was near to retirement age. Sometimes this meant that they were effectively treated as current needs that could be met by, for example, a lump sum payment to come out of a pension in four or five years’ time. Again, future needs were in part determined by the wife’s ability to generate her own income. The future needs sometimes appeared to be seen as an ‘add-on’ extra where financial resources were available to meet them (see discussion of outcomes in Chapter 5).
An important principle which respondents in England and Scotland generally said underpinned their assessment of the options in a case was the desire to achieve a clean break. Again, this is a factor which solicitors are encouraged to seek under the Matrimonial Causes Act 1973 and the Family Law (Scotland) Act 1985. For some solicitors this was an overriding objective if it was at all possible:

‘I think the clean break is the biggest advantage with both parties. I mean divorce is always acrimonious and a very, very upsetting time for most people and you generally tend to find that once you’ve got the finances out of the way, both parties tend to be quite friendly towards each other again and if you’ve got children involved then that’s even better still.’

(Legal Executive, England, over half of time spent on divorce work)

‘Now there are times when they can absolutely do that, yes, they can go in total opposite directions and have the glorious, desirable clean break where the day after the divorce is finished, even if they disappeared off the face of the earth it wouldn’t matter.’

(Legal Executive, England, over half of time spent on divorce work)

A clean break was generally interpreted as meaning not making maintenance payments to the wife, which appeared to be seen as distinct from an obligation to make child support payments.

The ongoing nature of maintenance, as well as the option to review and alter a maintenance order, both lead to a degree of uncertainty which appeared to be respondents’ rationale for believing that a clean break is preferable. While recognising the wish for a clean break, respondents also said that circumstances of individual cases determined whether or not this was practically possible. A clean break was only seen as possible where there was enough capital to ‘buy off’ a wife’s entitlement to maintenance.

‘It was obvious from first instructions that it wouldn’t be a clean break because they didn’t have the capital. The wife needed to be around to look after the children. She didn’t have a marvellous earning capacity, so obviously a case of ongoing maintenance.’

(Partner, England, over half of time spent on divorce work; acted for wife)

Respondents said that in their experience clients also often sought a clean break: husbands so that they would have no ongoing financial commitment and could build a new life, and wives because they did not want to be financially dependent, wanted to cut emotional ties and wanted the certainty of a finished settlement. In the cases discussed, it was certainly true that a primary objective for some husbands was a clean break. However, solicitors noted that a clean break is not necessarily always in the husband’s best interest. In one case, a judge suggested at a pre-trial review that he would consider that the husband, at age 50, would not
have enough time to build up any more capital for his own future if he were to pay a lump sum to the wife in a clean break settlement; the judge therefore suggested a maintenance order and earmarking of the pension. It also seemed less clear that wives were always keen to have a clean break, and some disputes arose where wives sought maintenance and husbands refused.

It is clear from the above discussion that solicitors’ early assessment of a case is a complex mixture of their own views and judgements, the circumstances of the case and the wishes and priorities of their client. The same is true of their approach to the role of pension rights in relation to the overall settlement, as seen in the following section.

2.2 Assessment of pension rights

There was a widespread understanding among respondents that pensions should be considered as part of the financial settlement. On the whole, respondents also recognised the value of pension rights: that they were often either the largest or the second largest asset after the house.

2.2.1 Basis of entitlement to pension rights

Respondents had very different approaches to the role of pension rights in the financial settlement. As discussed above, one of the factors that respondents said they considered in assessing the case was their client’s entitlement or claim. The concept of an entitlement seemed to be particularly important in relation to the pension rights, perhaps in response to the perceived situation (in England and Wales only) of pension rights not being taken into account.

However, there were very mixed views about what a claim on a pension was based on. Respondents gave the following rationales for taking a pension into account. The rationales were not mutually exclusive and were only sometimes expressed as conceptually distinct from each other:

- the right to a ‘share’ in the pension because it is one of the assets of the marriage, where the wife’s contributions are taken into account; this was seen as especially important where there is a ‘glaring imbalance’ in pension rights, or where the husband has a very large scheme and the wife no pension;
- compensation for lost opportunity to build own pension rights in a situation where a wife has not worked but contributed to the marriage through caring for the children;
- compensation for the lost benefit that would have been received if the couple had stayed married: some respondents noted that ‘technically’ this lost benefit was only the widow’s benefit; on the whole, however, respondents appeared to mean the share in the whole of the husband’s pension that the wife would have had by being married to him (although this was not clearly stated);
- needs and resources - because the pension rights can be used as a means to an end: to meet parties’ needs for financial provision in old age;
• because the law requires that they take pensions into account: some respondents were motivated by a fear of being found negligent; as one solicitor said:

‘Straight-away, as soon as someone comes in I’m thinking about the pension, I mean I’m terrified of forgetting the pension... I’m thinking of the pension from the outset, I don’t want to get sued.’

(Partner, Scotland, less than half of time spent on divorce work)

One solicitor summed up the difference in strategy between the two main approaches of compensation for lost benefits and needs for future provision:

‘One way is saying, well, there’s the pension, at the moment that’s what she’s going to lose so how do we compensate her for that and you look at those calculations. This is the other way round, saying my needs at the moment are £18,000 a year or whatever, assuming I need that for life, and this of course builds in inflation, all sorts of other assumptions, that’s the lump sum that a husband is going to have to find.’

(Partner, England, over half of time spent on divorce work)

In Scottish matrimonial law, pensions have generally been seen as a part of matrimonial property. Some respondents in Scotland, nonetheless based their belief in an entitlement to pension rights on compensation and needs, rather than a principle of fairness or equality.

2.2.2 Attitudes of clients towards pension claims

There was a widespread view among respondents that a husband (as the pension-holder) and a wife (non pension-holder) held distinct views towards the pension rights of a husband. Both partners in a couple were said to have a low awareness of the option of making a claim on a pension, and that pensions should be taken into account along with the rest of the matrimonial assets. Some respondents perceived a recent increased awareness among clients about pension rights.

There was a general belief that husbands can be possessive about their pension rights and are often hostile to the idea of their pension being taken into account in the financial settlement, particularly to the idea of a direct (i.e. earmarking) claim. A husband’s hostility was said to be on the grounds that the pension is a product of his own salary and work, and that it is not going to come into payment until after the marriage is over. Some solicitors also held the view that the nature of the pension as a non-tangible and future asset meant that it should be viewed in a different way from other assets, partly because contributions would be continuing after the marriage was over, and partly because of the level of unpredictability surrounding its future value (see Chapters 4 and 5). The wife’s claim on other assets, such as the matrimonial home or savings, did not appear to generate similar hostility. In England, the attitude towards the pension may reflect the fact that it has only recently been widely taken into account; however, there was no sense among Scottish solicitors that clients were any more aware or husbands any less possessive about their pension.
"My experience is the husbands tend to shut up shop and say you’re not having any of my pension, that’s it, and the instructions you get from a husband are, for the most part, quite deliberately brief on the pension front."

(Legal Executive, England, over half of time spent on divorce work)

Solicitors also felt that some wives can be reluctant to claim against a husband’s pension rights for a variety of reasons:

- they are unaware of its value;
- they are persuaded by their husband not to claim;
- they are more interested in their immediate financial situation than their future needs.

In the divorce cases under discussion, there were several examples where the husband’s and/or the wife’s negative attitude towards making a direct claim on the pension rights was one of the driving factors in the overall settlement. In some cases, it seemed that because the husband was in a position of relative financial strength, he was the one who was able to set the agenda:

‘The husband made it absolutely dear that under no circumstances whatsoever would he agree to anything which involved an earmarking order ... that makes it a lot simpler because you either say OK, well, we are not going to get any agreement because we are not going to give up ... or you know the parameters within which you can negotiate.’

(Partner, England, acted for wife)

However, there were also cases where both parties were comfortable with the idea of a pension claim.

Solicitors seemed to vary in the extent to which they tried to persuade a reluctant wife to pursue a claim: sometimes there was a great deal of frustration on the part of the solicitor where they felt a client had gone directly against their advice and their own best interests, in other cases the solicitor felt that it had not been inappropriate for the wife to decide not to pursue her entitlement, for example where a wife had a priority to meet her immediate needs.

Reflecting these client attitudes, solicitors said that they approached the pension rights in a different way depending on whether they were representing the husband or the wife. When acting for husbands, respondents on the whole said that they had advised or ‘warned’ the husband that his pension rights were liable to be taken into account. However, some respondents said they would always wait for the wife’s representative to raise the issue of pensions, and would not raise it themselves or provide information until requested. There were examples of cases under discussion where respondents felt the solicitor on the other side had been negligent in relation to the wife’s pension claim because they had not requested full information, although this seemed to be rare.
Apart from a difference in approach towards pension rights depending on whether they were acting for a husband or a wife, there were a number of other factors which respondents said influenced them in assessing whether they would consider pension rights as an important asset.

There was fairly broad agreement about the circumstances where pension rights were not considered worth pursuing, in other words where the time and cost were felt to outweigh the benefit. These were given by solicitors as:

- a young couple, with no children: because there is the opportunity to build up a pension from scratch; both in terms of the time remaining until retirement and because the wife has not lost any value in the labour market through taking time out to care for children;
- the distance from retirement: because needs for old age are not given priority if a long way off;
- a short marriage: because contributions to the marriage are not assumed to be equal; in other words if there are substantial pension rights it may be that this was built up prior to the marriage;
- equivalent pension rights between husband and wife;
- size of pension rights either absolute or relative to other assets; with very low value pension rights, some respondents felt that they were not worth the legal costs of pursuing; other solicitors however felt that they would always put them 'into the pot'.

These factors are to a large extent overlapping. For example, a young couple is far more likely to have insubstantial rights, which may also be equivalent in value. They will also have many years until retirement and each will have a long time to build up their own pension rights without being reliant on the other's.

Some respondents felt that there would be certain circumstances where pensions would not be taken into account at all, based on some of the above factors. Others said that they would always take them into account in some way, even if just to set off against each other or to use as a bargaining tool (see Section 3.2).

On the whole respondents said that they would usually look at any pension rights and get an initial valuation for them, presumably because this process was generally felt to be relatively straightforward and without a value they would not be in a position to see whether they could discount them or not (see Chapter 4 on valuations). Occasionally, solicitors said that they would wait for a wife’s solicitor to request a valuation. Some solicitors indicated a cut off point of pension value, below which they would not consider it worth pursuing a claim. There was a spread of opinion about where this would be. This ranged from anything under about £4,000, to £25,000 or less: this latter figure came from a respondent who said it had been indicated by a local district judge in the context of a couple in their thirties.
Pension rights were considered particularly important where the couple were near to retirement, had been married a long time and where the pension rights were substantial or there was a great disparity. Some respondents identified particular types of pensions which they believed to be particularly good or of high value and which would ‘sound warning bells’ in a case. These were: public sector pensions, in particular police and senior civil service pensions were noted, and large employer occupational schemes.

In the cases under discussion, there was wide variety in the extent to which the pension rights had been considered important. There were some cases where the pension rights were not considered important, and on the whole they fitted in with the circumstances outlined above. For example, in one case the couple were both under 35, with no children, and both working. The husband’s pension rights were valued at £4,000 and the wife’s two schemes valued together just under this, and they were offset against each other in the settlement. In another case, the pension rights appeared to be a minor aspect of the settlement and were felt, by the husband’s solicitor, to not be sufficiently substantial in value. However, the husband’s pension was valued at £78,000 and the wife’s at £35,000. The wife was earning around £17,000 and the fact that she had her own pension and was working could have been a factor in considering the pension rights unimportant (although the husband’s solicitor was not explicit on this point). There were also cases where, although the pension rights were taken into account in the sense that they were part of the negotiating process, they did not form a very significant part of the settlement, despite sometimes being fairly substantial: this was sometimes because other assets were more or equally substantial (see Chapter 5):

‘Because there was so much to play around with and because the pension is such a small part of the wider picture.’
(Solicitor, Scotland, acted for wife)

The other major circumstance where pensions were not taken into account in the financial settlement was where the wife had decided not to pursue a claim against them, despite having information about their value (see Section 3.2).

In some cases, the respondent had initially said in the earlier survey that the pension rights had not been taken into account, although when interviewed it turned out that there had in fact been some sort of compensation or offsetting used.

2.2.4 SERPS

There was a widespread feeling that SERPS was of low importance and that it was rarely valued or taken into account in financial settlements.

Indeed, treatment of SERPS was not raised by the solicitor in any of the interviews and only discussed when raised by the researcher. It had not
been taken into account in any of the cases under discussion, although an assessment of the value of the wife's SERPS had been obtained in a couple of cases. One of these solicitors said he would look at a wife's SERPS in order to assess her ability to meet her own future financial needs and where it might help to achieve a clean break:

‘If people are more mature and they have obviously a working background whether it’s as running a business or not, it could make the difference because it can reassure someone that if you do a deal on a clean break-ish sort of scenario that they are left with something because if that forecast indicates that this is what the State will be giving them then fair enough.’

(Partner, England, over half of time spent on divorce work)

In the two cases where the wife's SERPS was valued, the value was felt to be too small to meet her financial needs fully, and therefore the husband's pension was still felt to be relevant in meeting her needs.

There was a general feeling that SERPS was something that was never an issue, although some respondents recognised that it should ‘go into the pot’ in order to have an overview of the full financial situation, but had nonetheless not looked at it in the case under discussion.

There appeared to be four different reasons why solicitors said that they did not take SERPS into account:

- the size of the rights: an assumption (sometimes based on experience) that their value would be too small: either relative to other assets or other pension rights, or in absolute terms;
- an assumption that both husband and wife have SERPS, so they will offset each other;
- lack of knowledge about how SERPS is valued (see Chapter 4);
- general legal practice: the similar approach among other solicitors, and the fact that the form which requests financial information under the ancillary relief pilot scheme5 excludes information about SERPS.

‘They should, I know we should but no... I think probably because both parties are probably entitled to it anyway, at the end of the day it’s not worth much anyway. I don’t know, we just don’t bother.... I mean it works out evenly in the end because nobody really bothers at all about it, nobody gets it valued really.’

(Solicitor, Scotland, over half of time spent on divorce work)

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5 This is a new scheme for dealing with ancillary relief cases that was introduced into a number of courts in 1996. The pilot procedure requires the completion, production and exchange of prescribed forms at set times to ensure that cases are not allowed to drift unnecessarily. The most important of the forms is Form E which ensures full disclosure of financial information in a standard format. This form is intended to help both the court and the couple to understand the financial circumstances of the case.
2.2.5 Knowledge about pensions

Solicitors' understanding of pensions varied considerably. This was partly influenced by their degree of experience of dealing with pension rights in divorce cases; for some the nature of their caseload was such that pensions or any other financial assets were rarely considered valuable enough to take into account.

There was an overall air of anxiety about the general area of pensions, which was referred to as a 'hideously complicated industry', a 'minefield', and an 'area of mystery and concern'. This was largely because solicitors felt they lacked expert financial skills and understanding. This anxiety was particularly acute in relation to understanding different types of valuation (see Chapter 4). Knowledge about different elements of pensions and their implications again was variable; for example, the distinction between the capital and income element, the death in service benefit, the widow's benefit, and the role of Additional Voluntary Contributions. This lack of knowledge about aspects of the pension was particularly apparent when solicitors were talking about earmarking (see Chapter 5).

