

## Legal update

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### Divorce order issues relating to a member's pension interest

This document deals with various divorce order issues relating to a member's pension interest, including the relevant legislative provisions, the requirements for a divorce order to be binding on a retirement fund, suggested simplified wording for a binding divorce order, providing member information to a third party and the taxation of divorce order amounts payable after 1 March 2012. Previous Legal Updates relating to this and similar issues are Legal Update 6-2011: Divorce issues updated, Legal Update 5-2014: Changes to the Pension Funds Act: Payment of benefits - paragraph 5: Deductions allowed from a pension benefit, Legal Update 5-2015: Different marital regimes and their impact on retirement funds and Legal Update 6-2015: Divorce order issues relating to a member's pension interest.

#### 1. DIVORCE ACT

##### 1.1 Section 7(7)

This section provides that the pension interests of a member will be considered to be part of their assets in the determination of the patrimonial benefits to which the parties to a divorce action may be entitled. This amount has to be reduced by previous awards involving the pension interest. This does not apply to a divorce action in respect of a marriage out of community of property entered into on or after 1 November 1984, in terms of an antenuptial contract by which community of property, community of profit and loss and the accrual system are excluded.

##### 1.2 Pension interest

"Pension interest" is defined as follows:

- (a) in respect of a member of a pension fund - the benefits to which the member would have been entitled in terms of the rules of the fund if their membership of the fund would have been terminated on the date of the divorce on account of their resignation from their office; and
- (b) in respect of a member of a retirement annuity fund - the total amount of the member's contributions to the fund up to the date of the divorce, together with a total amount of annual simple interest on those contributions up to that date, calculated at the same rate as the rate prescribed as at that date by the Minister of Justice in terms of section 1(2) of the Prescribed Rate of Interest Act, 1975. The interest rates changed as follows:

1/10/1993 – 31/07/2014	1/8/2014 – 7/1/2016	8/1/2016 – 29/2/2016	1/3/2016 – 30/4/2016	1/5/2016 – 31/8/2017	1/9/2017 – 30/4/2018	1/5/2018- 31/12/2018	1/01/2019- date
15,5%	9%	9,75%	10,25%	10,50%	10,25% pa	10% pa	10,25% pa

Looking at this definition regarding a pension fund, it appears to apply only when the member *is* a member of the fund at the date of divorce and means the benefit to which the member . . . *would have been entitled* . . . “if their membership of the fund would have been terminated on the date of the divorce on account of their resignation from their office”. Where the member has already become entitled to the benefits and has already left their employment before the date of the divorce, the formula based on benefits to which they “would have been entitled” in the event of a resignation, can strictly speaking no longer apply. The hypothetical event upon which this formula was intended to be based is a resignation “on the date of the divorce” and the calculation was intended to be made on this basis when the pension benefits eventually accrued to the member at some time after the divorce. See in this regard *Elesang v PPC Lime Ltd & others* [2007] JOL 18998 (NC), par 9 and 11.

A distinction must be drawn between a pension *interest* which has not yet accrued and one which has accrued and has in the process been converted into a pension *benefit*. In the case of a pension benefit the accrued right would form part of the joint estate (see *De Kock v Jacobson & another* 1999 (4) SA 346 (W), at 349H, *Sempapalele v Sempapalele & another*, 2001 (2) SA 306 (O), at 311C and *Maharaj v Maharaj & others*, 2002 (2) SA 648 (D), at 650–651).

### 1.3 Section 7(8)

This section provides as follows:

- “(8) Notwithstanding the provisions of any other law or of the rules of any pension fund—
- (a) the court granting a decree of divorce in respect of a member of such a fund, may make an order that—
    - (i) any part of the pension interest of that member which, by virtue of subsection (7), is due or assigned to the other party to the divorce action concerned, shall be paid by that fund to that other party when any pension benefits accrue in respect of that member;
    - (ii) the registrar of the court in question forthwith notify the fund concerned that an endorsement be made in the records of that fund that that part of the pension interest concerned is so payable to that other party and that the administrator of the pension fund furnish proof of such endorsement to the registrar, in writing, within one month of receipt of such notification;
  - (b) any law which applies in relation to the reduction, assignment, transfer, cession, pledge, hypothecation or attachment of the pension benefits, or any right in respect thereof, in that fund, shall apply *mutatis mutandis* with regard to the right of that other party in respect of that part of the pension interest concerned.”

