

# Pensions and divorce

## Pension attachment (Earmarking) information leaflet

*The information contained in this leaflet is not intended to be a comprehensive study of issues relating to pensions and divorce or the dissolution of a civil partnership, nor to provide legal advice and cannot be relied upon or treated as a substitute for a member or the spouse or former spouse of a member or other third party obtaining specific legal advice concerning individual situations.*

### Pension Act 1995 – Attachment Provisions (England and Wales)

*Notes to assist those responsible for drawing up Orders under Section 166 of the Pension Act 1995, as amended from time to time.*

The Pension Act 1995, and subsequent regulations, made provisions to the Matrimonial Causes Act 1973 (MCA) which governs the settlement of marital assets in England and Wales. These provisions came into effect on 1 August 1996, and apply in cases where the petition for divorce, judicial separation, or nullity of marriage proceedings was filed on or after 1 July 1996 or where dissolution of a civil partnership was filed after 5 December 2005.

#### What Benefits can be subject to an Attachment Order?

Under these provisions Orders can be issued which will require the APS Trustee (the Trustee) to either:

- ◆ Pay part or all of a lump sum death benefit to a former spouse or civil partner (Section 25C of MCA),
- ◆ Pay part or all of a member's pension benefits in the Scheme to the member's former spouse or civil partner when the pension is payable (Section 25B of MCA),
- ◆ Pay a portion of any commuted tax-free lump sum from a member's pension to a former spouse or civil partner (Section 25B of MCA).

**No other benefits or provisions within the Scheme can be subject to an Attachment Order.**

#### Making an application

Where an application is made for an Order, the following details should be served on the Scheme Trustee, which has 14 days after service to raise any objections:

- ◆ A copy of Form A or, where terms have been agreed between the divorcing parties, notice of the application.
- ◆ An address to which any notice, that the Trustee is required to serve under the Divorce etc. (Pensions) Regulations 2000, is to be sent.
- ◆ An address to which any payment the Trustee is required to make to the applicant is to be sent and sufficient bank or building society details to enable the payment to be made into the applicants account.

It is unlikely that the Trustee will wish to make any formal intervention in divorce proceedings. However, we do ask to see a copy of the draft Attachment Order as soon as it is available as it provides the Trustee with an opportunity to raise any potential problems before the matter reaches court, which might save everyone concerned time, trouble and expense.

## Administration Costs

Divorce and pension regulations provide pension schemes with the ability to recover the administrative expenses that they are likely to incur in complying with their obligations under the regulations. The British Airways pension schemes make such a charge, which is payable by the Scheme member at the time a sealed Court Order with a pension attachment annex is received by the Trustee.

The standard minimum charges applied **in all cases** are:

Current member or member with a deferred pension: £1,350.00 plus VAT

Retirement member with pension in payment: £1,600.00 plus VAT

Higher charges can be applied in certain circumstances. The actual charge levied will depend on the volume of work and the complexity of the communications that the Scheme administrators are engaged in. If the case requires the involvement of senior pension personnel or any of the external advisors to the Scheme the Trustee has discretion to determine what the maximum charge will be.

## Guidance when drawing up pension attachment orders

### Pension Benefits

The Court has power to vary a member's pension in favour of a former spouse or civil partner and can instruct the Trustee to pay an amount or a percentage of the member's pension from its start date (or immediately, if the pension is already in payment) to a former spouse or civil partner.

The 1995 Pensions Act did not introduce any new provisions regarding the collection of income tax from pensions subject to an Attachment Order. Therefore, the assessment of income tax must still be made on, and deducted from, the member's full pension entitlement. No deduction for income tax is made from the pension paid to the former spouse or civil partner.

The instructions in the Order will need to be considered to ensure that they fit within the scope of the Scheme rules and also that other relevant considerations such as statutory deductions from pension, such as income tax, can be accommodated. When drawing up the Order it is important that the maximum payment to a former spouse or civil partner does not exceed the member's remaining pension after the deduction of income tax.

As tax deductions can fluctuate, if the percentage quoted is of the net pension, the amount payable to the former spouse or civil partner will also fluctuate. **We normally find it more appropriate if the percentage to be "attached" is therefore assessed as a portion of the member's gross pension so that the amount can be more clearly identified.**

### Pension Increases

Where expressed as a percentage of the member's pension the "attached" pension payable to the former spouse or civil partner will be reviewed annually and increased in the same manner as the member's pension. However, if the pension subject to an Attachment Order is expressed as an amount (e.g. under Scottish law), it will not be increased annually unless the Order specifies that it is to be increased. **If the Order does specify that the pension should be increased, we can only apply the same percentage of increase to the former spouse or civil partner's new pension as would have applied to the members pension; thus any Order should be worded accordingly. (See the Member's Handbook for explanation of Scheme increases.)**

### Tax-free lump sum benefits – commuted from pension

The court has power to instruct the Trustee to pay part / all of any tax-free lump sum commuted from a pension to a former spouse or civil partner.

