

Legal update

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Different marital regimes and their impact on retirement funds

Summary

This document looks at the different types of marital regimes and their impact on pension benefits as it relates to a spouse's pension, divorce and the death of a member and can be summarised as follows:

Type of Benefit	Marital Regime that should be taken into account
Spouse's pension	Depends on the definition of "eligible spouse" as per fund rules
Divorce	Civil marriage (in community of property & out of community of property with accrual) , Customary marriage, Civil union, Muslim marriage
Section 37C – death distribution	Civil marriage, Customary marriage, Civil union, Muslim marriage, life partner, co-habitee, domestic partnership, marriage according to tenets of any religion

A detailed explanation of the various marital regimes and the impact on retirement benefits is set out below.

A. Types of Marriages

1. Civil marriage

A civil marriage is a marriage that is entered into in terms of the Marriage Act. The 3 types of civil marriages are: (1) marriages in community of property; (2) marriages out of community of property without accrual; and (3) marriages out of community of property with accrual.

1.1 Marriages in community of property

Under the common law, a marriage is in community of property unless it is specifically concluded in terms of an antenuptial contract. Unless parties have agreed to exclude community of profit and loss, the patrimonial regime applicable to the marriage is presumed to be a marriage in community of property.

A joint estate is formed between the parties. Assets are shared equally and the parties are jointly and severally liable for all debts incurred by either party. Although each party has a right of disposal over the assets, consent (verbal or written) may be required in certain instances.

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1.2 Marriages out of community of property without the accrual system

This marriage is concluded in terms of an antenuptial contract where community of property and profit and loss is excluded. Each party has full right of disposal over their own assets and does not need consent from the other party. Basically, this regime states “what’s yours is yours and what’s mine is mine”. This type of marriage regime is mostly chosen by parties who have substantial estates or incomes at the time of marriage.

In terms of Islamic law, a Muslim marriage (further discussed in point 5 below) is deemed to be a marriage out of community of property without the accrual system. This is the default option, unlike in civil law where community of property is the default option.

1.3 Marriages out of community of property with accrual

The accrual system ensures that both parties in a marriage are entitled to a fair share of the estate once the marriage comes to an end, through divorce or death of a spouse. This type of marriage is a popular choice for couples financially established at the time of marriage. “Accrual” implies the sharing of the profits generated during the marriage if the marriage comes to an end. The estate values are then determined separately, and the larger estate must transfer half the net difference to the smaller estate.

2. Customary marriage

A customary marriage is in accordance with traditional customs and culture of South Africa’s indigenous people. Customary marriages are legally recognised in terms of the Recognition of Customary Marriages Act (“RCMA”), which came into effect on 15 November 2000.

The RCMA provides for the recognition of customary marriages concluded before its commencement, and sets out the requirements for the validity of customary marriages entered into after the commencement of the RCMA. Registration is not a requirement for a valid customary marriage, but the RCMA provides that there is a duty on the spouses to ensure that their marriage is registered.

The RCMA allows a man in a customary marriage to enter into another customary marriage with another woman, or to enter into a civil marriage with that same customary marriage spouse. He cannot however enter into a civil marriage with another woman. A man who entered into a civil marriage first, can also not enter into a customary marriage thereafter. This can best be illustrated by way of the following example: a man, M, entered into a customary marriage with a woman, W1. M can enter into another customary, with a second woman, W2. M can also enter into a civil marriage with W1. M cannot however enter into a civil marriage with W2. If M enters into a civil marriage with W1, he cannot thereafter enter into either a customary or civil marriage with anyone else.

Customary law applies to the patrimonial consequences of a customary marriage concluded prior to the commencement of the RCMA. A customary marriage concluded after the commencement of the RCMA without an antenuptial contract, and where neither of the parties is party to another customary marriage, is a marriage in community of property.

3. “Common law” marriage

When a man and a woman live together “as husband and wife” without observing the formalities of a legal marriage, their relationship is known in legal terms as 'co-habitation', and it has also been referred to as "living together" or "domestic partnership".

There are many couples who live together but have no intention of getting married. Does living together for a certain period of time mean that the parties are married in terms of the common law? After a long debate over many years, the Constitutional Court in *Volks NO v Robinson and Others*

confirmed that the answer is “No”. There is no common law marriage in South African law and the duration that a couple live together does not turn into a default marriage.

At the dissolution of the relationship the assets or any obligations are determined or distributed based on the arrangement that the parties used during their relationship.