## 2. PENSION FUNDS ACT

### 2.1 Section 37D

Section 37D of the Pension Funds Act, as amended in 2013, provides as follows with regards to divorce:

#### “37D. Fund may make certain deductions from pension benefits.

- (1) A registered fund may—

.....

- (d) deduct from a member's or deferred pensioner's benefit, member's interest or minimum individual reserve, or the capital value of a pensioner's interest after retirement, as the case may be—
    - (i) any amount assigned from such benefit or individual reserve to a non-member spouse in terms of a decree granted under section 7(8)(a) of the Divorce Act, 1979 (Act No. 70 of 1979) or in terms of any order made by a court in respect of the division of assets of a marriage under Islamic law pursuant to its dissolution;
    - (iA) any amount payable in terms of a maintenance order as defined in section 1 of the Maintenance Act, 1998 (Act No. 99 of 1998); and
  - (e) deduct from a member's or deferred pensioner's benefit, interest or minimum individual reserve, as the case may be, employees' tax required to be deducted or withheld in terms of the Fourth Schedule to the Income Tax Act, 1962 (Act No. 58 of 1962), as a result of the deduction referred to in this subsection.
- (2) .....
- (3) (a) Any amount that may be deducted in terms of subsection (1)(d) or (6) may only be deducted after the amount of member's or deferred pensioner's benefit or minimum individual reserve available has been reduced by any loan amount or guarantee amount referred to in subsection (1)(a), where such a loan or guarantee was granted prior to the granting of the court orders, irrespective of the fact that that amount is due and payable or not: Provided that the aggregate of all amounts deducted in terms of this subsection may not exceed the member's pension interest available at any given time.
  - (b) In the event that more than one of the court orders referred to in subsection (1)(d) provides for the deduction of amounts from a member's benefit or minimum individual reserve, as the case may be, at the same time, the court orders must be dealt with in accordance with the following hierarchy—
    - (i) any maintenance order referred to in subsection (1)(d)(iA);
    - (ii) any decrees of divorce or for the dissolution of a customary marriage.
- (4) (a) For purposes of section 7(8)(a) of the Divorce Act, 1979 (Act No. 70 of 1979), the portion of the pension interest assigned to the non-member spouse in terms of a decree of divorce or decree for the dissolution of a customary marriage is deemed to accrue to the member on the date on which the decree of divorce or decree for the dissolution of a customary marriage is granted, and, on the written submission of the court order by the non-member spouse—
    - (i) must be deducted by –
      - (aa) the pension fund or pension funds named in or identifiable from the decree;
      - (bb) the pension fund or pension funds to which the pension fund referred to in item (aa) transferred the pension interest referred to in the decree;

- (ii) must be deducted on the date on which an election is made or, if no election is made within the period referred to in paragraph (b)(ii), the date on which that period expires; and
  - (iii) must reduce the member's accrued benefits or minimum individual reserve at the date of the decree.
- (b)
  - (i) The pension fund must, within 45 days of the submission of the court order by the non-member spouse, request the non-member spouse to elect if the amount to be deducted must be paid directly to him or her, or if it must be transferred to a pension fund on his or her behalf.
  - (ii) The non-member spouse must within 120 days of being requested to make an election—
    - (aa) inform the pension fund of how the amount referred to in subparagraph (i) must be dealt with; and
    - (bb) if he or she elects that the amount must be paid to him or her directly, provide the pension fund with the details of how that payment must be effected; or
    - (cc) if he or she elects that the amount must be transferred to a pension fund on his or her behalf, provide the pension fund with the details of that pension fund.
  - (iii) The pension fund must pay or transfer the amount within 60 days of being informed of how the amount must be dealt with in accordance with the non-member spouse's election.
  - (iv) In the event that the non-member spouse fails to make an election or identify the pension fund to which the amount should be transferred within the period referred to in subparagraph (ii), the pension fund must pay the amount directly to the non-member spouse within 30 days of the expiry of that period.
  - (v) Despite subparagraph (iv), in the event that the pension fund cannot reasonably ascertain how the payment to the non-member spouse must be effected, the pension fund must retain the amount and any fund return referred to in paragraph (c)(ii) in the pension fund until such time as details of how that payment must be effected is made available to the pension fund by the member, the non-member spouse or any other person.
- (c) A non-member spouse—
  - (i) is not a member or beneficiary in relation to the pension fund; and
  - (ii) is entitled to the accrual of fund return from the date of the deduction contemplated in paragraph (a)(ii) until payment or transfer thereof, but not to any other interest or growth.
- (d) Any portion of the pension interest assigned to the non-member spouse in terms of a decree of divorce or decree for the dissolution of a customary marriage granted prior to 13 September 2007 are for purposes of any law other than the Income Tax Act, 1962, including, but not limited to, section 7(8)(a) of the Divorce Act, 1979, deemed to have accrued to the member on