At pension commencement date members are given the option to commute part of their pension in exchange for a tax-free lump sum. **(Where pension is given up for a lump sum the reduction to the pension is permanent.)** The maximum lump sum that can be taken without incurring a tax charge is governed by HM Revenue & Customs regulations and cannot be accurately assessed until the member's pension commencement date. If the divorcing parties decide to proceed with an Order which includes a provision to earmark a lump sum commuted from pension, we may be able to provide an estimate of the member's allowable tax-free lump sum. The member would need to advise their intended leaving date to enable us to calculate this sum. The figure we provide would be an estimate only, based on the information provided and using current pension details. We cannot provide any pension figures based on projected salary information.

**If the Order is to be subject to such a clause, in addition to the instructions to the Trustee to pay the relevant percentage of the tax-free lump sum to a former spouse or civil partner, it will also be necessary for the member to provide the court with an irrevocable undertaking that they will commute the required percentage from their pension.**

This is because the Order will only require the Trustee to make payment of the tax-free lump sum to the former spouse or civil partner where such a payment applies. The Trustee cannot compel a member to take part of their pension as a tax-free lump sum. Therefore, if this provision is required, the Court will need to make sure the member is compelled to commute the required amount.

**The pension/lump sum benefits subject to an Attachment Order are paid to the former spouse when the member retires. The attachment provisions end when the member dies or, if sooner, when the former spouse remarries or former civil partner enters into a new civil partnership.**

### Lump sum originating from Death Benefit

The position concerning the lump sum death benefit depends on whether the Scheme Trustee has a discretionary power to select beneficiaries, or whether there is a binding nomination system. In the British Airways Pension Schemes the Trustee has absolute power to select beneficiaries and under Section 25C 2(a) of the Act the Trustee can be compelled to pay all or part of any lump sum death benefit to the former spouse.

If a lump sum death benefit is to be the subject of a pension Attachment Order, which is binding on the APS Trustee, an appropriate clause should be included in the Order. There may be inheritance tax due in respect of payments not paid at the Trustee's discretion.

## Preliminary draft of order

We have received various Orders previously which conflict with benefits available from the Scheme or which may be difficult or impossible to apply in practice as intended by the parties. To assist with the drawing up of Attachment Orders further information on the Scheme rules and procedures is shown on page 4. This should be read in conjunction with the Scheme Member's Handbook.

## Additional information

### Additional Voluntary Contributions (AVCs)

AVCs are contributions that can be saved by members on top of their main Scheme contributions. Currently, AVCs can be put towards the tax-free lump sum available to the member at retirement (subject to HM Revenue & Customs' regulations on maximum allowable tax-free lump sums). Alternatively AVCs can be used to purchase a pension annuity of the member's choice or transferred out of the Scheme (in whole or in part) independently of the member's Scheme pension.

If an Attachment Order is received for a member who has a pension in payment that includes an annuity (purchased with AVCs) the annuity will be taken into account when assessing the percentage of pension to pay to the former spouse or civil partner unless it is specifically excluded in the Order.

If the Court Order contains an instruction to the Trustee to pay a lump sum to a former spouse or civil partner at the member's retirement and the member has an AVC account, the instructions in the Order must be specific both in the clause addressed to the Trustee and in the undertaking the member will be required to make to the court.

### Spouse / Civil Partner / Surviving Dependant's Pensions

Where a member has paid higher contributions towards the Adult Survivor's pension cover, an adult survivor's pension is payable from the member's date of death but only to a legal spouse or civil partner. If the member is not legally married or does not have a registered civil partner at their date of death, the Trustee has discretion to pay such a benefit to a surviving dependant (this term is defined in the Scheme rules under 'Pensionable Dependant'). A former spouse or civil partner for whom financial provision is being made could qualify in principle. This is a discretionary benefit so no guarantees can be made as to whether or not such a benefit would be payable at this time. Only at the relevant time (i.e. after the member's death) can the Trustee exercise its discretionary powers and this would be after giving careful consideration to circumstances prevailing at the date of the member's death.

It should be noted that Adult Survivor's pensions are not included in the benefits that can be "attached" under the provisions introduced in the Pension Act of 1995.

*This leaflet provides general guidance to how Attachment Orders can be accommodated within APS. If you have any specific queries not covered above please contact us before issuing any instructions which may conflict with the provisions of the Scheme.*