

English pension orders following a foreign divorce

Unlike in many other jurisdictions, English pension schemes will not act on agreements between parties to share their pension benefits (English or otherwise), nor will they recognise, implement or enforce foreign orders. In short, English schemes require English orders. The English court has power on divorce, or after a foreign divorce, to make orders regarding pensions.

In practice, after a foreign divorce, an English order is most commonly obtained by utilising the Matrimonial and Family Proceedings Act 1984, Part III, provided at least one of the parties has not remarried. The purpose of this Act was to try to alleviate situations whereby inadequate financial provision had been made ancillary to a foreign divorce. Whilst not therefore strictly for the purposes of enforcing foreign orders, it has, however, permitted a system to develop to obtain English pension orders after a foreign divorce.

The parties need to satisfy the English court that it has jurisdiction to entertain the application which, under s15(1) of the Act is primarily achieved by either party being:

- (a) domiciled in England & Wales on the date of the application for leave or so domiciled on the date on which the foreign divorce took effect in the other jurisdiction; or
- (b) habitually resident in England & Wales for one year ending with those dates.

For obvious reasons it is unusual for the parties to be able to satisfy those primary grounds for jurisdiction. However, all is not lost. S15(1A) of the Act includes an additional ground for jurisdiction, being reliance on the EU Maintenance Regulation (Council Regulation (EC) No 4/2009) (EUMR) which governs jurisdiction for “maintenance” claims within the EU. Thus, applications for pension orders under Part III commonly utilise a “mop up” clause at Article 7 of the EUMR being a “forum necessitatis” provision allowing the English court jurisdiction, on an exceptional basis, provided proceedings cannot be brought or are impossible in another Member State and there is a sufficient connection with England. The order required must also be required for the recipient’s ongoing maintenance needs.

Use of the EUMR, via s15(1A), provides a straightforward route to obtain English pension orders in cases involving no other EU Member States. However, the association of the parties with other EU Member States does create potential difficulties with careful consideration required as to the applicability, or not, of Article 7 or indeed the EUMR generally. Specialist advice should be obtained.

However, a word of warning. The future applicability of the EUMR is Brexit dependent. If the UK exits the EU without a deal then the EUMR will cease to have effect in England & Wales meaning parties could no longer rely on Article 7 and there may be no substitute in domestic law or otherwise. Unless the parties are able to rely on the primary grounds for Part III jurisdiction of domicile or habitual residence then enforcing foreign orders against English based pensions may be at best difficult or at worst impossible. Swift action is therefore required prior to Brexit to make use of this procedure