13 September 2007 and must be paid or transferred in accordance with paragraphs (a) and (b).

- (5) Despite paragraph (b) of the definition of “pension interest” in section 1(1) of the Divorce Act, 1979, the total amount of annual simple interest payable in terms of the definition may not exceed the fund return on the pension interest assigned to the non-member spouse in terms of a decree granted in terms of section 7(8)(a) of the Divorce Act, 1979.
- (6) Despite paragraph (b) of the definition of “pension interest” in section 1(1) of the Divorce Act, 1979, the portion of the pension interest of a member or a deferred pensioner of a pension preservation fund or provident preservation fund, that is assigned to a non-member spouse, refers to the equivalent portion of the benefits to which that member would have been entitled to in terms of the rules of the fund if his or her membership of the fund terminated, or the member or the deferred pensioner retired on the date on which the decree was granted.”

Even though the Divorce Act does not make any reference to the entitlement of a non-member spouse of a deferred pensioner to a portion of their pension interest, the Pension Funds Act has been amended in 2014 to allow for divorce order deductions to be made from either a member's or deferred pensioner's benefit or a member's interest or minimum individual reserve, or the capital value of a pensioner's pension after retirement. It is debatable whether such an expansion is enforceable.

## 2.2 Order of deductions

Section 37D(3) of the Pension Funds Act provides for the following order of deductions where there are more than one possible deduction to be made against a member's benefit at the same time:

1. Home loan / guarantee granted by the fund.

Section 37D(3)(a) of the Pension Funds Act provides that a divorce order deduction may only be made after the amount of the member's or deferred pensioner's benefit or minimum individual reserve available has been reduced by an outstanding home loan or guarantee if the home loan or guarantee was granted prior to the granting of the divorce order “irrespective of the fact that that amount is due and payable or not”. In the 2011, the Pension Funds Adjudicator, in the case of *Farrell L v Cape Municipal Pension Fund & Another*, confirmed the following: “The deduction of an outstanding housing loan from pension interest is notional. It does not mean that the housing loan is settled immediately after the deduction thereof, as no actual cash is paid to the creditor. What it means is that the outstanding loan is considered by the fund when computing the available pension interest and it is acknowledged that in the event that the member spouse leaves employment at that time, he shall be entitled to his withdrawal benefit less the outstanding housing loan balance.” The member's pension interest in this case is equal to his fund credit, less the outstanding housing loan.

2. Maintenance order
3. Divorce order.

### 2.3 Periods applicable with regards to divorce orders

Section 37D(4)(b) of the Pension Funds Act stipulates the following periods applicable to divorce orders:

1. Within **45 days** of the submission of the court order to the fund, the fund must request the non-member spouse to elect if the amount to be deducted must be paid directly to them or if it must be transferred to a pension fund on their behalf.
2. Within **120 days** of being requested to make an election, the non-member spouse must inform the fund of their election. If they elect that the amount must be paid to them directly, they must provide the fund with the details of how payment must be made. If they elect that the amount must be transferred to a pension fund on their behalf, they must provide the fund with the details of that pension fund.
3. If the non-member spouse makes an election, the fund must within **60 days** of being informed of how the amount must be dealt with, pay or transfer the amount.
4. If the non-member spouse does not make an election, the fund must within **30 days** of the expiry of the 120 day period, pay the amount directly to the non-member spouse.
5. If the fund cannot reasonably ascertain how the payment to the non-member spouse must be effected, it must retain the amount and the fund return on the amount in the fund until details of how the payment must be effected is provided to the fund by the member, the non-member spouse or any other person.

### 2.4 Interest/fund return payable to non-member spouse

Section 37D(4)(c) of the Pension Funds Act clearly states that the non-member spouse is not a member or beneficiary in relation to the fund. The non-member spouse is only entitled to fund return (interest) on their benefit from the date of the deduction, which is the date on which an election is made or, if no election is made within the 120 day period referred to in paragraph 2 above, the date on which that 120 day period expires. The non-member spouse is not entitled to any other interest or growth.