What about assets accumulated during the relationship? If the parties can prove that a domestic partnership exists between them, the assets of the partnership are deemed to be jointly owned by the parties and debts will be the joint liability of the parties. A domestic partnership is where parties live together outside of marriage in a relationship which is similar to, or has most of the characteristics of a marriage. The parties can also enter into a universal partnership where they agree to put their property together. Where parties cohabit but never marry, a tacit universal partnership may be found to exist. In 2012, the Supreme Court of Appeal in the case of *Butters v Mncora* confirmed the following three essential elements of a partnership:

- 1) each of the parties must bring something into the partnership or bind themselves to bring something into it, whether it be money or labour or skill;
- 2) the partnership business should be carried on for the joint benefit of the parties; and
- 3) the object should be to make a profit.

4. Civil unions

The Civil Union Act (“CUA”), effective from 30 November 2006, provides for the recognition of civil unions between certain classes of persons, such as same-sex partners.

The CUA places civil unions in the same legally recognised category as civil marriages in terms of the Marriage Act and provides that any reference to marriage in any other law, including the common law, is also a reference to a civil union.

This provision has the following consequences:

- (a) both the Divorce Act and the Matrimonial Property Act apply to civil unions;
- (b) parties to a civil union may institute divorce proceedings against each other in terms of the Divorce Act; and
- (c) the same patrimonial consequences applicable to civil marriages in terms of the common law, the Divorce Act and the Matrimonial Property Act apply to civil unions.

5. Muslim marriage

Muslim marriages are not yet legally recognised. The Muslim Marriages Bill is currently in parliament and awaits proclamation. The constitutional court has made every effort in terms of the bill of rights, wherever possible, to extend the rights of Muslim spouses so that they have the same or similar rights to parties in a civil or customary union. Even though the Muslim Marriages Bill has not yet been enacted, there is precedent set by the courts that Muslim spouses can rely on to claim maintenance and other proprietary relief. In the 2004 Constitutional Court case of *Daniels v Campbell No and Others* it was confirmed that parties to a Muslim “marriage” were to be considered spouses because they were married, albeit that their marriages were not solemnised under the Marriage Act and not recognised as valid under south African law. The Constitutional Court also confirmed the position of women who are party to a polygamous marriage concluded in terms of the Muslim law, stating that they are deemed to be spouses for purposes of inheriting or claiming from the deceased estate where their deceased husband died without leaving a will.

6. Marriages under other religions not legally recognised

Hindu, Tamil, Chinese and other foreign marriages involving South African citizens are not legally recognised in South Africa and are of relevance for this document only in so far as the distribution of lump sum death benefits are concerned and will be dealt with in paragraph B below.

B. Impact on retirement benefits

In terms of the Pension Funds Act ("PFA"):

- (i) A spouse for the purposes of a lump sum benefit distributed under section 37C, is defined as a *person who is the permanent life partner or spouse or civil union partner of a member in accordance with the Marriage Act, the Recognition of Customary Marriages Act, the Civil Union Act, or the tenets of a religion.*

This definition includes all of the legally recognised types of marriages discussed above. It does not include common law partners and also the definition is flawed in the sense that there is no legislation dealing with a permanent life partner.

- (ii) A dependant, in relation to a member, is defined as -

- (a) *a person in respect of whom the member is legally liable for maintenance;*
- (b) *a person in respect of whom the member is not legally liable for maintenance, if such person -*
- (i) *was, in the opinion of the board, upon the death of the member in fact dependent on the member for maintenance;*
- (ii) *is the spouse of the member;*
- (iii) *is a child of the member, including a posthumous child, an adopted child and a child born out of wedlock;*
- (c) *a person in respect of whom the member would have become legally liable for maintenance, had the member not died.*

The above definition includes dependants in respect of whom the member is legally liable for maintenance, for example minor children and a spouse who rely on the member for the necessities of life. In terms of paragraph (b)(i) above, a dependant could include a "common law" spouse. In terms of paragraph (c) above, the dependency of a fiancé, for example, may be considered.

1. Spouse's pension

A spouse's pension may be payable to a spouse depending on whether such spouse qualifies as 'eligible spouse' in terms of the fund's rules.

Fund rules may state that you must be married to the same person at date of retirement and date of death for them to qualify for a spouse's pension. This prevents so-called 'death-bed marriages', where a pensioner marries someone much younger than them after they have already retired and on their death the fund realises that there is a much younger spouse to whom they have a liability to pay a pension for many years.

2. Divorce

Current divorce law provides that a non-member spouse in a divorce action may share in the "pension interest" of the member spouse.