Solicitors generally recognised their own limitations, and said they were comfortable about calling on experts in the field, either legal financial experts, actuaries or barristers. In being conscious of their own lack of awareness, some respondents felt they were learning very quickly:

'I would say that I am on a tremendous learning curve in relation to pensions. I have learnt a great deal about pensions during the last probably year, 18 months, about all kinds of schemes and the way in which they operate and I'm becoming more used to looking for what benefits there are there.'

(Solicitor, England, less than half of time spent on divorce work)

Others felt it was impossible to keep up with every aspect of pension provision:

'There's so much new stuff out on pensions, it's really hard, even the specialist practitioner, to keep up with absolutely everything.'

(Solicitor, England, over half of time spent on divorce work)

Solicitors' knowledge and understanding of pension legislation and specific provisions in relation to earmarking are discussed in Chapter 5.
3 CONDUCT AND PROCESS OF REACHING FINANCIAL SETTLEMENTS

3.1 Assessment of cases

3.1.1 Use of financial information

Solicitors generally emphasised the importance of full financial disclosure and expressed concern about proceeding in any negotiations without it. Gathering together all the relevant information was generally described as their starting point in any case. However, the collection of information had been problematic in some of the cases under discussion, sometimes because of the attitude of the other side, and solicitors had viewed this as wasted time (and therefore costs). Despite this, some settlements had been reached without full information on pensions, or where the wife’s solicitor felt that not all financial information had been disclosed. There was much anxiety where solicitors knew or suspected that settlements had been based on less than full disclosure. Information about pension rights was generally seen as very important, although sometimes it was what took longest to arrive. Despite the value placed on information about pensions, some solicitors expressed anxiety about their ability to use and interpret such information, especially pension valuations. (See Chapter 4 for further discussion about pension information).

In some cases, respondents who were acting for wives had found the solicitor on the other side slow to disclose financial information, including about the pension rights. There was some suggestion that this could be used as a negotiating or delaying tactic. In other cases, respondents acting for a husband did not seek or did not pass on information about the value of pension rights because it was not specifically requested.

Respondents had a range of different ways in which they described their approach to considering the financial circumstances of a case. Two recurring images used were the ‘balance sheet’ and the ‘melting pot’. Both carry the idea of considering everything that is available and looking at the best way to distribute it, either in a way that balances or a way that gives a fair share. Solicitors also described their approach as needing to consider current needs and future needs, both in terms of income and capital.

In the cases under discussion, it was not always clear how systematic the process of surveying all the financial resources and reaching a negotiating position was in practice. Part of this was because of the difficulty for respondents in recalling the negotiating details of a case which would have been conducted some time ago. Sometimes it was also less clear what a solicitor’s strategy was when acting for the husband, except as a broad goal, for example, wanting to minimise loss or sometimes to achieve a clean break.
In practice, solicitors appeared to adopt a number of strategies, which were more or less systematic in terms of establishing financial entitlement prior to negotiation:

More systematic strategies:
- making an informed assessment of financial needs: looking at current income and expenditure, or at the amount of capital required to re-house or generate future income;
- starting from a principle of a 50/50 division of matrimonial property, then applying that to all financial assets by putting them in the pot or on the balance sheet.

Less systematic strategies:
- establishing a broad goal, for example that the wife stays in the matrimonial home, and using that goal to drive negotiation over final amounts, rather than making a precise assessment of needs or entitlements.

On the whole, the first of these strategies was adopted in the larger money cases, where there were no significant resource constraints. It was also only used in these cases by solicitors who had acted for the wife. Except in these sort of cases, assessment of financial needs, within the constraints of available resources, did not appear to be done very comprehensively. This is despite the fact that solicitors generally said that clients' needs were one of the main guiding principles behind their approach (see Chapter 2). In situations where assets were very limited, or where there were large debts, the negotiation stage was by definition fairly restricted. For example, in one case, it had been established that all assets would be split 50/50; however by the time of the settlement the matrimonial home was in negative equity and had been repossessed. The husband’s net earnings were less than £10,000 a year and the wife was in receipt of benefits; their respective pensions were valued at £9,000 and £13,000. It was felt that the pensions were not sufficiently large or different from each other to be worth pursuing and a nominal maintenance order was the only element in the settlement.

Sometimes the lack of a prior systematic assessment was well-illustrated in the way that solicitors described their initial negotiating position:

(in relation to a lump sum) ‘that’s a case where you think of a figure and treble it. Yes, because you mustn’t be caught short on that, the most dreadful thing is for the sheriff to say, well, I would have awarded the pursuer £15,000 except that she was only asking for £5,000.’

(Partner, Scotland, acted for wife)

In some cases, the solicitor’s opportunity to adopt a systematic strategy was constrained by the attitudes of the two parties to the settlement, either because of their specific priorities or because they agreed elements of the financial settlement between themselves (see Section 3.2).
3.1.3 Use of different resources to meet needs

A number of factors shape solicitors' consideration of the different types of assets and their assessment of how suitable they are to meet needs, entitlements or other objectives, such as a clean break. In practice, respondents did not always systematically review these different aspects before reaching a negotiating position:

- the extent to which the asset is realisable: examples were given of a pension, and to a lesser extent, a life policy or a house with a large mortgage which are non-realisable; a business is also non-realisable because if sold it no longer generates income;
- whether the asset can be seen as income-generating or not; for example, a pension or an invested lump sum can generate future income;
- the ability to create security or certainty: achieved for example by the transfer or purchase of a house mortgage-free; a life policy (or death-in-service benefit) can be an insurance against maintenance payments stopping on death;
- the extent to which the asset requires contributions before it can be realised, for example a house with a mortgage, or a pension some time off payment.

Where liquid assets existed, such as savings or shares, they appeared to be seen as being important for both current income, and future income, generated from invested capital.

Another way in which solicitors had met current and future income needs was through the payment of maintenance or periodical allowance. The principle of the clean break means that solicitors look for alternative ways of meeting needs where possible. Solicitors talked about this being possible when there was 'enough' capital to buy off a maintenance entitlement. However, solicitors did not appear always to make a systematic assessment of how much capital is enough. In some cases the current and future income which would be generated by a lump sum had been calculated; in others the extent to which a lump sum might generate income did not appear to have been considered. Whether or not maintenance rather than a lump sum was used to meet future income needs appeared in practice to be underpinned partly by the solicitor's attitude towards it, and the attitude of the two parties.

In one case with low financial resources, a decision to seek a lump sum rather than maintenance for the wife was influenced by the fact that the wife was receiving Income Support and any maintenance payments would result in the reduction of her benefit payments. Instead the wife was paid two fairly small lump sums (one of which came from the pension), calculated to keep her level of capital below the benefit threshold.

Financial debts had been approached in slightly different ways. In one case, they had been put on the balance sheet exactly as if they were a negative asset. In this case, the husband took on just under £20,000 of...
debt but also kept his pension of just over £20,000, so that effectively they were seen as offsetting each other, despite being very different types of asset. In another case, the husband’s side agreed to take on all the debt as a negotiating tool, their value was therefore not purely in monetary terms: in this case the husband had wanted to take on all the debts in order to try to reach a clean break with no maintenance payments.

The pension rights mainly appeared to be regarded as capital rather than as future income. Some respondents said that they considered the pension in a different way from other assets, because of the fact that it is a future, non-realisable resource. In particular, that they would be reluctant to put it as ‘cash in the pot’ to be divided up along with the rest of the assets. (This was also linked to their concerns about using the CETV as a method of valuation, see Chapter 4). Others were comfortable about using it as a notional cash sum, but took into account its particular characteristics in deciding how to use it.

Some respondents believed that the simplest and most logical way of reaching a settlement was to trade off the pension against the matrimonial home. In this way both parties kept the asset that they wanted, the immediate needs and security of the wife were met through a realisable asset, without damaging the husband’s future resources. However, this method does not necessarily take into account a wife’s future income needs. This issue is discussed further in Chapters 5 and 7.

Chapter 4 looks in more detail at the consideration of the value of the pension rights in reaching a settlement.

3.2 Negotiating a settlement

In reaching a settlement, one of the main factors is the process of negotiation: what the other side’s starting position is, and the factors influencing how the parties wish to negotiate. From solicitors’ description of the financial circumstances of divorce cases, it appeared that the husband’s negotiating position is often stronger, so that if the wife wants to avoid going to court then it is sometimes necessary to give way on some aspects. In one case, the husband was adamant that he would not give up any of his pension rights to his wife. The wife’s solicitor felt obliged to negotiate within this situation as he might otherwise not have been able to get the husband’s voluntary co-operation to pay off the mortgage which the wife needed if she was to have a secure home.

3.2.1 The style of negotiating

Solicitors on the whole advocated a style of working which was non-adversarial and conciliatory, seeking to achieve an outcome which was fair and in the best interests of both parties. This was seen as good practice in family work, important to preserve good relations where possible, and to save time and costs. However, there were occasional stark contrasts between a respondent’s stated approach and their practice in the case under discussion.
• one solicitor acting for a wife in a large money case had decided to adopt a strategy of public embarrassment by freezing the husband’s assets knowing this would attract publicity and with a view to gaining a position of negotiating strength: ‘we wanted to hammer him’;

• another solicitor representing the husband ‘decided to call the wife’s bluff’ on the issue of maintenance by not agreeing to it despite the fact that he thought the court was likely to have made a maintenance order. This position led to ‘a year’s worth of arguments’;

• a third solicitor talked about the importance of being very open between the two sides in relation to all information, then later said that his strategy was to encourage the husband to ‘charm’ the wife into not claiming against his pension.

However, on the whole, respondents seemed to aim for a balance between acting in their client’s best interests and reaching a fair settlement.

There were different views among respondents about how much they would attempt to persuade or challenge a client who was adopting a confrontational approach. Ultimately, however, respondents were agreed that they had to follow client instructions, even if they went against their own advice. In the cases under discussion, there were several where the solicitor said that they had not fully agreed with the stand taken by the client.

3.2.2 The role of negotiation

In some of the cases under discussion, it was clear that reaching the settlement had been very straightforward. This was true, for example, where the wife had made no claim on any of the financial assets, or the couple had negotiated what respondents called the ‘bare bones’ of a settlement between themselves, presenting it to a solicitor only for specific legal advice and the drafting of the order.

In some cases, negotiation was perceived as easier because it was approached in a ‘professional’ way by the both solicitor and client on the other side and a reasonable first offer was made:

‘Generally speaking because he had a good lawyer who knew how to play the ‘devil’s advocate’ game, they knew what they would have to offer us and so the offer of maintenance was almost bang on the nail as far as we were concerned.’

(Legal Executive, England, acted for wife)

In other cases, where there were ongoing disputes and disagreements, the solicitors’ role in negotiations was critical. Sometimes this was in terms of what respondents described as ‘horse trading’ or ‘doing a deal’. This broad brush approach of trading was used, for example, where a claim on the pension was given up in order to keep the matrimonial home, or where maintenance was given up for a lump sum.
Negotiations and compromises around specific figures were also described as taking place in some cases in the following situations:

- the percentage of the pension which should be earmarked:
  ‘I’m not quite sure how we arrived at 22%, to be honest, after this time. I think it was just a simple negotiation based on the figures at the time which is often what it boils down to.’
  (Partner, England, acted for wife)

- the amount of maintenance for the wife:
  ‘We thought he should pay more than he was agreeing to pay and so we kind of compromised somewhere in the middle. I think we said that she could get more but we decided it wasn’t worth fighting the case just to get some more maintenance because everything else was agreed.’
  (Solicitor, England, acted for wife)

- the amount of lump sum payment to meet wife’s needs:
  ‘We then went to the computer model and a figure was produced which went back and forth but it was finally agreed upon.’
  (Partner, England, acted for wife)

In some of the cases under discussion solicitors had been unable to reach a settlement through negotiation and the case had been resolved at a court hearing. In others, the settlement had been influenced by suggestions or opinions expressed by a judge at an interim hearing, such as a pre-trial review.

As described above, there tends to be an unequal balance of financial resources between husband and wife, which leads to the husband’s representative usually being in the stronger negotiating position, and more able to determine terms. However, in the cases under discussion, there was a range of other factors which had an influence on the husband’s or wife’s attitude towards the financial settlement.

Some cases were driven by the specific priorities of a client for one of the assets or for a clean break. For example, in one case the husband had been seriously ill and was unlikely to be able to purchase a new life insurance policy for himself. One of his solicitor’s priorities was to ensure that the joint life policy was assigned to the husband, and the solicitor said that this meant he was prepared to pay the wife ‘more than we otherwise would have paid’. In another case, the wife’s priority was to stay in the matrimonial home with the children and she was prepared to forego a claim on the pension in order to do so.

In some cases, solicitors felt that the husband had been very generous and was motivated by a sense of fairness towards his wife. These tended to be cases where the husband could afford to be generous without doing serious jeopardy to his own standard of living, because of having a high and stable income himself and substantial other assets with which to meet the
wife's needs (although not a half share). In one case where the husband had his own immediate needs secured, because he was sharing a home and living costs with a new partner, the wife's solicitor felt that the husband had been 'quite reasonable', and that it was a 'very civilised case'.

There were other circumstances where the husband or wife was willing to settle for less than they could have got, according to their solicitor. As one solicitor put it:

'E very case has got another agenda, it's not just pounds, shillings and pence.'

(Solicitor, England, over half of time spent on divorce work)

The following type of circumstances had influenced the client's decision not to continue with negotiations:

- avoiding conflict and ongoing acrimony: in a number of cases, the solicitors felt or knew that the wife had been under pressure from her husband to accept less. In one case, the wife's solicitor had started off asking for half of all the assets, and then:

'W e started negotiating and the negotiations went on and on and on and on and on. T he other side prepared a M inute of A greement but the M inute of A greement was offering much less than we calculated our dient was due so we kept going back saying that it was unacceptable and unfortunately due to the pressure that their dient was putting on our dient, she wanted us to accept on her behalf but then she kept changing her mind ... I didn’t want to take instructions when she was upset so we would wait until she was more ludd and then she would still say that she was sick of him and he’d been on the phone again and she wanted him out of her life and the way to do that was just to accept and she wasn’t interested in the money. S o after a lengthy meeting with both myself and a partner when we explained to her all the pitfalls of accepting this, she agreed.'

(Solicitor, Scotland, acted for wife)

There were also examples of cases where husbands were said to have compromised in negotiations for the sake of future relations.

- in other cases the wife appeared to have a low expectation of her entitlement or little interest in the available financial resources; this was sometimes because she was wanting to start a new life with a new partner.

In one case, the wife did not want to make any financial claims; the matrimonial property was rented and she was living with a new partner, and in what the husband’s solicitor called ‘the revolt stage’ of separation, where she wanted to sever relations as quickly as possible; both husband and wife had personal pension rights that were not valued (both were on relatively low salaries, under £15,000).

- cost of legal fees: although solicitors said that the cost of lengthy disputes was often a factor in a client’s decision to settle for less, they did not generally highlight this as a feature in the cases under discussion.
4 OBTAINING FINANCIAL INFORMATION AND PENSION VALUATIONS

As Section 1.3 described, the Pensions Act 1995 introduced the Cash Equivalent Transfer Value (CETV) as the required basis for valuing occupational and personal pensions in divorce cases, although other information about pension value is also admissible. This chapter therefore explores solicitors' understanding and use of the CETV, and the circumstances under which other information or valuations are sought. It also looks at how CETVs and other valuations are used in arriving at the non-pension holder's share of the value of pension rights in financial settlements.