The Pension Funds Adjudicator's has confirmed that the non-member spouse is not entitled to any investment returns or growth on their portion of the pension interest after the date of the divorce. Looking at the definition of pension interest above, it is clear that it does not include any amount which accrues to a member spouse after the divorce.

### 2.5 Preservation funds

The Pension Funds Act has been amended with effect from 1 November 2008 to provide in section 37D(6) that the division of pension interest also applies in respect of preservation funds. For this purpose, pension interest refers to the benefit the member would have received if their membership of the preservation fund terminated on the date of the divorce.

### 2.6 Subsequent transfer to another fund prior to giving effect to a divorce order

The provisions of section 37D(4)(a)(i)(bb) allows for the deduction of pension interest in terms of a binding divorce order by *the pension fund or pension funds to which the pension fund referred to in item (aa) transferred the pension interest referred to in the decree*. This will apply in circumstances where the order is made against Fund A while the member belongs to Fund A, and then the member transfers to Fund B, without Fund A effecting the deduction. Fund B must then deduct the pension interest and make payment to the non-member spouse. This would apply to both section 14 transfers and a transfer based on a recognition of transfer (ROT).

## 2.7 Foreign divorcee must seek SA court order

A member who has emigrated and subsequently divorces in that country must apply to a South African court to have the divorce order recognised and enforced in South Africa. This is the case if the non-member wants to claim a share of the former spouse's retirement savings.

In 2011, the Pension Funds Adjudicator, in the case of *Edgar v Momentum Retirement Annuity Fund and others*, ruled that the place of residence plays an important role in deciding whether or not to recognise the judgement of the foreign court. This is because the "common" law procedure to have such a judgement recognised and enforced in South Africa is to bring an action in a South African court to make the foreign judgement its own.

## 3. WHAT EXACTLY IS PENSION INTEREST?

Looking at the definition of "pension interest" in the Divorce Act, read together with sections 37D(5) and (6) of the Pension Funds Act, the pension interest to which a non-member spouse can lay claim can be summarised as follows:

1. Pension and Provident fund (for both defined benefit and defined contributions funds): the benefit to which the member would have been entitled under the fund rules if he resigned on the date of divorce.
2. Retirement annuity fund: the total of the member's contributions to the fund up to the date of divorce, plus simple annual interest at the prescribed rate, which is currently 9%, limited to the fund return on the pension interest assigned to the non-member spouse.
3. Preservation fund: the benefit to which the member or deferred pensioner would have been entitled under the fund rules if his membership of the fund terminated on the date of divorce.

## 4. THE IMPACT OF THE MARITAL SYSTEM ON A DIVORCE ORDER

Refer to Legal Update 5-2015 for a detailed discussion of the different marital regimes and their impact on retirement funds. The position can be summarised as follows:

Marital regime	Non-member spouse entitled to portion of member's pension interest?
In community of property	Yes
Out of community of property,	
- with accrual	Yes
- without accrual	No

## 5. PROVISION OF MEMBER INFORMATION TO A THIRD PARTY

A board of a fund owes a fiduciary duty not only towards the members of the fund, but also to its beneficiaries. Where a divorce order grants a non-member spouse a right to share in the member's pension interest, that non-member spouse is entitled to know the value of the total pension interest at a specific date. It would then be fair and reasonable to oblige the fund, in fulfilling its duty of good faith, to disclose to the non-member spouse such information as is reasonably required by them for the exercise or protection of any right. The failure or refusal to do so without appropriate justification, will amount to an improper exercise of the fund's powers and / or maladministration by the board of the fund. However, a non-member spouse is not entitled to other information such as the value of the

member's entire benefit (if that is different from the pension interest) or the member's insurance cover or contribution rate. That still remains confidential.

In establishing whether a non-member spouse is entitled to the information requested, the following questions must be answered:

- Does the non-member spouse have an antecedent right which they wish to exercise or protect?
- Is the information sought by the non-member spouse reasonably required by them in order to exercise or protect their rights?
- Has the fund provided any grounds to justify its refusal of the information sought?

The non-member spouse will have an antecedent right arising from a court order where they have a right conferred upon them by a divorce order to share in their former spouse's pension benefit.

Where the divorce proceedings between the member and non-member spouse have not yet been finalised (i.e.: a court order has not yet been issued), FundsAtWork will disclose a member's pension interest to an attorney acting for the non-member spouse where the attorney requires the value of the member's pension interest to accurately assess the value of the joint estate, on the attorney's written request. Where the non-member spouse is not represented by an attorney, that information will be provided to the non-member spouse directly.