With regard to Muslim marriages, the Pension Funds Adjudicator in the case of *Tryron TY v Nedgroup Defined Contribution Pension and Provident Funds and Another* said that it is possible for

a spouse that is married in terms of Islamic law only to share in the other spouse's pension interest on divorce provided such order has been made an order of the court.

This was also confirmed in the judgment delivered on 29 January 2015 in the case of *Rose F v Rose F and Others* where the judge confirmed that *a marriage as contemplated by the Divorce Act, must be considered or interpreted to include a Muslim marriage.*

For a pension or provident fund, the "pension interest" is an amount equal to the withdrawal benefit which would have become payable in terms of the rules of the fund if the member had resigned on the date of the divorce. For a retirement annuity fund, the "pension interest" is equal to the sum of all the contributions, plus simple interest at the prescribed rate of interest applicable on the date of divorce. The Pension Funds Act limits the annual simple interest payable to the fund return on the pension interest assigned to the non-member spouse.

Upon divorce, the court determines the value of each spouse's assets and the pension interest, as defined, will be included if the parties included the pension interest in their divorce settlement agreement. For further particulars in this regard you are referred to Legal Update 3-2012.

2.1 Marriages in community of property

Each spouse will be entitled to 50% of the joint estate, which joint estate includes the parties' pension interests as well. The only exception would be if the Court made an order in terms of Section 9 of the Divorce Act that one party forfeits in favour of the other, either wholly or partially, their patrimonial benefits due to severe misconduct during the divorce.

2.2. Marriages out of community of property with the accrual system

A redistribution of assets will be done according to a prescribed formula. This means 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. A spouse's pension benefits will therefore be taken into account when the accrual is calculated.

2.3. Marriages out of community of property without the accrual system

2.3.1 Before 1 November 1984: Each spouse will keep their own estate. Neither spouse will have a claim against the other. However, section 7(3) of the Divorce Act provides that a Court may on application by one of the parties, order that a part of one-spouse's assets be transferred to the other spouse. The spouse's assets which are to be transferred to the other, may then also include their pension benefits. The parties can also agree to a sharing of their pension interests in a settlement agreement.

2.3.2 Before 2 December 1988: Black marriages that were entered into under section 22(6) of the Black Administration Act before that section was repealed are deemed to be marriages out of community of property without accrual. For these marriages, each spouse will keep their own estate. Neither spouse will have a claim against the other. However, section 7(3) of the Divorce Act provides that a Court may on application by one of the parties, order that a part of one-spouse's assets be transferred to the other spouse. The spouse's assets which are to be transferred to the other, may then also include their pension benefits. The parties can also agree to a sharing of their pension interests in a settlement agreement.

2.3.2 After 1 November 1984: Each spouse will keep their own estate. Neither spouse will have a claim against the other.

3. Section 37C – Distribution of death benefits

The distribution of lump sum benefits payable on the death of a member of a fund is regulated by section 37C of the Pension Funds Act (“the PFA”). The section provides that death benefits do not form part of the deceased's estate but has to be distributed in line with the provisions of the PFA.

The definition of “dependant” in the PFA highlights the three dependant classes –

- 1) a legal dependant,
- 2) a factual dependant, and
- 3) a future dependant.

A cohabiting partner could qualify as a “factual dependant”. A person can qualify as a factual dependant even if the deceased fund member owed her no duty of support, but if the deceased in some way contributed to that person's maintenance. The person claiming to be a factual dependant will have to prove she was dependent on the deceased at the time of his death.

The 2006 case of *N G Hlathi v University of Fort Hare Retirement Fund & Others* dealt with the distribution of death benefits under section 37C and the determination of a cohabitee's legal status. A large part of the death benefit was awarded to the deceased member's permanent cohabitee. The complainant was the deceased's mother who argued that the benefit should have been paid to her instead.

The Adjudicator held that the cohabitee could not qualify as a spouse, but could qualify as a factual dependant and that no dominant servient relationship was necessary. It was held that the trustees had acted reasonably in distributing the death benefit and the complaint was dismissed.

Subsequently the PFA was amended to make provision for the definition of spouse to include permanent life partners.

In the case of a customary marriage, should the board decide to treat a person as a customary spouse, it needs to establish,

- (i) that a customary union was indeed concluded and,
- (ii) that the union continued to subsist at the time of the death of the member.

Where there is more than one spouse, the trustees must pay the benefit to the dependants in such proportions as they deem equitable. This means that each spouse may receive a portion of the benefit, or that one of the spouses may receive the entire benefit, but the trustees have the discretion to decide what proportion each spouse will actually receive. They will exercise this discretion after a full investigation into the matter and they must apply their minds to the facts at hand.

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