4.1 Understanding and use of CETVs

4.1.1 Understanding and use

It was generally recognised that CETVs are the form of valuation provided for in pension legislation and required by the courts. Although descriptions of it varied and there seemed to be confusion among some solicitors, it was generally understood to be a measure of the current value of the pension, based on the sum that would be paid out if the pension were transferred to another scheme. Reference was also made to the 'scheme value', the 'transfer value', the 'current value' or the 'cash value'. These phrases were sometimes seen as identical to the CETV and sometimes as something different, although the difference could not always be explained by the solicitor. Confusion also arose where the CETV was seen as a valuation provided by actuaries (rather than by the pension scheme), the equivalent of the pension the member will receive on retirement, or a valuation that takes into account individual circumstances such as the member's current age or likely retirement age.

In Scotland there was some relief that the preferred approach to valuations had been clarified. It was said that before the CETV had been identified as the required form of valuation, pension values had been dealt with in an inconsistent and somewhat 'rough and ready' way, with actuarial valuations used in different ways and solicitors or the court sometimes estimating the value of pensions.

'It doesn’t actually merit thinking too closely about what you negotiated for clients at that time (before the Pensions Act). I had one case ... and it’s frankly embarrassing to read the report ... for all parties, including the sheriff, in the way we approached it.'

(Partner, Scotland, over half of time spent on divorce work)

Despite some lack of clarity, then, the CETV was usually the first or only form of valuation sought. Solicitors described applying to the pension scheme for a CETV as a matter of course at an early stage in their conduct of cases. However, from solicitors' discussion of their practice generally and of the specific case identified, it emerged that the CETV was not always sought. For example, no CETV was obtained in cases where
solicitors were acting for the pension holder and the other party did not request information about pension value, or where they were acting for the wife who instructed them not to make (or not to continue with) a claim against the pension. As noted in the previous chapter, the fact that they were proceeding without full information generally caused solicitors some anxiety.

4.1.2 Concerns about CETVs

There were, however, some concerns about how appropriate the CETV is as a measure of the value of a pension. As noted in Chapter 2, there was a recurrent view that the wife is entitled to a share in pension rights in compensation for the fact that they would have benefited from the husband’s pension had the marriage continued. This underpinned concern that the CETV is a measure of the current value only, and therefore an inadequate measure of the wife’s actual loss, especially where the parties are young. This led to a preference for valuations based on the projected value of the pension.

‘They (CETVs) are not a very good reflection, I don’t think, of the real true value of the pension. I mean, they are a starting point but they’re not the whole picture.’

(Partner, England, over half of time spent on divorce work)

‘The transfer value is what the pension is worth today if it’s being transferred, but it’s not actually a useful figure for trying to negotiate a settlement of lost pension rights.’

(Solicitor, England, less than half of time spent on divorce work)

It was also argued that the CETV takes no account of the growth of the value of the pension fund between valuation and payment of the pension, to the disadvantage of the non-member - particularly if the parties are young and there will be many years of growth before payment. Against this, however, it was noted that spouses are not entitled to a share in the increased value of other assets - such as property - beyond the date of separation or settlement, and that the non-member benefits if a lump sum or property is received now in compensation for a pension from which the member will only benefit at some future date.

There seemed to be a particular conceptual tension between using the CETV and earmarking, with some concern about the wife’s entitlement being calculated on the basis of the current value of the fund if it is not to be paid until some point in the future. One solicitor argued that earmarking should either be based on the CETV with interest accruing on the wife’s share, or on the projected value of the fund. More generally, although there was some uncertainty, solicitors sometimes assumed that earmarking would give a wife access to the increased investment value of the current fund, or to future contributions to the pension scheme, or both. As discussed in Sections 4.2 and 4.3 below, it was sometimes assumed that the value of the pension at the point of payment needed to be assessed if earmarking was being considered.
A final concern about CETVs was that they discount the value of the fund on the assumption that it will be paid to another scheme, and that this is inappropriate since no transfer is intended.

Obtaining a CETV was generally seen as a straightforward procedure. Solicitors acting for the pension holder either got authority to request the CETV themselves or asked their client to request it, but there was a preference for the former approach if there was uncertainty about the client’s ability to make the necessary arrangements. The length of time between request and receipt of the CETV seems to vary, with experiences of two days to three months. In practice the time involved was not generally felt to be problematic, although one solicitor reported a long delay which meant that the CETV did not arrive until shortly before the date set for the final hearing.

The difficulty of obtaining CETVs for retained occupational pension rights, where members had left a company many years ago, was also noted. It was also sometimes said that a CETV could not be obtained in relation to a unit-based personal pension, a pension that was already in payment or an unfunded scheme, although few solicitors seemed to have encountered cases involving these types of pensions. Finally, some solicitors reported being sent a projected value, rather than a CETV, by pension schemes.

The assumption that the wife is entitled to compensation for the loss of the pension that would have been enjoyed had the marriage continued underpinned a practice of obtaining a projected value of the pension from pension schemes. Although there was some lack of clarity about precisely how it differed from a CETV, it was generally seen to take into account the future growth in the value of the pension fund, based on different assumptions about the likely growth rate. There seemed to be some confusion, however, as to whether this was based only on current contributions, or whether it also included the value of future contributions that might be made. Projected valuations were also said to provide a valuation for the different elements of the pension - income, death in service benefit, lump sum on retirement and widow’s benefit. This was sometimes said to be particularly important if earmarking is being considered although, as noted in Chapter 2, levels of understanding of the different elements of pensions were very varied.
Solicitors also sought other information about the pension scheme rules, such as those relating to retirement age and the proportion of the pension that can be commuted into a lump sum. Again, this was seen as necessary if earmarking is being considered:

‘Particularly if you’re looking at earmarking orders, you’ve got to know how much can be commuted ... because it’s no good having an order to commute a lump sum which clearly the husband cannot commute .... A gain, if you’re going for an earmarking on the actual income side of it, you need to be able to know or have some guidelines as to how much annual pension this man is going to have ... so you need those sort of figures as a rough guideline to sort of try and project forward as to what is going to be available in the pot to divvy up at that stage.’

(Legal Executive, England, over half of time spent on divorce work)

Such information was also sometimes sought because local courts requested it, or because it was required for Form E in the ancillary relief pilot scheme (see footnote 5).

Even where it seemed to be common practice for solicitors to seek additional information, however, it was not always understood. This was said to be partly a reflection of different and often confusing ways of presenting information on the part of pension schemes, but also seemed to reflect solicitors’ confusion about pensions generally and valuations in particular.

Solicitors also reported seeking valuations from actuaries. Again, this was underpinned by concern that the CETV is not an adequate basis for valuing the benefit lost by the wife as a result of divorce. Actuarial valuations were described in different ways, such as the sum that would need to be invested now (outside a pension scheme) to generate the same pension benefits for the wife as for the husband, or a measure of the wife’s total loss. It was said to take more account of the individual circumstances of the case (such as the parties’ ages) and to include future growth in the scheme, although it was again unclear whether this meant investment growth or the value of future contributions. Again, however, there seemed to be a high level of confusion about actuarial valuations. Solicitors were quite frank in acknowledging that they lacked a firm grasp on the issues involved and were heavily reliant on the expertise of their actuary.

‘I know that it’s not something that I know enough about ... I mean, it’s rocket science. It’s not something that you could get your head round by spending three or four hours reading up. You couldn’t ever get into what they (actuaries) are doing.’

(Partner, Scotland, less than half of time spent on divorce work)
I mean, I’m meant to be a specialist in family law and you can hear me being fairly woolly about pensions and you will find that most people don’t really know what they’re talking about ... If you get a good actuary he can just produce a figure for you and some substantiation, and you send it off.’

(Solicitor, Scotland, over half of time spent on divorce work)

Actuarial valuations were understood generally to produce a significantly higher value than the CETV – one solicitor cited a case where the CETV had been £170,000 and the actuarial valuation £260,000. It was thought that there were some circumstances where they might result in a lower valuation than the CETV, although the reasons and circumstances were not clear. There were said to be a range of different approaches on which actuarial valuations might be based, so that two actuaries valuing the same scheme might produce quite different valuations (depending in part on whether they were instructed by the solicitor acting for the member or non-member). Actuarial valuations were therefore seen as something of a ‘fishing exercise’ the result of which was unpredictable.

Some solicitors also described using actuarial tables to calculate the lump sum that would need to be invested to produce a sum equivalent to the lost pension benefit.

The circumstances under which actuarial valuations were sought were rather clearer. They were sought where the scheme was thought to be particularly valuable: where the CETV showed a high value, or where civil service or police pensions were involved. It was in these sorts of cases that the actuarial valuation was thought likely to be very significantly higher than the CETV. The difference had to be sufficiently large to justify both the payment of the actuary’s fee (several hundred pounds) and disputing pension value with the other side. The threshold at which an actuarial valuation was sought varied considerably between solicitors: one, for example cited £30,000, another £80,000.

Actuarial valuations were also sought if earmarking was being considered, if the approach of local courts was to expect them, or if there were unfamiliar or complex features in a scheme. In this latter circumstance, there seemed to be an element of solicitors seeking the reassurance of actuarial expertise where they were concerned they may have misunderstood the pension rights.

By comparison, actuarial valuations were not sought where the size of pension rights was low, or where there were insufficient other assets to compensate the non-member at the level of the CETV, let alone any higher level. If both parties had pension rights, further valuations might not be sought on the assumption that the increased value of one would offset the increased value of the other. One solicitor referred to having been refused an extension of legal aid funding to cover an actuarial valuation, on the grounds that CETVs were the prescribed basis for valuing
pension rights. The unpredictability of actuarial valuations could also be a disincentive to seeking them.

‘You can spend a lot of time arguing over pension rights, surrender values and so on of policies. You can do an awful lot of work fishing around, you can prove that one is worth more than you thought and this one is worth a lot less. You don’t necessarily achieve anything and to say to a client ‘well, it’s going to cost a lot of money to do this and I can’t guarantee it’ll do you any favours’ … .’

(Partner, England, less than half of time spent on divorce work)

However, a general uncertainty about valuations seemed also sometimes to underpin some solicitors’ practice of rarely seeking actuarial valuations.

4.3.3 Using actuarial valuations

Solicitors referred to some cases where each side had instructed actuaries to value the same pension rights, and where there had been subsequent negotiation between the solicitors – or, sometimes, between the actuaries – to agree an acceptable compromise value. A valuation higher than the CETV was sometimes used systematically as the basis for assessing entitlement, but in other cases was used as a general bargaining weapon to obtain a more generous settlement overall (see Section 4.5 below).

4.4 Valuing SERPS rights

As noted in Chapter 2, SERPS rights were rarely taken into account by solicitors, and indeed there was sometimes surprise when they were raised in the interview. There was very little experience of obtaining valuations of SERPS rights. Some solicitors seemed never to have considered how a value might be obtained: others assumed that it was impossible to value SERPS rights. Where SERPS rights had been valued, the valuation had been obtained from the Benefits Agency – in one case by a welfare rights specialist working in the law firm.

4.5 Using valuations in negotiating settlements

It was sometimes difficult to get a clear account of how the pension valuation had been used in arriving at the settlement in the selected cases. In part, this was because solicitors’ involvement with their case had usually ceased some months ago, and resurrecting details of how the settlement was calculated would have required detailed examination of case papers. However, it also seemed to reflect their uncertainties around pensions and valuations, and the difficulties that pensions presented as a contingent and non-liquid asset. As noted in Chapter 2, some solicitors adopted a ‘balance sheet’ approach, identifying assets belonging to each party and seeking to redistribute them to achieve an equal or fair balance. Pensions were seen to present difficulties as an asset that ‘you can’t move from side to side’. This seemed to underpin some uncertainty about how pension valuations should be treated.

‘Even when we’re presented with things like transfer value, we don’t actually know what to do with it.’

(Solicitor, England, less than half of time spent on divorce work)
Nevertheless, within the sample it was possible to identify cases where:

- the CETV was used systematically as the basis for compensation to the wife;
- some other valuation or assessment of the wife’s entitlement was used systematically;
- the approach seemed not to be based on a systematic use of a pension valuation.

These approaches were sometimes underpinned by individual solicitors’ views about the basis of the wife’s entitlement to a share of the pension rights, but not always consistently so. For example, some solicitors described the basis of the entitlement as compensation for loss of opportunity to enjoy the husband’s pension. They viewed the CETV as an inadequate measure of this entitlement, and accordingly sought, and systematically used, valuations based on projected benefits. Others, however, expressed the same concern about CETVs but nevertheless used them as the basis of negotiation.

In one case, a solicitor viewed the wife’s entitlement as being based on need for provision in old age. Here, the settlement was negotiated on this basis, with an agreement for indefinite maintenance and earmarking of the death in service award to secure maintenance in the event of the husband’s death before the pension came into payment. By comparison, however, another solicitor viewed the wife’s entitlement as being based on a combination of need, compensation for loss of access to the husband’s pension and compensation for her withdrawal from employment to look after the family as a result of which she had been unable to fund her own pension. Here, however, the settlement was based on the CETV.

The following section provides examples of these three different approaches.

4.5.1 Systematic use of the CETV

In some cases, the value of the wife’s entitlement, based on the CETV, was clearly identifiable in the settlement. This occurred, for example:

- where the wife received a lump sum equivalent to CETV;
- where the equivalent of the CETV was provided through a combination of redistribution of assets and earmarking of the pension;
- where each party’s pension rights had an equal CETV, and were offset against each other.

In other cases, the solicitor had based negotiations on the CETV and sought to use it systematically, but had been unable to obtain full compensation for the wife. This generally occurred where the non-pension assets had been insufficient to compensate for her share of the CETV, particularly if a higher priority was given to the transfer of the house into her name. (This issue is discussed further in Chapter 5.)
4.5.2 Systematic use of other valuation or assessment

In other cases, an actuarial valuation or projected value seemed to form the basis of the pension aspects of the settlement. Although the number of cases is small, this seemed to be true in particular of cases involving earmarking, and may reflect the conceptual tension between CETVs and earmarking discussed above. There were cases, for example, where earmarking was based on the projected income or lump sum, or where on-going maintenance was set at the level equivalent to (or related to) the forecast pension income.

4.5.3 Less systematic use of the CETV

Finally, in other cases the settlement seemed not to be based on a systematic use of a pension valuation. This occurred in a range of circumstances:

- Where the approach was based on an assessment of the wife’s needs. Some solicitors adopted a ‘bottom up’ approach which involved assessing the wife’s needs and negotiating a settlement— including the pension— that met them, rather than a ‘top down’ approach of treating the pension as an asset to be divided or taken into account in some other way. This was the approach used, for example, in cases where the proportion of pension income earmarked related to the wife’s anticipated income needs. Similarly, in one case involving very substantial assets, the pension was dealt with by offsetting against capital and property in a settlement that was driven by the objective of meeting the wife’s capital and income needs.

- Where the settlement was driven by bargaining or ‘horse-trading’ between the two sides, rather than on a systematic assessment of needs and resources. Although the pension was taken into account in the settlement, it could not be separately identified.

In some cases, there had been negotiations around a global settlement sum, in which the value of pension rights was not specified. In one case, negotiations were driven by one party’s need for a very speedy divorce because of an impending remarriage. In another, the court determined the proportion of the pension that would be earmarked, and the basis of the assessment was unclear to the solicitor interviewed. Again, this approach seemed sometimes to be underpinned by uncertainty about treating the CETV as the equivalent of an asset:

‘Generally speaking I take what I would call a broad brush approach and, you know, you can’t do a detailed arithmetical calculation, I don’t think, involving the cash equivalent transfer value as a figure.’