As far as other third parties are concerned, a member's personal information, which includes their pension benefit, is confidential and will not be provided to a third party without the member's prior written consent. This can be obtained directly from the member, or could be presented to the administrator in the form of a power of attorney by the third party. The administrator should be careful though not to divulge more information than that authorised by the member. Where the member gives permission for all information regarding all benefits that they may be entitled to under any fund administered by the administrator, the administrator may divulge any and all such information. Where however the member specifically refers to information pertaining to one fund only, no information in respect of any other fund may be given out. This implies that the administrator is not even allowed to hint at other funds that the member may have membership of.

## 6. SUGGESTED SIMPLIFIED WORDING FOR BINDING DIVORCE ORDER

Instead of the long-winded provisions often found in divorce orders, it is suggested that more simplified wording be considered. For instance, a divorce order can read as follows:

1. *The defendant is a member of the ABC Provident Fund ("the fund").*
2. *The plaintiff is entitled to 50% of the defendant's pension interest in the fund as defined in section 1 of the Divorce Act\*.*
3. *The fund is ordered to pay or transfer the assigned portion of the pension interest to the plaintiff or an approved fund on her behalf in terms of section 37D(4) of the Pension Funds Act.*

*\* In the case of a preservation fund, the reference should be to section 1 of the Divorce Act, read together with section 37D(6) of the Pension Funds Act.*

It is not an absolute requirement that the references to the specific provisions of the legislation should be included in the divorce order for it to be binding on the fund.

In Kwa Zulu Natal, the courts have applied a practise whereby a divorce order requesting a transfer of pension interest is not granted unless the court is provided with a letter from the fund confirming membership and that the proposed order meets the requirements of the pension legislation. Similarly, to protect all parties' interest, parties to a divorce order would be wise to send the proposed orders



relating to the division of pension interest to the funds concerned before the date of the divorce so that the funds can indicate whether the order, once made, will be binding on the funds.

## 7. DIVORCE ORDER BINDING ON THE FUND

A fund can only give effect to a divorce order issued by a High Court, Regional Court or Divorce Court. The divorce order must refer to a marriage or relationship that ended and was dissolved in terms of the Divorce Act. In the 2015 case of *Rose F v Rose F and Others* the judge confirmed that *a marriage as contemplated by the Divorce Act, must be considered or interpreted to include a Muslim marriage.*

The member must still be a member of the fund, and in the case of an occupational fund, still in his employer's service, at the date of the divorce order.

The 2004 Supreme Court of Appeal case of *Old Mutual Life Assurance Company (SA) Ltd and Another v Swemmer* confirms "... the importance of deeds of settlement and divorce orders relating to pension interests being formulated very carefully indeed in order to ensure that they fall within the ambit of subsecs 7(7) and 7(8) of the [Divorce] Act. If this is done, then all that would be required of the pension fund in question is to perform administrative functions to give effect to the order, without the rights of the fund or the relationship between the fund and the member spouse being affected in any way, and it would not be necessary to join the fund as a party to the divorce proceedings."

In *Herbst v Sanlam Insurance Limited and Others* [2014] ZAWCHC 30, the court confirmed that a fund may not act on a court order which is invalid. In this case, the order required payment of 50% of the proceeds of a living annuity to the annuitant's former spouse. This is not valid, since neither the Divorce Act nor the Pension Funds Act nor the Long-term Insurance Act envisage such a deduction.

The divorce order will be binding on the fund if **all three** the following requirements are met.

### 7.1 Division of pension interest

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

If the divorce order states that the non-member spouse is entitled to 50% of the member's pension interest, this requirement will be met.

However, if the order entitles the non-member spouse to a percentage of the member's "provident interest", "pension fund", "pension benefit", "joint estate", "interest in the fund" or "policy proceeds", this requirement will not be met.

Where the divorce order entitles the non-member spouse to "50% of the member's pension interest, less the tax thereon", it is not clear what amount is due or assigned to the non-member spouse. This order will also not be binding on the fund.

Where a divorce order entitles a non-member spouse to 100% of a member's pension interest, the suggestion is that the fund must first obtain a tax directive for that amount and then pay the non-member spouse the difference between 100% of pension interest and the tax payable on that amount. The non-member spouse will then have a claim against the member for the balance of the amount due to them.

