# What is the position of a spouse's pension in the case of a divorce?

Although the question of whether a person's pension benefits, in cases of divorce, forms part of his/her estate, may be common knowledge to some, to many it is still not clear what the legal position is regarding this issue.

A pension fund / pension benefit, as defined by the Pension Fund Act, 24 of 1956, includes a Pension Fund, Annuity Fund and a Provident Fund.

Perhaps it could be argued that the confusion regarding this issue, is understandable, as before August 1989 a spouse's Pension Fund did not form part of his/her estate. After 1 August 1989 however, the position changed when the Divorce Amendment Act 7 of 1989 came into effect.

Section 7(7) of the Divorce Act provides that, in the determination of the patrimonial benefits to which the parties in any divorce action may be entitled, the pension benefits of a party shall be deemed to be part of his assets.

The effect of the Section is that in any divorce action, a party's pension benefits shall form part of his estate in the determination of the patrimonial benefits to which parties to a divorce action are entitled.

The position regarding the pension benefits in the different marital regimes is therefore as follows:

1. Marriages in community of property

When parties enter into a marriage in community of property, one joint estate is formed. When the marriage dissolves through divorce, each spouse will be entitled to 50% of the joint estate, which joint estate includes the parties pension benefits. An exception would be if the Court made an Order in terms of Section 9 of the Divorce Act to the effect that one party forfeits in favour of the other, either wholly or in part his/her patrimonial benefits due to substantial misconduct. Such forfeiture of patrimonial benefits shall include a spouse's pension benefits.

2. Marriages out of community of property without the accrual systemWhen a marriage out of community of property without the accrual system dissolves

through divorce, each spouse retains his/her own estate. Although the basic rule is that neither spouses have a claim against each other, Section 7 of the Divorce Act provides that the Court may, on application by one of the parties, order that a part of one-spouse assets be transferred to the other spouse. The spouse's assets, which are to be transferred to the other, shall also include his/her pension benefits.

3. Marriages out of community of property with the accrual systemAt the dissolution of a marriage out of community of property with the accrual system through a divorce, a redistribution of assets will be done according to a prescribed formula, which stipulates that the spouse whose accrual during the marriage was smaller is entitled to half of the difference of the accruals between the spouse's estates. The accrual is calculated by deducting the beginning value of the estate from the end value of the estate. An example of the calculation is given elsewhere in this newsletter. A spouse's pension benefits will therefore in this case once again be taken into account when the accrual is calculated.

It is important to note that in terms of Section 1 of the Divorce Act, a spouse is only entitled to the other spouse pension benefit as at date of divorce. It therefore means that a spouse is not automatically entitled to any interest accrued to the other spouse pension benefits. It also means by implication that any benefits of whatever nature including the interest accrued upon a pension benefit, does not form part of a person's estate for the purposes of divorce.

The parties are however entitled to entered into an agreement between themselves regarding the interest accrued to a spouse's pension benefit.

It should also be born in mind that in terms of Section 37A of the Pension Fund Act 24 of 1956, a person's pension benefits are taxable. The present legal position is that the tax payable on the pension benefits of a spouse who is entitled to the benefits (member spouse), is deducted from the total amount of the pension benefits, meaning that the non-member spouse will receive his share of the pension interest, tax free.

The parties are in this instance also entitled to enter into an agreement, which provides that the tax payable on that part of the pension benefits, to which the non-members spouse is entitled, shall be recovered from such spouse.