(Partner, England, over half of time spent on divorce work)

‘Trying to work out what we paid for keeping his pension to himself by way of a lump sum is actually quite difficult so I can’t say to you that I’ve got any specific sums.’

(Legal Executive, England, acted for husband)
• The third set of circumstances where the treatment of the pension was not based on a systematic use of a valuation was where the wife’s entitlement had not been pursued by their solicitor – either as a result of explicit instructions, or for some other reason that was unclear to the solicitor interviewed. Sometimes no valuation of any sort had been obtained. Here, the existence of the pension was sometimes used in an impressionistic way as a bargaining weapon to secure a greater share of other assets, so that it was reflected in the settlement to some extent. In other cases, however, no claim was ever made on the pension and its existence was not reflected in the settlement in any way.
This chapter looks at the different ways in which solicitors deal with pension rights in the overall financial settlement. There were two distinct strategies which solicitors described for taking pension rights into account. The first was to give the wife a direct access to a share of the pension when it fell due through earmarking. The second was to compensate the wife for her loss of pension rights, through offsetting her expectation of pension access against other assets, payment of a lump sum, or both.

A number of key elements of respondents' approaches to dealing with financial settlements (as identified in Chapter 2) appear to underpin their views about the most appropriate method. These elements can be summarised as:

- the wish for a clean break and for certainty;
- the consideration of each party's needs and resources within a framework of 'fairness';
- the need to reflect the client's wishes (for example, to keep their pension intact, to remain in the matrimonial house, to buy other housing);
- the perception of the pension as a different type of asset because of its future and contingent nature;
- the perception among some parties of the pension as predominantly the husband's asset.

This chapter looks first at the way in which solicitors have used earmarking, and their perceptions of its role. It then describes the wide-ranging concerns that solicitors expressed about earmarking and that underpin their very limited use of it. The role of compensatory methods for dealing with pensions is then explored, and the range of ways in which these are used.

Solicitors in England and Scotland on the whole used the general term 'earmarking' to refer to earmarking in a general sense, with or without Attachment or Section 12A Orders. Similarly, the term 'earmarking order' was used as a general term that encompassed Attachment or Section 12A Orders. As discussed further below (Section 5.1.2), solicitors did not generally distinguish between earmarking without and earmarking with Attachment Orders. In the reporting of solicitors' views and practices, we have used the terms in the same way, unless referring specifically to Attachment or Section 12A Orders, or to earmarking without an order.

5.1 Use of earmarking

There was a very clear preference among the solicitors interviewed for dealing with the pension rights by compensating for their loss rather than making a direct claim through earmarking. This seemed to be
underpinned by three dominant factors: the desire for a clean break settlement, problems associated with the operation of earmarking, and unfamiliarity with earmarking. Although there were different views, there was on the whole a sense of caution and uncertainty about the use of earmarking and attachment provisions. Some solicitors felt that earmarking was a useful 'additional tool' and something which it was 'helpful to have in your armoury', although even here it was seen as useful in specific circumstances only. At the other end of the spectrum were solicitors who said they would find it hard ever to recommend or advise any client to use an earmarking provision. In the middle were solicitors who said they would use earmarking if they had no other option, 'as a last resort'.

Even where solicitors had used earmarking, it had not always been their own preferred option for dealing with the case and sometimes arose only at the suggestion of the other side or the court. These solicitors had generally dealt with very few cases - often only the case discussed in the survey - and actual experience of earmarking was therefore not extensive.

Earmarking was used in a range of different ways. Solicitors reported having earmarked pension income (in England only), the lump sum on retirement, and the death-in-service benefit. Sometimes just one of these elements had been earmarked, and sometimes two or all three in combination, so that the whole of the pension was earmarked. In some cases, more than one pension had been earmarked.

Regardless of the element of the pension that had been earmarked, there were cases where a fixed sum had been earmarked, where a proportion had been earmarked and where the entirety of one element of the pension had been earmarked. These methods were sometimes used in combination. For example, in one case the wife was to receive a fixed sum, to be paid in instalments before the husband retired, with the balance to be paid from the pension. (However, this case was still ongoing and it was unclear whether this approach would be accepted by the court.) In another, a proportion of the lump sum on retirement was earmarked up to a maximum figure.

In England, there were cases where pensions had been earmarked with and without Attachment Orders.

Where earmarking had been used as a way of treating the pension, it was not necessarily the only way in which the pension was taken into account. For example, there were cases where the wife received a lump sum, the house or other assets immediately, with a further lump sum earmarked; where she received maintenance, with the pension income also earmarked; and where she received maintenance, with the death-in-service benefit earmarked to replace maintenance in the event of the husband’s death before retirement.
Not all earmarked cases in England involved Attachment Orders. Where Attachment Orders had not been made, this seemed to be for a range of reasons:

- The solicitor interviewed did not know of the existence of Attachment Orders, either believing that the earmarking order automatically imposed an obligation on the trustees or believing that such an obligation could never be imposed on anyone other than the pension member:

  ‘It depends. The contract between him and the pension company does mean it should be paid direct to him and he pays the money on but it depends on your pension trustees, it may be different from one to another. They may say right, we’ll give a cheque to her direct... but the actual contract is it should be paid to him and he then pays it over... I’ve never had that (an order on the trustees), because that would be altering the contract between him and the pension people and I don’t think the court has got the power to do that.’

  (Solicitor, England, over half of time spent on divorce work)

  ‘The order is that he shall pay or cause to be paid to her, but we’ve sent a copy of the order (to the pension trustees) ... they’re aware of the terms of the order and of our client’s address and details ... So practically I think the intention is that they would send it to her but if they don’t then it’s his responsibility to make sure she gets it.’

  (Solicitor, England, acted for husband)

- The solicitor interviewed was aware of Attachment Orders but the wife’s solicitor had not requested one (to the surprise of the husband’s, who had not seen it as their role to suggest one):

  ‘I can’t imagine anyone acting for the other spouse would agree to anything other than attachment... He would take it and fly off to Rio I should think. I can’t imagine how you wouldn’t do that.’

  (Solicitor, England, less than half of time spent on divorce work)

There was also a suggestion that solicitors might not use an Attachment Order where the couple were very friendly and there was a level of trust between them.

Where Attachment Orders had not been sought, solicitors sometimes appeared not to have given detailed consideration to how the wife would know of the husband’s retirement.
5.2 The role of earmarking

There was a high level of consistency in respondents' views about the circumstances where they would use or consider using earmarking provision. It was seen as valuable in only specific circumstances:

- where the value of other assets is insufficient to compensate the wife for the loss of the pension;
- where there are substantial assets, either in absolute terms or in relation to immediate needs;
- in the case of an older couple close to retirement.

The circumstances are explored in the sub-sections below. There is some overlap between them and they were not always described by solicitors as conceptually distinct. They do not, by any means, automatically lead to earmarking.

5.2.1 Not enough assets to compensate

This emerged as the dominant reason for using earmarking. It was invariably worded in a negative sense: in other words, solicitors would use earmarking only if compensating the wife for her loss of pension was not possible. This might arise in a number of different ways:

- Where the pension was a particularly large asset in comparison with others. One solicitor, for example, talked about a current case where the pension rights were worth over £250,000 and the equity in the house under £90,000. In order to try to reach an equal division of assets, the solicitor was considering an earmarked lump sum of £60,000 and re-mortgaging the house to release another £60,000 but was conscious that even this was still some way off 50%. In another case the pension was worth £40,000 but the equity in the house and value of other assets was more than outweighed by the couple’s debt.

- Where the wife sought maintenance and the other assets were insufficient to allow maintenance to be capitalised. In one case, where the husband had a new partner and a clean break was his 'number one aim', the court had decided that earmarking his pension was one way of reaching that solution. His solicitor commented:

  'But at the final hearing it was the pensions that actually made the difference, it was the pensions that got us into a position where we were able to achieve a clean break for him so that he didn’t have to pay continual maintenance. I think if we hadn’t had the ability to hit her with a lump sum from the pension there was certainly a high possibility she would have got some sort of maintenance then.'

(Partner, England, acted for husband)

- Where both parties required capital to meet immediate needs – for example for rehousing, or in one case where the husband’s business had failed and he required a capital sum to meet living costs.
- Where the husband’s ability to generate a capital sum from income or borrowing was very limited, for example where his salary was very low or where he was bankrupt.
5.2.2 Capital surplus to immediate requirements

Before earmarking was available, it was said that to have been very difficult to reach a fair settlement in such cases. Either the wife's full entitlement had not been met, or the husband had had to 'borrow up to the hilt' to finance the compensation.

Even in these circumstances where earmarking was the only option, it was seen as far from ideal, and unlikely to be greeted enthusiastically by either party. One solicitor said he advised husbands to view an earmarked pension in a more positive light by thinking of it as something which they had never had and therefore would not miss:

'I say to husbands, well, look, you know, O.K, you're going to lose some of your pension later on but you've got the rest of your working life to build up and you don't have to find it now, you don't miss it, you'll never have it, you won't miss it, you must just budget accordingly when the time comes.'

(Partner, England, over half of time spent on divorce work)

More generally, however, it was seen as difficult to view it positively.

The second circumstance where earmarking was sometimes considered was where there was sufficient capital to meet immediate needs, but where compensating the wife in full for loss of the pension or otherwise reaching a fair settlement still required a direct claim on the pension. Again, this emerged in a number of ways:

- Where the matrimonial assets were very significant in absolute terms. Earmarking was used, for example, in one of the selected cases where the matrimonial assets had been worth around £4 million, of which pensions accounted for around £1 million.

- Where the total assets involved were less valuable, but where the couple's needs were more modest. This emerged in one case, for example, where both parties had already re-housed themselves adequately and were in employment which supported their immediate needs. In another, the couple's circumstances were very modest, both living in housing association accommodation and with combined earnings of under £20,000 per annum. The solicitor interviewed had been surprised to discover that the husband had savings of over £40,000 and a pension valued at over £60,000.

- Where there was a particular advantage to structuring the settlement so that capital was paid to the wife in instalments. In one case, for example, the wife was on Income Support and a payment of more than £8,000 would have affected her eligibility. It was agreed she would receive one lump sum immediately, and the pension was earmarked to provide a second lump sum at a point when it was expected she would have spent most of the first. In another, where there was a surplus of current resources, earmarking gave the opportunity to exercise a degree of control over a wife's financial planning, or to 'structure a settlement to meet future needs'. The earmarked
portion was seen as safeguarded for the wife’s future:

‘We didn’t need the money now and it would be of use to her later... I think she was fairly sensible but depending on what she was going to do with the money she received, it might be quite nice just to keep some back, you know, sort of looking after her slightly.’

(Solicitor, Scotland, acted for wife)

5.2.3 Couple close to retirement

Where retirement and the payment of the pension were fairly near, it was felt by some respondents that earmarking would be a relatively safe option. The couple’s proximity to retirement effectively mitigated at least some concerns about earmarking and about the uncertainties involved (discussed further below). Age appeared not sufficient on its own to make earmarking attractive: the cases described generally also involved either insufficient other assets for compensation or capital surplus to immediate requirements.

In these circumstances, earmarking was thought to be more acceptable. Two main reasons were given. First, that the wife would not have to wait long to get her payment so that it could effectively be seen as a resource to meet current needs, for example re-housing, rather than future needs. The second reason was related to concerns over valuing the pension (see Chapter 4). Where pension rights will very shortly fall into payment, solicitors seemed less concerned and more comfortable about establishing the likely size of the pension.

There was also a sense that a direct claim on the pension was more appropriate after a longer marriage, and that the wife’s entitlement was stronger because she had supported the family throughout the whole period of contributions to the pension, and foregone an opportunity to build up her own pension rights. This view was presented in contrast to the underlying attitudes of some husbands that pensions are essentially their own asset.

5.3 Other advantages of earmarking

The cases where earmarking had been used generally fit the three circumstances detailed above. However, in some cases earmarking had also been used to secure maintenance payments - for example, where there was a maintenance order up to the husband’s retirement and an earmarking of pension income, and where there was a maintenance order and earmarking of the death-in-service benefit to provide an alternative source of schemes if the husband died before retiring. Interestingly, solicitors did not identify this use of earmarking in their general discussion of its role.

There were said to be some other advantages to earmarking rather than compensating the wife for loss of the pension, although these were given little emphasis by solicitors. The other advantages were as follows.

First, as noted in Chapter 2, there was a sense of injustice where the wife received compensation now in respect of a right that the husband will
enjoy only in the future. It was said that if a husband had to wait before he could benefit from his pension, then it was fair that a wife should similarly have to wait.

Second, there was some difference in opinion among respondents about how an earmarked lump sum would compare to an invested lump sum in terms of financial growth, but some believed that an earmarked portion of a pension scheme would provide far greater return. It was also said that earmarking would give the wife an opportunity to benefit from future contributions, although there was again some uncertainty about this. Others felt that a lump sum which the wife could invest herself and have control over would be more beneficial. Some of this difference in opinion appeared to be linked to a different understanding of whether earmarking was for a fixed amount or a percentage (the latter but not the former would reflect the growth on a husband’s continued contributions).

However, it is perhaps a measure of the unpopularity of earmarking that the third advantage identified was the value of a threat of earmarking as a negotiating tactic. Suggesting or threatening to seek an earmarking or an Attachment Order was said to be very helpful as a lever to secure a more generous settlement. In one case, where the husband had wanted to keep his pension intact, the wife’s solicitor had used the threat of a possible earmarking claim to secure the husband’s payment of the wife’s mortgage. Similarly, in another the husband’s solicitor had threatened to ask the court for an Attachment Order to secure the wife’s agreement to a proposed settlement.

‘I used the existence of them tactically in one case I was dealing with ... and what I said in that case was if the wife didn’t want to go for this deal then we would look at things altogether a different way, we would litigate on it and we would ask the court to make an earmarking order ... And she went for the split we proposed.’

(Partner, Scotland, less than half of time spent on divorce work)

5.4 Concerns about earmarking

Despite acknowledgement that earmarking can be of some value in specific circumstances, a wide range of concerns about it, and reasons for not using it, were identified. These related to the impact of earmarking on the settlement; uncertainties seen as inherent to the concept of earmarking; and practical difficulties raised by earmarking. Although solicitors identified a range of strategies for dealing with these problems, there remained a high degree of anxiety about using earmarking. This appeared to be underpinned by, but also to reinforce, solicitors’ unfamiliarity with earmarking.

5.4.1 The impact of earmarking on the overall settlement

The major problem that respondents perceived with earmarking was that it does not create a clean break situation. As noted in Chapter 2, a clean break settlement is seen as very important, particularly for the parties’ psychological adjustment to the end of the marriage. Continuing financial dependence was not seen as being in either party’s interests.
‘Some husbands still have the knack of, you know, making the wives feel beholden to them if it’s an ongoing financial settlement, I think that is the biggest bugbear of it all... divorce is always acrimonious and a very, very upsetting time for most people and you generally tend to find that once you’ve got the finances out of the way, both parties tend to be quite friendly towards each other again.’

(Legal Executive, England, over half of time spent on divorce work)

‘It’s being earmarked by the wife and the husband is thinking, my God, we’re never going to be able to move on because, OK, I get to retirement and there’s my money going to my ex-wife.’

