

## QDROs AND ENGLISH PENSIONS: FURTHER THOUGHTS

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At [citation], I wrote about the increasingly familiar scenario where you have an English<sup>1</sup> client who comes across to the United States, transporting with him/her significant pension rights accrued whilst working in England and divorce proceedings then ensue in the United States. My earlier article, to which reference should be made for a full discussion of the problems which may arise, concluded that English pension schemes will only implement pension sharing orders made by an English court and will not implement pensions split and provided for in a qualified domestic relations order (QDRO). One of the solutions identified to this problem was the power of the English court to make a pension sharing order conferred by the Matrimonial and Family Proceedings Act 1984, Part III, which provides for financial relief in England and Wales after an overseas divorce. However, jurisdiction<sup>2</sup> will need to be founded either on the domicile or habitual residence of *either* of the parties. Habitual residence must be for one year prior to the date of the application to the English court<sup>3</sup> and will thus not normally be a viable option. Domicile, which is discussed more fully in the earlier article, might provide a basis of jurisdiction where, for example, the prospective applicant has retained British nationality and intends to return to England on completion of a work contract.

However, there will be many situations where neither habitual residence or domicile will provide a basis for jurisdiction. I suggested in my earlier article that there was in these circumstances a risk that the English pension(s) might fall into something of a black hole. Whilst the other options of addressing the problem suggested in the earlier article remain, there is an additional possibility for establishing the jurisdiction of the English court to make a pension sharing order under Part III of the 1984 Act. In addition to the conventional bases of establishing jurisdiction, namely, domicile and habitual residence, found in section 15(1) of the 1984 Act, it is possible to establish jurisdiction under section 15(1A) of the 1984 Act by reference to the jurisdictional requirements of the EU Maintenance Regulation<sup>4</sup>. The EU Maintenance Regulation contains a comprehensive system of jurisdictional rules that governs all maintenance applications in EU member states, regardless of whether or not the other jurisdiction involved is an EU member state. The primary provision as to jurisdiction in the EU Maintenance Regulation is article 3, which is based on the habitual residence of either party. Alternatively, if the court has jurisdiction to entertain proceedings concerning the status of the person (eg divorce), it will have an ancillary jurisdiction to deal with maintenance,

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<sup>1</sup> For the purposes of this article, it is assumed that the parties are English. England and Wales are a single jurisdiction for family law purposes. Northern Ireland has a separate legislative framework, which is nonetheless broadly comparable to England and Wales. Scotland is, however, a separate family law system, where pension sharing is available.

<sup>2</sup> Matrimonial and Proceedings Act 1984, s 15.

<sup>3</sup> Matrimonial and Proceedings Act 1984, s 15(1)(b).

<sup>4</sup> Council Regulation (EC) 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and co-operation in matters relating to maintenance obligations.

unless the status jurisdiction is based solely on the domicile of one of the parties. One is therefore again thrown back on habitual residence. Article 4 permits the parties to agree (eg in a pre-marital agreement) which state will have jurisdiction to deal with disputes in relation to maintenance. However, there must be a connection between the court chosen and the parties based on habitual residence. Article 5 provides for jurisdiction based on the appearance of a defendant before the court (other than simply to contest jurisdiction) and Article 6 provides a subsidiary jurisdiction (where no court has jurisdiction under Articles 3-5) based on the common domicile of the parties. The remaining jurisdictional provision, Article 7, is the part of the EU Maintenance Regulation which may come to the assistance of those facing the problems under discussion. It provides for jurisdiction on the basis of *forum necessitatis* where jurisdiction has not been established under Article 3-6. The court of a state may, on an exceptional basis, hear the case if the proceedings cannot reasonably be brought or conducted or be impossible in the state to which the dispute is closely connected (in our example, the United States). The dispute must have a sufficient connection with the member state of the court seised (i.e. England based upon the administration of the pension scheme in this jurisdiction). Under the EU Maintenance Regulation, it is only possible to make a pension sharing order which provides for “maintenance”. This term has been widely interpreted<sup>5</sup>. It will therefore be useful to recite in the pension sharing order, where jurisdiction is based on Article 7, that pension sharing order is sought for the maintenance needs of the applicant.

What appeared to be a black hole may not, therefore, be as dark as previously appeared. A potential solution may be available to those facing the problems in question, where jurisdiction cannot be founded in either habitual residence or domicile.

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<sup>5</sup> See, for example, *Van Den Boogaard v Laumen* [1997] 2 FLR 399 where ‘maintenance’ was interpreted as covering lump sums and property adjustment orders for the purpose of maintenance/needs, but not encompassing sharing or compensation.