

1st April 2009

LEGAL UPDATE FAW 5/2009: WHEN IS A DIVORCE ORDER BINDING ON THE FUND?

For any claim to an entitlement to a portion of a member's pension interest, we will require a copy of the divorce order.

The divorce order is binding on the fund if **all three** the following requirements are met:

- (i) It must be clear what percentage of the pension interest or what amount is due or assigned to the non-member spouse.

Where reference is made to a division of the member's *provident* interest or pension *fund*, this requirement is not met.

Where the order states that the non-member spouse is entitled to 50% of the member's pension interest, less the tax thereon, the administrator will have to calculate the amount due to the non-member spouse as follows: apply for a tax directive in respect of 50% of the member's pension interest. On receipt of this directive, deduct the tax as reflected on the directive from 50% of the member's pension interest. The non-member spouse will be entitled to the balance of the 50% less the tax. The administrator will then have to cancel the tax directive and apply for a tax directive on the amount due to the non-member spouse.

Administrator action		Amount in question	Tax applicable
1	Apply for tax directive	50% of interest = R100 000	R40 000
2	Reduce entitlement as per directive with	R40 000	
3	Non-member spouse entitled to	R60 000	
4	Cancel original tax directive		(R40 000)
5	Apply for tax directive on non-member spouse benefit	R60 000	R15 000
6	Pay tax to SARS	R15 000	

- (ii) The fund must be named in the order - Pension Funds Amendment Act No. 11 of 2007.

The fund must be named in or be identifiable from the order - Financial Services Laws General Amendment Act No. 22 of 200

Pension Funds Amendment Act No. 11 of 2007		Acceptable or not
Name in divorce order	Tight Screws	✘
Correct name	Johnny Jacks (Pty) Ltd t/a Tight Screw	
Financial Services Laws General Amendment Act No. 22 of 2008		Acceptable or not
Name in divorce order	Tight Screws	✓
Correct name	Johnny Jacks (Pty) Ltd t/a Tight Screw	

Whereas the Pension Funds Amendment Act No. 11 of 2007, which came into effect on 13 September 2007, required that a fund be named in a divorce order before a fund can make a deduction in favour of a non-member spouse, the Financial Services Laws General Amendment Act No. 22 of 2008, the relevant section of which came into effect on 1 November 2008, requires that the fund be named in or identifiable from the divorce order.

In respect of divorce orders granted from 13 September 2007 until 31 October 2008, only divorce orders that correctly reflect the name of the fund will be considered to meet this requirement. This implies that the name of the fund must be 100% correct. Refer in this regard to par. 5.14 of the determination of the Pension Funds Adjudicator in the matter of *L Dossou v Cape Municipal Pension Fund*.

In respect of divorce orders granted prior to 13 September 2007 and from 1 November 2008, this requirement will be met if the fund is either named in or identifiable from the order.

Time line	The fund can deduct for the non-member spouse if:
Previously up to prior 13 September 2007	The fund is named or identifiable from the order
13 September 2009 to 31 October 2008	The fund name is stated correctly 100%
After 31 October 2008	The fund is named or identifiable from the order

In general, where reference is made to 'the funds to which the member belong', this requirement will not be met. If however the divorce order refers to 'the fund to which the member belongs as a result of his employment with ABC', then the fund may be identifiable. Where the member belongs to more than one fund, albeit a hybrid, as a result of his employment with ABC, it is suggested that the administrator asks the member to confirm in writing which funds were intended.

In her determination in the matter of *P A Barnard v Municipal Gratuity Fund*, the Pension Funds Adjudicator explored the meaning of the word "identifiable" and remarked as follows in paragraph 50: *The entity that is in a better position to identify or to conduct an investigation to identify a fund is the board of trustees of the fund that was served with the divorce order.* Although this might apply in the case where the divorce order was served on a fund, it does not hold true in the instance where a divorce orders is served on an administrator and not the fund.

The various business units in Momentum have agreed that in the event of the fund not being identifiable from a divorce order that has been served on the administrator, the following will apply:

- If the letter accompanying the divorce order identifies the fund, the requirement that the fund be *named in or identifiable from the decree* shall be deemed to have been met.
- The administrator will send a letter to the party who submitted the divorce order setting out the reason/s why the order is not binding on the fund.
- If in response to that letter the name of the fund concerned is provided by the non-member spouse or their attorney, the administrator will also obtain written confirmation from the member or their attorney to that effect, whereafter the requirement that the fund be *named in or identifiable from the decree* shall be deemed to have been met.

(iii) It must be specifically ordered that the fund should pay the amount concerned to the non-member spouse.

Where the member is ordered to make payment to the non-member spouse, the fund is not in a position to make a deduction in favour of the non-member spouse.

Where the order only refers to the non-member spouse's entitlement to a portion of the member's pension interest, but no reference is made to payment, one cannot assume that it is implied that the fund has to effect payment. It may very well be that it was the parties' intention that the payment be made to the member, and only once the benefit is paid to the member.

Where the divorce order has a reference to the effect that payment has to be made in terms of the provisions of section 37D of the Pension Funds Act or section 7(8)(a) of the Divorce Act, or the fund is ordered to make an endorsement in its records in accordance with section 7(8)(a) of the Divorce Act, and provided the other 2 requirements referred to above have been met, the fund can make a deduction in favour of the non-member spouse. Refer in this regard to the determination of the Pension Funds Adjudicator in the matters of *Gericke RB v Billiton Pension Fund & Sentinel Mining Industry Retirement Fund* and *P A Barnard v Municipal Gratuity Fund*.

If the order is not binding on the fund, the member and/or the non-member spouse have to be advised accordingly. It should be noted that a defective court order cannot be amended by an agreement between the parties – they will have to go back to court to get an amended court order.

Please also note that the date of the amended order will not have an influence on the amount due to the non-member spouse, but will determine the accrual date. For example, if the parties got divorced on 22 September 2008, but the divorce order was defective and an amended order that is binding on the fund is only obtained on 12 December 2008, the pension interest to be divided will be the member's resignation benefit as at 22 September 2008. The accrual date however will be 12 December 2008.

Suggested simplified wording for a binding divorce order

The non-member spouse is entitled to 50% of the member's pension interest in the ABC Provident Fund. The ABC Provident Fund is ordered to pay this amount to the non-member spouse.

Hettie Joubert
Legal adviser at FundsAtWork
Momentum

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