(Partner, England, over half of time spent on divorce work)

There was also a suggestion that greater use of earmarking might give rise to more cases involving maintenance, because the wife’s smaller share of current capital might not be sufficient to meet her living costs.

These concerns about the lack of clean break were linked to the sense of ‘uncertainty’ that respondents felt earmarking created (see Section 5.4.2). Comparisons were made with Mesher and Martin orders, which give one party a contingent interest in property and which are seen as similarly unattractive.

A related concern was the fear that earmarking might jeopardise the ability to meet a wife’s current needs, for example for rehousing, again because her share of other available assets might be less. One solicitor in Scotland noted that it might be more difficult to negotiate a departure from the 50/50 division to one more favourable to the wife, if earmarking were offered instead by the husband.

5.4.2 Uncertainties inherent to the concept of earmarking

There seemed to be much anxiety about the future, contingent and thus uncertain nature of an earmarked pension. These uncertainties led respondents to believe that earmarking was risky, made financial planning very difficult, and was particularly unattractive for younger couples where the period of time before the pension fell due was longer.

Areas of uncertainty identified were:

• the impact of the husband’s death before retirement;

• the impact of the wife’s remarriage: respondents generally said that an earmarked lump sum would not be affected but that entitlement to earmarked pension income would lapse. Other respondents said that it depended on the wording of the order;

• other changes in circumstances. There was concern that an earmarked order would also be open to appeal or variation;
that an Attachment Order might be ‘defeated’, whether deliberately or not, by a husband ceasing to make contributions, postponing retirement, choosing not to commute pension income to a lump sum, or moving his pension into a new scheme;

that the pension scheme might collapse, or the trustees refuse to be bound by the Attachment Order (see Section 5.4.3);

that the pension scheme might not produce the anticipated figure, so that an earmarked lump sum could not be paid or so that both parties were impoverished. One solicitor commented that pensions are generally designed to support one household and might simply not generate enough to support two. There were sometimes cases where solicitors had earmarked a proportion of a lump sum but appeared not to have a clear idea of the likely magnitude of the sum that their client would receive.

These concerns led to much anxiety about how earmarking and Attachment Orders should be worded.

A number of practical difficulties were also identified.

First, it was noted that earmarking requires a court order, which is particularly unattractive in Scotland if a Minute of Agreement or simplified divorce would otherwise be possible.

‘You couldn’t, for example, have a simplified divorce, you know, the tick box style, if you wanted the Court to make an earmarking order, you’d have to go through an expensive full style divorce to get your earmarking order so it’s not - the uptake hasn’t been anything like what it could and should have been.’

(Partner, Scotland, less than half of time spent on divorce work)

At the same time, there was some concern in England that undertakings, which were felt by some to be a critical element of the earmarking order (see below), could be part of a consent order but not of an order made without the husband’s consent.

Second, there was much concern about the need for a wife to retain contact with either the husband (if there is no Attachment Order) or with the pension scheme (where an attachment/Section 12A Order has been obtained). There was a real anxiety about ensuring an earmarked pension gets paid to the recipient. Solicitors were generally aware that it was the recipient’s responsibility to keep the pension trustees informed of any changes of address. One solicitor thought that the wife forfeits the earmarked pension if it is not paid within a year of falling due, although this was not based on experience. Concern about these anticipated administrative difficulties add to solicitors’ reluctance to use earmarking:
'I mean when you look at the suggested forms of information and notification to pension companies, I can see correspondence. I just get visions of correspondence going on for years with these people [scheme administrators], they never answer the letters anyway.'

(Partner, England, less than half of time spent on divorce work)

'... we've lost contact with her so you don't know when to expect the money. I mean the result of the earmarking order is the cheque is sent to what used to be your mother's home but she's dead by now .... You've got an interest in when somebody retires with whom you no longer necessarily have any contact and you've then got to remember to tell the pension providers if you ever move.'

(Partner, Scotland, less than half of time spent on divorce work)

There was concern about possible negligence actions against a solicitor if an earmarked entitlement was not paid by the husband or the pension scheme.

A third practical difficulty related to solicitors’ experiences of contact with pension schemes about earmarking. Here, there were quite varied experiences. Some solicitors reported finding pension companies very co-operative, prepared to discuss the wording of an order before it was made and confirming the trustees would follow the order. Others had less positive experiences. One reported a scheme refusing to discuss the case until the order was made; another had received a letter from the trustees after serving the order in which they refused to enforce it on the grounds that their contract was with the husband. (This was remedied through further correspondence.)

5.4.4 Strategies for dealing with problems and uncertainties

Solicitors who had used earmarking were able to identify a range of strategies they had used to overcome some of the difficulties and concerns identified above:

• earmarking the death-in-service benefit where available, or taking out insurance against the husband’s death, to counter the situation where the husband died before retirement;
• earmarking retained rather than current pension rights: because, since no more contributions will be made, the value of the pension is more predictable;
• using ongoing maintenance orders in conjunction with an order earmarking pension income to give a more predictable retirement income: the existing maintenance order can be reviewed at the time of retirement in the light of the amount of pension income generated;
• seeking advice about drafting of orders: from the court, barristers, other solicitors and pension schemes. Solicitors also talked about using the precedents provided by the Family Law Association;
• requiring the husband to enter into a series of undertakings in the order: for example, to commute the maximum or minimum lump sum available, to authorise the pension scheme to provide information to the wife, not to do anything to undermine the value or growth of the scheme;

• earmarking a fixed sum rather than a proportion, or in one case earmarking a proportion up to a maximum fixed sum - 25% up to a maximum of £60,000. There was some doubt however as to whether this would be acceptable to the court;

• working with pension schemes: as noted, their experience was mixed but some solicitors had liaised with pension schemes about the wording of an order before it was made

• if acting for the wife, emphasising to her the importance of keeping in contact with the pension scheme and that this is the client's own responsibility.

Solicitors' concerns about earmarking seemed, to some extent, to be underpinned by unfamiliarity with its operation. Those who had never earmarked were unsure about some aspects of the legislation - such as whether all pensions can be earmarked, whether fixed sums or percentages can be earmarked, whether earmarking can be applied to both pension income and lump sums, whether orders can be varied. They seemed also not to be aware of possible strategies for minimising uncertainty.

Among those who had earmarked, too, there remained uncertainty, particularly about how the amount or proportion to be earmarked should be calculated, how predictable the lump sums or pension income are, whether interest should accrue on earmarked sums and whether the wife should have access to future contributions. Even where strategies for minimising uncertainty had been used, however, there remained an air of anxiety, which seemed to be communicated within the profession, for example in discussion at conferences and seminars about the potential pitfalls of earmarking. Solicitors had not yet had practical experience of Attachment Orders being implemented and paid, and remain cautious until they have been proved.

It was said that courts and pension schemes are also unfamiliar with earmarking, with inconsistencies in their practice.

The size and method of selection of the sample means that it cannot sustain systematic comparisons between Scotland and England. However, there seemed to be particular anxiety about earmarking in Scotland, and the quantitative survey of solicitors showed very low use of earmarking there. Of the three earmarked cases in Scotland in our sample, none of these had gone through to conclusion. One had been revoked (by agreement of both parties); one overturned on appeal (on a number of grounds) and one was still pending as the court had refused to accept the
order (on the grounds that an unspecified amount was earmarked – whatever balance of a fixed lump sum remained unpaid at the husband’s retirement).

Solicitors in Scotland reported that there may be particular difficulties there. Respondents noted that there had been very few earmarking cases in Scotland and some said that they were being advised (sometimes by actuaries) to keep away from earmarking. The following provides some illustration:

‘I’m not a fan, we tend to stick to things we know … I think earmarking is a halfway house, which is maybe neither fish nor fowl, and a good red herring!’

(Partner, Scotland, over half of time spent on divorce work)

‘Everyone’s avoiding earmarking like the plague… because it’s so complicated, dependent on so many unknown factors.’

(Partner, Scotland, over half of time spent on divorce work)

‘We’re having serious problems … our sheriff is not a fan of it at all.’

(Partner, Scotland, less than half of time spent on divorce work)

‘The courts don’t really know what to do either so the whole thing’s a mess, there’s no point doing it … we can’t really afford to go through maybe two or three days of court on the arguments about earmarking… And so, you know, it’s far better just to come to some solution whereby we get deferred payment of capital.’

(Solicitor, Scotland over half of time spent on divorce work)

There was, then, an overwhelming preference for compensating the wife for her loss of pension benefits by offsetting the value of the pension against other available assets – particularly the matrimonial home, or cash. This was not simply a reflection of the specific problems raised by the operation of earmarking. The fact that earmarking does not create a clean break was on its own sufficient to make compensation the preferred approach. In fact, solicitors did not identify particular circumstances where they saw compensating as a suitable way to deal with the pension: it was suitable wherever it was possible.

Respondents’ perceptions of the desirable elements of a clean break can be categorised as follows:

- independence and control: a clean break cuts ties, and allows both parties to start a new life, both emotionally and financially; the wife’s entitlement is no longer dependent on the husband’s circumstances;
- certainty: the full entitlement has been paid and is not open to review or variation.

5.5 The role of compensation methods

There was, then, an overwhelming preference for compensating the wife for her loss of pension benefits by offsetting the value of the pension against other available assets – particularly the matrimonial home, or cash. This was not simply a reflection of the specific problems raised by the operation of earmarking. The fact that earmarking does not create a clean break was on its own sufficient to make compensation the preferred approach. In fact, solicitors did not identify particular circumstances where they saw compensating as a suitable way to deal with the pension: it was suitable wherever it was possible.
A clean break was seen to be what both husbands and wives also want. ‘Most people given the choice would prefer to do a deal now. Most husbands don’t want the idea of their ex-wife having some entitlement to what they see as their pension in the future … and most wives live for today, they’d rather have the security for example of the home or a better deal on capital which enables them to buy a home than worry about the long-term future pension thing. A lot of women … they want to have the independence of buying their own pension, they don’t want to be beholden to their ex-husband.’

(Legal Executive, England, over half of time spent on divorce work)

This seemed also to be underpinned by the priority solicitors gave to ensuring that the parties’ immediate needs are met – particularly, in the case of the wife, a secure home for herself (and children) and a secure way of funding her living expenses. Again, it was seen to reflect the wishes and instructions of the client.

This does not mean that future needs were necessarily ignored. Where settlements did not involve direct access to the pension through earmarking, solicitors noted that future needs could be met through the sale of the wife’s home (for example, moving to a smaller house when the children had grown up) and through investment of a lump sum, perhaps in a pension or an annuity. However, it did not always seem that detailed consideration had been given to the sums required to support the wife in old age, or to the level of investment in a pension or annuity that would generate a specific level of income. In some cases, the wife’s future needs seemed to have been given little emphasis.

In the cases under discussion, solicitors had used a wide variety of methods of taking the pension into account in the settlement, sometimes in conjunction with each other and with earmarking. Their approach was driven by consideration of each party’s current (and, although sometimes to a lesser extent, future) needs, and the way in which different assets could be treated or applied, but the outcome was also influenced by the vagaries of the negotiating process (discussed in Chapter 2). Some of these methods for compensating seemed to be fairly standard; others were seen as more idiosyncratic and creatively tailored to the circumstances of the individual case:

• transfer of the matrimonial home to the wife, sometimes mortgage-free or with a commitment to make mortgage payments – this often-cited outcome was seen to be useful as a simple way of meeting the wife’s (and children’s) immediate housing needs and generating an asset that might fund old age;
• a Martin or Mesher order, enabling the wife to be adequately housed or to stay in the matrimonial home but generating a potential capital payment to the husband;

5.6 Range of compensation methods
• sale of the matrimonial home, generating a lump sum for one or both parties;
• generating a lump sum for the wife through sale of other assets, liquidating assets such as insurance or endowment policies, or from cash savings;
• a deferred lump sum, or a lump sum to be paid in instalments; in the light of the perceived risks and uncertainties associated with earmarking, there remained a preference for the practice of deferred lump sum orders tied to the husband retiring or reaching the age of 65;
• funding a lump sum through the husband’s borrowings;
• the husband’s assumption of liability for debt;
• an ongoing maintenance order to continue into retirement, or a maintenance claim left open so that the wife can apply for maintenance on the husband’s retirement;
• purchase of a family income policy to insure against maintenance payments;
• offsetting pensions against each other – valued for its simplicity.

It can be seen from the above list that taking the pension into account through these methods could meet a range of objectives, including meeting current income or housing needs, future capital or income needs, and achieving an equal division of assets.

The following examples provide illustrations of the factors involved in decision making around the distribution of different assets and the role of the pension:

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**Case 1**

This was a very large money case, with the husband’s pension rights valued at over £1 million and other assets at around £2 million. The matrimonial home had already been transferred to the wife and valued at £500,000. The husband’s salary was over £100,000 per annum, the wife was not working and was receiving substantial interim maintenance. Both were in their fifties. The case was identified by the solicitor as suitable for a clean break, and this was what both parties wanted. The pension remained in the hands of the husband and the wife received compensation through offsetting against the matrimonial home and payment of a lump sum of over £500,000.
**Case 2**

This was a case with very little in the way of assets and a young couple in their thirties with young children. The husband’s pension rights were valued at £20,000. The wife was not working, and the husband’s salary was £20,000 per annum. The house had been sold, realising just £4,000 equity and there were savings of £3,000. The couple had debts of £21,000. The wife received a lump sum payment of £3,000, the husband received the rest of the available capital, kept his pension intact, and took on responsibility for the debt. There was also an order for child support payments. The solicitor was aware that the wife had not been compensated for her full loss of all the matrimonial property, and three key factors seemed to underpin this. First, that there were not sufficient assets for full compensation; second, the wife’s reluctance to push for a more generous settlement because of her concern about the possible impact on the husband’s relationship with his children; third, the wife was young and the lost pension rights small.

**Case 3**

In this case, the husband had a pension valued at £70,000. The wife had retained rights worth £12,000. There was £30,000 equity in the house, £8,000 other assets and £7,000 debts. The husband was earning £70,000 a year and the wife was not working. They had three young children. The case was dealt with by a Mesher order on the house, a lump sum of £15,000 to the wife, and maintenance for the wife and children covering the mortgage and their living costs. The outcome had been strongly influenced by the husband’s approach: he was extremely possessive about the property and his pension to the extent that the respondent (the wife’s solicitor) said that, ‘he used to berate her for long periods and not take no for an answer’. The wife did not pursue her full entitlement, much to the frustration of her solicitor.

There were no cases where there was a possibility of a direct claim being made on a wife’s pension, but where a wife had pension rights in addition to her husband this was sometimes taken into account in making a decision about the extent and method of redistributing resources. In one case, the wife had slightly higher pension rights than the husband (£15,000 as against £10,000) but the solicitor felt that the amounts made it not worth pursuing a direct claim. However, she described the negotiation as including some ‘horse-trading’ whereby the agreed maintenance payments from husband to wife were lower in reflection of the wife’s pension rights. In practice, where both parties had pension rights they were generally offset against each other, with further compensation to the wife if the difference in value was significant and the availability of other assets allowed it.
As noted in Chapter 1, pension sharing (or pension splitting) is a new method of dealing with pensions on divorce. The Welfare Reform and Pensions Act 1999 allows the value of a member’s pension rights to be shared between the parties, creating a new pension entitlement for the non-member which can either be transferred to a different pension arrangement or left in the same arrangement. The legislation applies across Great Britain.

Although pension sharing was not available as an option for dealing with pensions in divorce cases, the research provided an opportunity to explore solicitors’ understanding and views, and the circumstances where they feel it might play a role.

The solicitors in the study were generally (although not universally) aware that pension sharing had been proposed, and seemed broadly to understand the concept. It was seen to have similarities with earmarking and, although pension sharing was generally thought to have fewer of the problems associated with earmarking, there remained a preference for dealing with pensions through compensation methods if possible.

As the previous chapter noted, earmarking was seen by solicitors as contrary to the principle of a clean break settlement. By comparison, pension sharing was seen as allowing a clean break, and this was perceived as a key advantage. Solicitors emphasised that, under pension sharing, the wife has control of her share of the pension. Although there was some uncertainty about the detailed operation of pension sharing (discussed further in Section 6.4) the fact that the wife can decide whether to make further contributions, can move the pension into a new scheme, and can decide when to start taking the pension was seen as a real benefit.

‘In this case (where the pension was earmarked) … control of the pension lies with him and his company, it doesn’t lie with her at all. She has got no control at all over how the money is distributed or whatever ... . (with pension sharing) she can build up on that as well, she has got the option herself to add to that if she wants to and she can start her own pension in that way and then build it up as she wants to build it up.’

(Solicitor, England, acted for wife)

The clean break aspect of pension sharing was seen to have both practical and psychological advantages. In practical terms, it was stressed that there was no need for the wife to keep in contact with the husband, or with his pension scheme trustees. The previous chapter noted the concern that husbands could ‘defeat’ an earmarking order by moving their schemes
elsewhere or ceasing to contribute, and pension sharing was seen to obviate this. One solicitor who had earmarked apparently without being aware of the availability of Attachment Orders stressed the advantage of pension sharing as not being dependent on the wife trusting her ex-husband. Pension sharing was also seen to remove some of the uncertainty associated with earmarking – for example, because the wife’s entitlement would not be affected by the husband’s death, either before or after the pension fell due, or by his postponement of retirement.

It was also noted that pension sharing might be more effective than earmarking in cases where there is a significant difference in the parties’ ages. Where the husband is much older than the wife, for example, she might prefer to receive her lump sum or pension income later than the date when he retires.

The psychological advantages of pension sharing as a clean break were also emphasised. As the previous chapter noted, solicitors identified scope for continued animosity and ill-feeling between parties where financial ties and dependencies remain after the end of the marriage. Pension sharing was seen to remove this problem, and to reflect the wife’s entitlement to the pension as a matter of right rather than dependency.

‘If ... the client can then move her pension entitlement somewhere else then I think emotionally she will then consider it to be her pension. If it’s still in ... the name of the ex-husband, conceptually I think it’s probably still viewed as that person’s benefit which is then being siphoned off sideways as it were. I think it makes it dearer that it’s a right ... as opposed to something that is given.’

(Solicitor, England, over half of time spent on divorce work)

Pension sharing was therefore seen to have some distinct advantages over earmarking, and also to share its advantages. A husband may prefer to split the pension in return for a larger share of capital currently available. A pension may offer greater investment potential than other options, such as an annuity. Pension sharing allows a large capital entitlement to be structured, holding some funds in reserve until a wife is older. As the previous chapter noted, there was some sense of injustice if a wife receives compensation now for an asset from which the husband will not benefit until some point in the future, and pension sharing was seen as fairer in this respect. It was also seen as a mechanism within which both spouses shared any risk associated with pensions as a future and somewhat uncertain benefit, and this led to a suggestion that all pensions in a case should be split, with the husband receiving a share of the wife’s as well as vice versa.

Finally, as with earmarking, it was noted that there might be a tactical advantage for a wife to make a direct claim on the husband’s pension, where he might prefer some form of offsetting instead, to secure a more generous settlement overall.
These perceptions of the merits of pension sharing – in terms of both advantages over earmarking and advantages shared with earmarking – had led some solicitors to consider delaying finalising a settlement until pension sharing was available as an option for dealing with the pension.

Whilst pension sharing was generally endorsed as a useful addition to the tools available to solicitors, some potential disadvantages were also noted.

There was concern about the administrative cost of pension sharing, and that the costs applied to two separate schemes would be greater than if the scheme remained intact. This was seen as particularly relevant if the scheme was relatively small, or if the wife’s future contributions to it were likely to be relatively low, when administration costs might be proportionally particularly significant. There was therefore a perceived danger that administrative costs could undermine the value of the scheme for both parties.

As noted earlier, although there was some uncertainty, there was a view that earmarking gives a wife access to future contributions to the pension made by the husband, and pension sharing was not seen to provide this. It was also noted that the wife’s share of a pension might not have the potential to generate as substantial a lump sum as earmarking, because of constraints on the proportion of pension income that can be commuted to a lump sum. There was concern that dividing a pension might undermine its investment growth, so that the combined growth of two separate schemes might be less than the growth of a larger single scheme.

Although pension sharing was seen as having the distinct advantage of creating a clean break, some of the disadvantages associated with earmarking were again identified. The uncertainty associated with pensions as an intangible future asset was again identified in relation to pension sharing. The value of the benefit ultimately received by the wife remained uncertain, and it was noted that the actual effect of pension sharing might benefit one party, or disadvantage the other, more than had been intended. The importance of giving priority to meeting the parties’ immediate needs was again stressed, and there was concern that pension sharing would be disadvantageous to a wife if it meant that she was provided with future resources at the expense of her current needs.
6.3 The role of pension sharing

Although pension sharing was seen as potentially useful and a distinct improvement on earmarking, there remained a preference for dealing with pensions through a redistribution of current resources. In general, then, solicitors anticipate its key role as being in cases where earmarking is currently considered appropriate, particularly:

- where there is inadequate capital to allow the pension to be off-set against other current assets:

  ‘I think it’s a first class idea ... . Perhaps it’s because they (the government) saw how difficult it was to deal with situations where ... the pension has to be taken into account but the money is not on the table, so how do you deal with it?’

  (Partner, Scotland, less than half of time spent on divorce work)

- cases involving substantial assets, where there is ample capital to meet the wife’s immediate as well as future needs:

  ‘I don’t think this (the case discussed) was a case for it because she needed the money now, it was an immediate need for capital. If there’s a future need for capital, ie there’s enough money now and there’s money left over and she could have that money in the future then, yes.’

  (Solicitor, England, over half of time spent on divorce work, acted for wife)

- where the wife does not need current provision, but where her ability to meet her own future needs is unequal to that of the husband.

There were different views about whether pension sharing would be particularly appropriate to older or younger couples. On the one hand, it was said that the closer the parties are to retirement, the less uncertainty there will be about the actual effects of pension sharing. On the other hand, it was said that the relative advantages of pension sharing over earmarking diminish as the parties get closer to retirement, since there is a shorter period during which contact with each other or with the pension scheme needs to be maintained. It was also noted that the wife’s ability to build up her share through contributions is likely to be more significant the younger she is.

Pension sharing was generally, then, seen as ‘just a better version of earmarking’, and likely to be used in its place, although there were also some suggestions that it might be used more widely. It seems to be positively received by solicitors as another option for dealing with pensions which should be available as well as, rather than instead of, other mechanisms.

6.4 Uncertainties about the operation of pension sharing

Although solicitors seemed generally to be familiar with the concept of pension sharing, there were some areas of uncertainty about precisely how it would operate. There was some confusion about whether the wife’s share would have to remain in the same scheme or whether she could transfer it, and a belief that the wife would have to have an existing scheme into which her share would be transferred.
‘But then again, it would only work with people who are in employment and who have schemes of their own, you know. There’s no point if it’s a wife without a pension scheme because where’s it going to go?’

(Solicitor, Scotland, over half of time spent on divorce work)

There was also some uncertainty about whether the two schemes would be completely separate or whether there might be some continued linkage, such as a requirement for both pensions to be taken at the same time. Complete separation was thought much more valuable. It was also hoped that the legislation would allow pension sharing by agreement, without requiring a court order.

Some solicitors wondered whether all pension schemes could be shared, and there was some awareness of the particular issues raised by unfunded schemes. There were suggestions that the tax implications of pension sharing for each party were potentially very complicated, but little detailed knowledge about this.

Finally, although the value of pensions as an investment option was noted, there was some uncertainty about precisely how their investment growth compared with other forms of investment.

Solicitors identified some particular aspects of preparation for the introduction of pension sharing that would be helpful to the profession:

- clear guidelines about how pension sharing should be structured and how it would operate. This seemed to be underpinned by anxieties and uncertainties about other aspects of pension provision, such as the treatment of valuations and the detailed operation of earmarking;
  ‘I think that there has got to be some guidance. I mean, one of the tragedies for us, the profession, is that it’s all well and good for the government and the civil servants who write this legislation to throw this idea into the ring and leave us to figure out what the hell they meant. And that’s how it stands at the moment – I mean, we’ve all been praying for a case to go through the Court of Appeal.’

(Legal Executive, England, over half of time spent on divorce work)

- clarity about the date of implementation: it was said that there had been a great deal of uncertainty about when different provisions of the Pensions Act had come into force, and solicitors hoped that this would be avoided in relation to pension sharing;

- ample notice of implementation, with a focus on publicising its introduction within the profession in the months leading up to implementation.

It was also said that preparatory work with the pension industry would be critical. In part this reflected the difficulties solicitors had encountered in their liaison with pension scheme trustees over Attachment or Section 12A Orders. There was also a recurrent concern that the implications of
pension sharing for administrative costs might make it unwelcome to the pensions industry, and some suggestion that pension sharing had already been delayed by the resistance of the pension industry.

Apart from this, however, there was a general view that the legal profession will be able to educate itself about pension sharing through existing sources of information and learning, and little sense of how the government could assist this process. Solicitors emphasised the value of continued professional development requirements in encouraging attendance at courses and seminars, seen as key ways of learning about pension provision. Text books, journals and magazines within both the legal and pensions industries were identified as important sources of information. Finally, it was also anticipated that the law societies and other associations within the profession would take a lead in ensuring that information about the new legislation and its implications is disseminated within the legal profession.
The research was commissioned to study the following questions:

- what do solicitors know about pensions and the different ways of taking them into account as part of a financial settlement arising from divorce?
- what do solicitors see as the role of pension rights in a divorce settlement?
- how do they take pension rights into account? How do they use the CETV in this process?
- when are they using earmarking provisions?
- what are solicitors' opinions about using pension sharing?

This chapter reviews the findings in relation to these questions and draws some conclusions about the circumstances where provision in relation to the non-pension holder is currently inadequate and the implications for future provision.

Reaching a financial settlement is in many ways a juggling act for solicitors. They need to weigh up the financial circumstances of the case, balancing a client's financial needs within the constraints of the available resources. At the same time, they need to take into account the wishes and priorities of their client, and balance these against the strategy of the other side and the wishes and priorities of the other party. They must also decide when it is appropriate to settle for less and when it is important to continue to negotiate.

Solicitors' decision-making is not only determined by the circumstances of the case. It is also shaped by their own knowledge and understanding, their general objectives in relation to a settlement and individual assets, and the thoroughness of their approach. Knowledge of the law and experience enable solicitors to negotiate their way through the complexities of financial settlements.

There was considerable variation in the extent of solicitors' understanding about pensions and ways of taking pension rights into account. Although there was a general recognition that pension rights were important in the settlement, some solicitors appeared to have little knowledge about the different pension benefits and rights. This lack of awareness makes it difficult for the full value of pension rights to be weighed alongside the rest of the financial assets.

There was also a low level of awareness about options available through the new provisions for making Attachment Orders or Section 12A Orders,
and a great deal of confusion about the way in which these provisions work in practice (even among some solicitors who had used the new provisions).

A third area of significant confusion was the implications of the different ways of valuing pension rights in order to take them into account in the financial settlement. This lack of understanding was rooted in a more general lack of knowledge about financial matters, particularly where they required an understanding of the mechanisms of investment and future growth.

7.2 Ways of viewing pension rights

There was a lack of clarity among solicitors about the basis for an entitlement to the pension rights. The view of entitlement was shaped by the different ideas of compensation (for past and future loss), equality and future need. Some solicitors adopted a general approach of an equal division of all assets, where solicitors did not have this approach, the measure of entitlement, that is the percentage share which would be expected, was not clearly identified at an early stage.

At the same time, the pension rights were not always viewed as an asset that was equivalent in nature to other matrimonial assets. This was because they were seen as future and contingent. This appeared to underpin a sense that the pension rights should be treated in a different way from other assets combined with uncertainty about how to treat them.

Both of these factors contributed to the belief that pension rights were less important where a couple were young and many years from retiring, and where the pension rights were not in themselves very substantial.

Lack of clarity about the nature of the entitlement and about the future nature of the pension rights also led to an ambivalence in using the CETV as a method of valuing the pension. The CETV appeared to have a useful function as a notional value when it came to compensating or offsetting the pension rights, but was not generally used in any systematic way when solicitors used an earmarking provision. When using earmarking, solicitors sought a share of the pension, rather than attempting to take the full value into account, and expressed concern about the difference between the current (notional) value and the actual value on retirement.

7.3 Preferences for ways of dealing with pension rights

There were a number of guiding principles which shaped solicitors' opinions about the most appropriate way to take the pension rights into account. These were largely rooted in the matrimonial legislation of the two jurisdictions. The main elements of these appeared to be: the desirability of a clean break to create certainty; the prioritisation of immediate needs over future needs, and the desire for a fair or equal outcome.
On the whole these principles led solicitors to have a strong preference for using a way of offsetting the pension rights against other assets, rather than earmarking, wherever possible. Although earmarking was perceived to deliver a fairer outcome on some measures, the uncertainty about what its future value would be caused some conceptual difficulties where solicitors were seeking to use it to achieve an equal division of assets.

In addition, there was a great deal of confusion and uncertainty about how earmarking and attachment worked in practice. This was partly related to anxiety about being dependent on the actions of the pension-holder and the extent to which attachment would deliver what was expected, but it was also due to uncertainty about drafting orders and the processes of putting Attachment Orders in place. The difficulties that are perceived to be part of earmarking and attachment emerged as a significant disincentive to using it.

Clients’ wishes and priorities can be critical for the outcome of a financial settlement. Attitudes of the public towards pensions and towards the entitlement of the non-pension holder to a claim on the pension appear, perhaps not surprisingly, to be lagging behind the actual legal position. Both parties seem to be reluctant (or even strongly resistant among some pension-holders) to see the pension as a joint asset like the matrimonial home. In addition, clients may be less focused on providing for their future, compared to their wish to provide for their current situation. This can cause difficulties for solicitors who are seeking to follow their client’s instructions at the same time as representing their best interests.

Although solicitors claim to seek a settlement that is fair to both parties, it is clear that they also aim to represent the interests of their client. This can lead to confrontation over the treatment of the pension rights. Where solicitors are acting for the pension-holder (the husband in these cases) an adversarial approach can have a major effect on the role of the pension in the financial settlement. Similarly, a non-confrontational approach by the non-pension holder’s representative can result in a less satisfactory outcome for their client.

Increased awareness about entitlement among the public would therefore go some way to addressing some of the circumstances where pension rights are currently not taken into account. There was some belief among solicitors that awareness is beginning to increase among the general public. Solicitors’ attitudes to the negotiation and the role they themselves play in shaping client objectives are also important.

On the basis of the cases in this study, it is possible to review the sort of situations where there appears to be under-provision for one party in the financial settlement. Without access to the full circumstances of the case, it is difficult to make a complete and objective assessment, although it is also possible to draw on solicitors’ own views about an unsatisfactory
outcome. In some cases, there appeared to be a fairly clear difference in provision between the two parties, and a danger of under-provision for the wife or non-pension holder.

There was a range of different outcomes in relation to the final division of resources:

- An equal division. Although sometimes apparently by chance rather than design. In one case the husband’s pension was valued at £160,000. In the settlement he agreed to make a lump sum payment to the wife, to be paid by instalments as a way of paying the mortgage on her house. Due to very large debts the husband could not make a cash payment. The instalment payments would eventually give a total sum that was equivalent to the pension value, (although the value of the house at the time of purchase was only about two thirds the value of the pension).

- The wife received more than half of all assets. In one case, the wife’s solicitor had calculated the lump sum which the wife would need to re-house her, to compensate for her loss of pension, and to pay off half of the joint debts. The figure arrived at was £80,000, which was funded from the proceeds of the sale of the house, and the husband kept his pension (valued at £22,000). The wife therefore received considerably more than half of the assets in order to put her in a secure position. The husband’s salary was about £65,000 and he had been keen to have a clean break to enable him to consider buying a new property with a new partner.

- The wife received less than half of all assets. There was one case where the husband was earning £33,000 a year and the wife about £10,000. They were both around 50. In the settlement the wife received a lump sum of £37,000 from the sale of the house and the husband kept other assets of around £18,000 and his pension valued at £47,000. The wife’s solicitor had some doubts about her client’s future position, but said that getting some money immediately for re-housing was what the wife had wanted.

Under-provision for the wife seems to arise in cases where:

- the wife chooses not to pursue her full entitlement: under pressure from her husband, or because of her own desire for separation, or possibly where the wife’s solicitor does not raise the issue of pension rights (although this is speculative on the part of husband’s solicitors);

- there are insufficient assets: the scope for different strategies in taking the pension rights into account can be severely constrained by the financial resources. Where the value of the pension is also low, there was concern about whether it could meet the financial requirements of two individuals rather than a couple. Given this, it is perhaps surprising that SERPS was so rarely valued and not taken into account in the future settlement;

- there is a focus on current needs at the expense of future needs: on the part of both solicitors and clients;
• it may be that uncertainties about how to treat the pension rights also underpin some under-provision.

Earmarking the pension can help towards improving provision for retirement, although not in all circumstances, and only if the earmarked proportion is sufficient to meet future financial needs.

There was a generally positive response to the proposals for pension sharing, particularly because pension sharing was perceived to be a way of gaining a direct claim on the pension rights while still attaining a clean break. The ability of the non-pension holder to obtain autonomy and control over their own scheme was seen as very beneficial because the outcome is less contingent on someone else’s behaviour. It was also seen as fulfilling the criterion of fairness because each partner would be in the same position with regard to the pension rights. It was felt that it would be useful in the same sort of situations as earmarking, that is where there are insufficient funds available to compensate for a loss of pension rights.

However, some of the concerns about earmarking of pension rights also apply to pension sharing: for example, anxiety about procedural difficulties, and about the share of the pension rights to which the non-pension holder would be entitled. Given current attitudes, it may take some time before the pension is regarded as an asset to be shared equally in the same way as the matrimonial home, and a direct claim on the pension through pension sharing may continue to be regarded as an extra resource to be used to meet particular needs. Where a direct claim on the pension is the most appropriate way of meeting those needs, solicitors need to feel comfortable and confident about recommending pension sharing or earmarking orders to their client and in knowing how to put them into place. Their current attitudes suggest that there is likely to be relatively low use at least initially, and that pension sharing is unlikely to address immediately the problems of under-provision.

Perhaps more importantly, there is likely to be a concern about the implications for immediate needs if they are not offset against a claim to the pension. In other words, if there is a direct claim on the pension, the claim on the other assets may be lower. Where there is a priority need to secure housing for one of the partners (normally the wife), this is likely to continue to over-ride the consideration of future needs and the role of the pension, particularly if it is some way off into the future. There seems particularly to be a tendency to focus on immediate income and housing needs where there are dependent children whose housing needs must also be secured.

An offsetting arrangement, whereby housing needs are met usually at the expense of fully meeting future income needs, is encouraged by legal principles that promote a clean break at the same time as an equal division of assets. If a clean break is seen by solicitors as a way of buying off a maintenance claim, then there may need to be a more systematic practice of considering what that notional maintenance claim is worth.
At the same time, the concept of an equal division of assets does not take into account the prior circumstances of the case, where there might be an unequal financial position and potential between the two parties, as a result of a decision for one party to withdraw, either totally or partially, from the labour market to raise children. Treating the two parties as the same, when their starting position is different, is unlikely to produce an equal result. Until it is a more common situation to have equal starting points between the two parties, a needs-driven approach may produce fairer results, although only if there is an informed consideration of future needs as well as current needs.

If pension sharing encourages a situation where each asset is treated separately and split equally then the needs of the less well-off of the two parties may be less likely to be met, and this study suggests that solicitors would be unlikely to favour such a strategy or outcome. Instead, they are likely to continue to advocate an approach which values the need for individual assessment and creativity within the legal framework.
enjoy only in the future. It was said that if a husband had to wait before he could benefit from his pension, then it was fair that a wife should similarly have to wait.

Second, there was some difference in opinion among respondents about how an earmarked lump sum would compare to an invested lump sum in terms of financial growth, but some believed that an earmarked portion of a pension scheme would provide far greater return. It was also said that earmarking would give the wife an opportunity to benefit from future contributions, although there was again some uncertainty about this. Others felt that a lump sum which the wife could invest herself and have control over would be more beneficial. Some of this difference in opinion appeared to be linked to a different understanding of whether earmarking was for a fixed amount or a percentage (the latter but not the former would reflect the growth on a husband’s continued contributions).

However, it is perhaps a measure of the unpopularity of earmarking that the third advantage identified was the value of a threat of earmarking as a negotiating tactic. Suggesting or threatening to seek an earmarking or an Attachment Order was said to be very helpful as a lever to secure a more generous settlement. In one case, where the husband had wanted to keep his pension intact, the wife’s solicitor had used the threat of a possible earmarking claim to secure the husband’s payment of the wife’s mortgage. Similarly, in another the husband’s solicitor had threatened to ask the court for an Attachment Order to secure the wife’s agreement to a proposed settlement.

‘I used the existence of them tactically in one case I was dealing with ... and what I said in that case was if the wife didn’t want to go for this deal then we would look at things altogether a different way, we would litigate on it and we would ask the court to make an earmarking order ... And she went for the split we proposed.’

(Partner, Scotland, less than half of time spent on divorce work)

5.4 Concerns about earmarking

Despite acknowledgement that earmarking can be of some value in specific circumstances, a wide range of concerns about it, and reasons for not using it, were identified. These related to the impact of earmarking on the settlement; uncertainties seen as inherent to the concept of earmarking; and practical difficulties raised by earmarking. Although solicitors identified a range of strategies for dealing with these problems, there remained a high degree of anxiety about using earmarking. This appeared to be underpinned by, but also to reinforce, solicitors’ unfamiliarity with earmarking.

5.4.1 The impact of earmarking on the overall settlement

The major problem that respondents perceived with earmarking was that it does not create a clean break situation. As noted in Chapter 2, a clean break settlement is seen as very important, particularly for the parties’ psychological adjustment to the end of the marriage. Continuing financial dependence was not seen as being in either party’s interests.
'Some husbands still have the knack of, you know, making the wives feel beholden to them if it’s an ongoing financial settlement, I think that is the biggest bugbear of it all... divorce is always acrimonious and a very, very upsetting time for most people and you generally tend to find that once you’ve got the finances out of the way, both parties tend to be quite friendly towards each other again.'

(Legal Executive, England, over half of time spent on divorce work)

'It’s being earmarked by the wife and the husband is thinking, my God, we’re never going to be able to move on because, O K , I get to retirement and there’s my money going to my ex-wife.'

(Partner, England, over half of time spent on divorce work)

There was also a suggestion that greater use of earmarking might give rise to more cases involving maintenance, because the wife’s smaller share of current capital might not be sufficient to meet her living costs.

These concerns about the lack of clean break were linked to the sense of ‘uncertainty’ that respondents felt earmarking created (see Section 5.4.2). Comparisons were made with Mesher and Martin orders, which give one party a contingent interest in property and which are seen as similarly unattractive.

A related concern was the fear that earmarking might jeopardise the ability to meet a wife’s current needs, for example for rehousing, again because her share of other available assets might be less. One solicitor in Scotland noted that it might be more difficult to negotiate a departure from the 50/50 division to one more favourable to the wife, if earmarking were offered instead by the husband.

There seemed to be much anxiety about the future, contingent and thus uncertain nature of an earmarked pension. These uncertainties led respondents to believe that earmarking was risky, made financial planning very difficult, and was particularly unattractive for younger couples where the period of time before the pension fell due was longer.

Areas of uncertainty identified were:

- the impact of the husband’s death before retirement;
- the impact of the wife’s remarriage: respondents generally said that an earmarked lump sum would not be affected but that entitlement to earmarked pension income would lapse. Other respondents said that it depended on the wording of the order;
- other changes in circumstances. There was concern that an earmarked order would also be open to appeal or variation;
that an Attachment Order might be ‘defeated’, whether deliberately or not, by a husband ceasing to make contributions, postponing retirement, choosing not to commute pension income to a lump sum, or moving his pension into a new scheme;

that the pension scheme might collapse, or the trustees refuse to be bound by the Attachment Order (see Section 5.4.3);

that the pension scheme might not produce the anticipated figure, so that an earmarked lump sum could not be paid or so that both parties were impoverished. One solicitor commented that pensions are generally designed to support one household and might simply not generate enough to support two. There were sometimes cases where solicitors had earmarked a proportion of a lump sum but appeared not to have a clear idea of the likely magnitude of the sum that their client would receive.

These concerns led to much anxiety about how earmarking and Attachment Orders should be worded.

A number of practical difficulties were also identified.

First, it was noted that earmarking requires a court order, which is particularly unattractive in Scotland if a Minute of Agreement or simplified divorce would otherwise be possible.

‘You couldn’t, for example, have a simplified divorce, you know, the tick box style, if you wanted the Court to make an earmarking order, you’d have to go through an expensive full style divorce to get your earmarking order so it’s not - the uptake hasn’t been anything like what it could and should have been.’

(Partner, Scotland, less than half of time spent on divorce work)

At the same time, there was some concern in England that undertakings, which were felt by some to be a critical element of the earmarking order (see below), could be part of a consent order but not of an order made without the husband’s consent.

Second, there was much concern about the need for a wife to retain contact with either the husband (if there is no Attachment Order) or with the pension scheme (where an attachment/Section 12A Order has been obtained). There was a real anxiety about ensuring an earmarked pension gets paid to the recipient. Solicitors were generally aware that it was the recipient’s responsibility to keep the pension trustees informed of any changes of address. One solicitor thought that the wife forfeits the earmarked pension if it is not paid within a year of falling due, although this was not based on experience. Concern about these anticipated administrative difficulties add to solicitors’ reluctance to use earmarking:
‘I mean when you look at the suggested forms of information and notification to pension companies, I can see correspondence, I just get visions of correspondence going on for years with these people [scheme administrators], they never answer the letters anyway.’

(Partner, England, less than half of time spent on divorce work)

‘... we’ve lost contact with her so you don’t know when to expect the money. I mean the result of the earmarking order is the cheque is sent to what used to be your mother’s home but she’s dead by now ... . You’ve got an interest in when somebody retires with whom you no longer necessarily have any contact and you’ve then got to remember to tell the pension providers if you ever move.’

(Partner, Scotland, less than half of time spent on divorce work)

There was concern about possible negligence actions against a solicitor if an earmarked entitlement was not paid by the husband or the pension scheme.

A third practical difficulty related to solicitors’ experiences of contact with pension schemes about earmarking. Here, there were quite varied experiences. Some solicitors reported finding pension companies very co-operative, prepared to discuss the wording of an order before it was made and confirming the trustees would follow the order. Others had less positive experiences. One reported a scheme refusing to discuss the case until the order was made; another had received a letter from the trustees after serving the order in which they refused to enforce it on the grounds that their contract was with the husband. (This was remedied through further correspondence.)

5.4.4 Strategies for dealing with problems and uncertainties

Solicitors who had used earmarking were able to identify a range of strategies they had used to overcome some of the difficulties and concerns identified above:

• earmarking the death-in-service benefit where available, or taking out insurance against the husband’s death, to counter the situation where the husband died before retirement;

• earmarking retained rather than current pension rights: because, since no more contributions will be made, the value of the pension is more predictable;

• using ongoing maintenance orders in conjunction with an order earmarking pension income to give a more predictable retirement income: the existing maintenance order can be reviewed at the time of retirement in the light of the amount of pension income generated;

• seeking advice about drafting of orders: from the court, barristers, other solicitors and pension schemes. Solicitors also talked about using the precedents provided by the Family Law Association;
• requiring the husband to enter into a series of undertakings in the order: for example, to commute the maximum or minimum lump sum available, to authorise the pension scheme to provide information to the wife, not to do anything to undermine the value or growth of the scheme;

• earmarking a fixed sum rather than a proportion, or in one case earmarking a proportion up to a maximum fixed sum - 25% up to a maximum of £60,000. There was some doubt however as to whether this would be acceptable to the court;

• working with pension schemes: as noted, their experience was mixed but some solicitors had liaised with pension schemes about the wording of an order before it was made

• if acting for the wife, emphasising to her the importance of keeping in contact with the pension scheme and that this is the client's own responsibility.

Solicitors’ concerns about earmarking seemed, to some extent, to be underpinned by unfamiliarity with its operation. Those who had never earmarked were unsure about some aspects of the legislation - such as whether all pensions can be earmarked, whether fixed sums or percentages can be earmarked, whether earmarking can be applied to both pension income and lump sums, whether orders can be varied. They seemed also not to be aware of possible strategies for minimising uncertainty.

Among those who had earmarked, too, there remained uncertainty, particularly about how the amount or proportion to be earmarked should be calculated, how predictable the lump sums or pension income are, whether interest should accrue on earmarked sums and whether the wife should have access to future contributions. Even where strategies for minimising uncertainty had been used, however, there remained an air of anxiety, which seemed to be communicated within the profession, for example in discussion at conferences and seminars about the potential pitfalls of earmarking. Solicitors had not yet had practical experience of Attachment Orders being implemented and paid, and remain cautious until they have been proved.

It was said that courts and pension schemes are also unfamiliar with earmarking, with inconsistencies in their practice.

The size and method of selection of the sample means that it cannot sustain systematic comparisons between Scotland and England. However, there seemed to be particular anxiety about earmarking in Scotland, and the quantitative survey of solicitors showed very low use of earmarking there. Of the three earmarked cases in Scotland in our sample, none of these had gone through to conclusion. One had been revoked (by agreement of both parties); one overturned on appeal (on a number of grounds) and one was still pending as the court had refused to accept the
order (on the grounds that an unspecified amount was earmarked – whatever balance of a fixed lump sum remained unpaid at the husband’s retirement).

Solicitors in Scotland reported that there may be particular difficulties there. Respondents noted that there had been very few earmarking cases in Scotland and some said that they were being advised (sometimes by actuaries) to keep away from earmarking. The following provides some illustration:

‘I’m not a fan, we tend to stick to things we know … I think earmarking is a halfway house, which is maybe neither fish nor fowl, and a good red herring!’

(Partner, Scotland, over half of time spent on divorce work)

‘Everyone’s avoiding earmarking like the plague … because it’s so complicated, dependent on so many unknown factors.’

(Partner, Scotland, over half of time spent on divorce work)

‘We’re having serious problems … our sheriff is not a fan of it at all.’

(Partner, Scotland, less than half of time spent on divorce work)

‘The courts don’t really know what to do either so the whole thing’s a mess, there’s no point doing it … we can’t really afford to go through maybe two or three days of court on the arguments about earmarking… And so, you know, it’s far better just to come to some solution whereby we get deferred payment of capital.’

(Solicitor, Scotland over half of time spent on divorce work)

There was, then, an overwhelming preference for compensating the wife for her loss of pension benefits by offsetting the value of the pension against other available assets – particularly the matrimonial home, or cash. This was not simply a reflection of the specific problems raised by the operation of earmarking. The fact that earmarking does not create a clean break was on its own sufficient to make compensation the preferred approach. In fact, solicitors did not identify particular circumstances where they saw compensating as a suitable way to deal with the pension: it was suitable wherever it was possible.

Respondents’ perceptions of the desirable elements of a clean break can be categorised as follows:

• independence and control: a clean break cuts ties, and allows both parties to start a new life, both emotionally and financially; the wife’s entitlement is no longer dependent on the husband’s circumstances;

• certainty: the full entitlement has been paid and is not open to review or variation.
APPENDIX A  DETAILS OF RESEARCH METHODOLOGY

A1 Use of qualitative research

The main research objectives for this study were to explore the role of pension rights in financial settlements arising from divorce, and the factors underpinning decisions about the treatment of pension rights. In returning to solicitors who had taken part in the earlier quantitative study, the aim was to explore their attitudes, processes and behaviour in greater depth. The nature of the research objective suggested a qualitative research design using in-depth interviews. The function of qualitative research is not to provide data that is statistically representative but rather to describe, clarify and explain. The open-ended and responsive questioning techniques used in qualitative research were felt to be particularly suitable for encouraging participants in the study to describe their attitudes and behaviour, and to explain why they held certain views or took certain courses of action. Qualitative research is also especially suited to the exploration of individual cases and case material.

A2 Design and selection of the sample

The design of the sample was agreed between the DSS research team and the research team from SCPR. The sample was designed to achieve diversity among solicitors and among divorce cases. In order to meet the research objectives, it was agreed that the focus of the study should be on cases where Attachment or Section 12A Orders had been used, and cases where there were substantial pension rights.

The sample of 30 solicitors was purposively selected from the quantitative survey of solicitors carried out by SCPR in 1998. This meant that information collected from survey respondents could be used to ensure a range and diversity on a number of sampling variables. The primary sampling variable was the way in which the pension rights had been treated: off-setting, lump sum payment, earmarking without an Attachment Order, earmarking with an Attachment Order, or not taken into account separately in the settlement.

Secondary sampling variables were then used to select a range of solicitors and of divorce cases:

- The solicitor:
  - size of firm;
  - degree of specialism in matrimonial work;
  - location.
- The case:
  - the nature of pension rights;
  - the size of pension rights;
  - whether the solicitor had acted for the husband or wife, and for a party with or without pension rights;
  - the ages of the parties;
  - the duration of the marriage;
  - whether there were dependent children.
The sample design was partly constrained by the relatively small number of cases in the sample frame that had used Attachment or Section 12A Orders, particularly in Scotland. As a result it was decided to aim to achieve a larger number of interviews in England (20) than in Scotland (10). It was anticipated that the sample would need to be fairly scattered geographically, in order to ensure that solicitors who had dealt with the relatively rare cases were included. However, it was decided to limit the study to solicitors based in England (rather than England and Wales), in order to minimise the extent of travel required.

### A 2.1 Sample selection

Solicitors were selected from among those who said they would be willing to consider a further interview following the SCPR survey. This was a relatively high proportion of respondents: 67% in England and Wales and 70% in Scotland. A detailed specification was developed for the SCPR data processing team to identify respondents from the sample frame based on our agreed quotas.

An initial selection of around 80 cases was made from the survey data to reflect the diversity on the agreed sample quotas. In order to allow for opting out, and difficulty in tracking solicitors, the initial selection oversampled by a factor of 2.5 in England and a factor of 3 in Scotland. Solicitors in Scotland were felt to be particularly important because of the rare nature of some of the cases. However, over-sampling was set at a relatively low level in the hope that opt-out would be low because solicitors had already agreed to a follow up interview. It was also felt to be important not to approach a large number of solicitors who would then not be required to take part.

Approach letters were initially sent to 50 solicitors. Only a very small number of solicitors among those approached refused to take part in the study, predominantly on the grounds that they were too busy. In addition, a number of solicitors had moved on and were not contactable. It was therefore necessary to write to a further 10 additional solicitors to ensure the full diversity on the sampling variables.

It was anticipated that some solicitors might be reluctant to take part in the study, having already taken part in the quantitative survey. There were some solicitors who were especially important in the design of the study, as they had dealt with relatively rare divorce cases, e.g., having used Section 12A Orders. In order to maximise participation, solicitors were offered £50 in acknowledgement of their time. We also emphasised the value of their contribution to the research in our approach letter and included a letter from the DSS (reproduced in Appendix B).

As in the survey, it was important to reassure solicitors that the case details would be completely confidential and that we did not require the names of any of the parties. Approach letters were followed up by a telephone call from one of the research team, which gave respondents the opportunity to address any concerns about the research. An appointment was made at a time and place of the respondent’s convenience.
Solicitors were asked to discuss and provide details on the same case that they used to complete the quantitative survey, and to look the case file out in advance where possible so that it was available to help recall of case details.

It was recognised that in a small number of cases, retrieval of the original case would not be possible, in which case we asked respondents to substitute a case with similar characteristics, in particular one which had used the same method of treating the pension rights. Solicitors were reminded that any substituted case must have been opened subsequent to the new pension legislation, i.e. the petition date should be after 1st July 1996 in England and after 19th August 1996 in Scotland.

In practice, only one solicitor needed to use a substituted case. In one interview, the case selected for the survey had in fact been completed prior to the introduction of the legislation that introduced Attachment Orders. It was therefore not possible to collect meaningful data about the treatment of the pension rights in the settlement, so it was decided to collect data on general views and experiences only.

The sampling criteria were monitored carefully during the recruitment of the sample. Generally, the sample achieved met the quotas set in terms of providing sufficient diversity within the sample. Full details of the sample composition are given in Table 1, in Chapter 1 of this report.

Fieldwork started in the last week in September 1998 and was completed in the first week in November. Interviews were carried out by members of the SCPR research team using topic guides drawn up in consultation with the DSS. A copy of the topic guide is given in Appendix B.

Interviews were carried out at the solicitor's office, and generally lasted between an hour and an hour and a half. All interviews were tape recorded and then transcribed verbatim for subsequent analysis.

Based on both tape recordings and the verbatim transcripts, a detailed content analysis of the qualitative data was undertaken. The analysis was undertaken using 'Framework', an analytic tool developed by SCPR. The first stage of the analytic process involves reading through the verbatim transcripts to identify the principal themes and sub-themes emerging from the data. A thematic matrix, consisting of six or seven A3 charts, is drawn up using the themes and sub-themes identified. Serial numbers for individual respondents are entered at the side of the charts. The material from the transcripts is then transferred onto the charts under the appropriate headings and against the serial number for the particular respondent. Each block of material on the charts has a page reference back to the verbatim transcript.

This method of analysis can be adapted to take account of themes that arise as the analysis develops in that headings can be added or subtracted as required. It also allows for within case analysis, to see how expectations and perceptions
help to shape behaviour and attitudes, or for comparisons to be made between cases.

The charts in the matrix were:

• Central chart;
• Approach to pension rights – general and specific case;
• Details of process – including clients’ attitudes, valuations;
• Details of settlement, including treatment of pension;
• Views on treatment of pension rights;
• Knowledge and awareness.
INTRODUCTION

•remind that SCPR is independent research institute; study is confidential
•background to study:
  - for DSS, Scottish Office and Lord Chancellor's Dept- monitoring impact of new provisions for dealing with pensions introduced in 1996- also proposed changes relating to pension sharing
•survey provided much helpful information, purpose of in-depth interview to look in more detail at types of cases which do not fully explain the account
  - what proportion of their own time spent on divorce work
  - number of solicitors in firm
  - number of years qualified
  - proportion of own time spent on divorce work
  - number of partners in firm
  - number of years qualified
  - proportion of own time spent on divorce work

FOCUS ON IDENTIFIED CASE BUT PROBE THROUGHOUT HOW PRACTICES/DECISIONS WOULD DIFFER IN OTHER CASES

1. BACKGROUND ABOUT THEM

•number of years qualified
•whether partner, solicitor etc
•number of solicitors in firm
•proportion of their own time spent on divorce work

FIELDWORK DOCUMENTS

APPENDIX B

2 GENERAL APPROACH IN DIVORCE WORK

•primary objectives in dealing with financial settlement
  - how differs between different cases, whether acting for husband or wife
  - working assumptions about financial settlement (eg 50/50 split, according to principles of self-sufficiency, contributions to marriage, desirability of clean break, minimal loss to standard of living etc)
  - parties' needs and circumstances, eg capacity for work, care for children, length of marriage, new partners (which are most significant)
  - assets of relationship (which are most significant)
  - whether have overall picture of 'fair' outcome in mind at early stage
  - how far forward in time they look

•clients' approach
  - involvement in shaping objectives and in negotiating process
  - understanding of relationship finances
  - understanding of rights, responsibilities, reasonable expectations

3 GENERAL APPROACH TO PENSIONS

•importance of pension rights in settlement
  - weight attached to pension rights / different types (occupational, personal, SERPS)
  - circumstances when pension rights more / less important (eg overall value, value relative to other assets, acting for husband/wife, older couples, children)
  - whether approach shared by other solicitors, clients etc

•type of cases when do / do not take pensions into account

•valuation of pensions
  - any rule of thumb they use in assessing pension value
  - views about CETV compared with Past Service Reserve
  - which 'fairer' - to which party
  - any impact on how treat pension rights in settlement
  - impact on other aspects of settlement

DECISIONS WOULD DIFFER IN OTHER CASES

FOCUS ON IDENTIFIED CASE BUT PROBE THROUGHOUT HOW PRACTICES/DECISIONS WOULD DIFFER IN OTHER CASES
4. CHECK (BRIEFLY) CASE DETAILS FROM PRO-FORMA/GET DETAILS IF SUBSTITUTED CASE

5. OVERVIEW OF PROCESS OF IDENTIFIED CASE
   • background to case
     - whether either party on legal aid
     - Advice and Assistance / civil legal aid
     - working histories / occupations of parties
     - whether new partners and their circumstances
     - ages of children
   • how typical/unusual were circumstances of case overall
   • initial assessment of case and objectives
     - whether shared by client/opposing solicitor/other party
   • overview of how settlement was arrived at (settlement and treatment of assets)
     - issues easily agreed
     - sticking points, compromises
     - role of client: involvement, instructions, understanding
     - advice from / involvement of other professionals
     - involvement of court

6. TREATMENT OF (ALL) PENSION RIGHTS IN IDENTIFIED CASE
   • whether (all) pension rights considered and taken into account - reasons and comparisons with other cases
   • perception of importance of pension rights in this case
     - their objective in relation to pension
     - significance of pension rights in relation to other assets
     - client’s approach/instructions
     - approach of other side
   • information sought about pension rights
     - how systematic was their approach
     - any valuation, type
     - from where/whom
     - who organised, cost, steps involved, how long took
     - ease of administering / understanding
     - whether any other valuations sought, how value agreed
     - any other information sought or decided (scheme rules?)
   • overall issues of pension rights (to be varied - make notes)

7. FINANCIAL SETTLEMENT IN IDENTIFIED CASE
   • overall terms of settlement (refer to survey responses if appropriate)
     - maintenance
     - periodic allowance payments to spouse (level, duration)
     - maintenance to children (level, support)
     - treatment and division of property/other assets
     - treatment of pension
     - how easy to identify treatment of pension rights within overall settlement
     - method for taking into account (eg lump sum, off-set - against what? earmarking, Attachment S.12A Order)
     - amounts or proportions
   • any orders for recovery of legal aid (other assets, etc.)
   • whether (all) pension rights dealt with separately in settlement or taken into account (or were)
   • whether (all) pension rights valued - views of other side; how agreed that would not be taken into account...
     - reasons why not taken into account
     - whether considered/valued
     - views of other side
     - how agreed that would not be taken into account

8. OVERVIEW OF PROGRESS OF IDENTIFIED CASE

9. SUBSTITUTE CASE

10. CHECK (BRIEFLY) CASE DETAILS FROM PRO-FORMA/GET DETAILS IF SUBSTITUTED CASE
8. FACTORS INFLUENCING CHOICE OF PENSION METHOD

- Any difficulties in administration / dealing with pension schemes
- Any difficulties in administration / dealing with pension schemes
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- Any
SAMPLE APPROACH LETTER TO SOLICITORS

[Name]
[Address]

[Date]

Dear [Name]

Study of pensions and divorce - follow-up stage

You may remember that you kindly took part in a survey earlier this year which investigated the treatment of pension rights in divorce cases. The study was carried out by SCPR (an independent policy research institute) on behalf of the Department of Social Security, the Scottish Office and the Lord Chancellor’s Department.

We are very grateful to you for having taken part in the survey. It is providing important feedback to government on the treatment of pensions in divorce cases and on the use and operation of the new provisions, commonly known as earmarking and Attachment Orders, which came into force in Summer 1996.

We are now undertaking the final stage of the study, where we would like to interview a small number of solicitors who took part in the survey, following up cases of particular interest and relevance to policies on pensions and divorce.

In the survey interview, you provided information about a divorce case that involved pension rights being dealt with by way of off-setting. Because of the importance of these cases, we are writing to ask whether you would be willing to take part in a follow-up interview.

The purpose of the interview would be to find out more about the process by which the financial settlement was reached in this case, and the factors that informed the decisions made about the treatment of pension rights. We would also like to explore further your views on pension sharing or splitting, and whether it would have been helpful in this case.

The interview would last for around one hour, and would take place at your office at a time that suits you, preferably later on this month or in early October. As with the telephone interview, the research will be completely confidential. We do not need personal information that would identify the parties involved in the case, and the names of solicitors and firms taking part will not be known outside the research team.

We do appreciate that this would be a further commitment of your time. However, the government is keen to learn as much as possible from the experience of solicitors who deal with pension rights in divorce cases, to ensure the introduction of a practical and workable system for pension sharing. We will be paying an honorarium of £50 to those taking part, in appreciation of the time given.

If it is possible without too much trouble on your part, it would be helpful if you could have the case file with you during the interview. Because the survey was undertaken without identifying the parties involved in the case, we do not know your case reference number. However, we have noted some details about the case on the attached sheet and can provide more information if needed to help you to identify the case. If you are unable to access the case file, it would be helpful if you could select another case which is as similar as possible, and in particular one that involved pension rights being dealt with by way of off-setting.

We would very much appreciate your help with this final stage of the study, and will telephone in the next few days to see whether you are willing to be interviewed again.

Yours sincerely

Sue Arthur, Jane Lewis, Julia Wheatley

Research Team

82
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