With regard to retirement annuity funds, in the 2011 case of *Edgar v Momentum Retirement Annuity Fund and others* the Adjudicator ruled the term "maturity value" (instead of "pension interest") does not meet the requirements of the Divorce Act. This is because "it is clear from the definition of "pension interest" that a non-member spouse is only entitled to a pension interest calculated as at the date of divorce, rather than on maturity".

## 7.2 Identification of Fund

The fund must be **named in or be identifiable from** the order.

This requirement has been dealt with in various disputes brought before the Pension Funds Adjudicator. In the following cases, the orders were found not to be binding on the fund concerned, for the reasons given:

*Shanmugam v Printing Industry Pension Fund* [2011] JOL 27698 (PFA) – the fund referred to in the order was liquidated 9 years before the divorce

*Joubert v Amplats Mines Retirement Fund* [2011] 1 BPLR 83 (PFA) – the fund was not named or identifiable. The order merely referred to the member's pension and that the records of the fund be endorsed.

*Hogan v Johannesburg Municipal Pension Fund* PFA/GA/23357/2008 – the order, which referred to 50% of “all the benefits which the plaintiff is or may be entitled to in respect of any life assurance and/or pension scheme benefits” did not name or identify the fund.

It is clear that where reference is made to “the funds to which the member belongs”, the requirement that the fund must be named or identifiable from the order, will not be met. Similarly, if it refers to “the Momentum pension fund”, it is not ascertainable, since Momentum administers many pension funds. If however the divorce order refers to “the fund to which the member belongs as a result of their employment with ABC”, “the fund of the member's employer” or identifies the fund membership number, then the fund may be identifiable. Where the member belongs to more than one fund as a result of their employment with ABC, albeit a hybrid, it is suggested that both funds be clearly identified if the intention is that the order is directed against both funds.

## 7.3 Fund ordered to pay

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

This requirement is the one that is most problematic.

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 no reference is made to payment, or no party is specifically ordered to make payment, one cannot make the deduction that it is implied that the fund has to effect payment.

If 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 two requirements referred to above have been met, then the fund can infer that this requirement has been met. A mere reference to endorsement, with no reference to section 7(8)(a) of the Divorce Act would however not suffice.

If the order is not binding to the fund, the member and / or the non-member spouse have to be advised accordingly. 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. An amended settlement agreement signed by the parties and the Registrar/Clerk of the court is insufficient. A new court order issued by the Judge/Magistrate is required. This involves an application to court to rectify or vary the previous order granted. Where the order does not reflect the intention of the parties as it is recorded in the settlement agreement incorporated in the order, for instance where the order refers to “50% of the member's pension value at date of divorce”, the parties can apply to court for the substitution of

“pension value at date of divorce” with “pension interest”. Where more than just a defect has to be corrected, an application to vary or amend the original divorce order will have to be brought.

A fund can be challenged if they deduct an amount from a member’s benefit based on an invalid court order. These challenges are not limited to claims by a member or non-member spouse, but can be brought by any interested party, such as an employer with a claim against the member under section 37D of the Pension Funds Act. For this reason, a fund should be extremely cautious in dealing with defective orders. As a general rule, they should insist on the rectification or variation of defective orders.

The date of the amended order will not have an influence on the amount due to the non-member spouse, but will determine when the benefit accrues to the non-member spouse. For example, if the parties got divorced on 15 August 2014, but the divorce order was defective and an amended order that is binding on the fund is only obtained on 20 November 2014, the pension interest to be divided will still be the member’s resignation benefit as at 15 August 2014. Because the accrual date is only 20 November 2014 though, the non-member spouse will be liable for the tax on that amount.

## 8. WHO MUST SUBMIT THE ORDER TO THE FUND?

The Divorce Act refers to the registrar of the court in question having to “notify the fund concerned that an endorsement be made in the records of that fund that that part of the pension interest concerned is so payable to that other party and that the administrator of the pension fund furnish proof of such endorsement to the registrar, in writing, within one month of receipt of such notification” (section 7(8)(a)(ii)). This is only required where the court made an order to this effect.

In practice, the divorce order itself usually specifies who would be responsible for submitting the order to the fund concerned. In the absence of a specific obligation contained in the divorce order, it is usually the non-member spouse that claims payment of her portion of the pension interest that submits the order to the fund, together with her request for and instructions as to the manner of payment.

## 9. NON-MEMBER SPOUSE’S OPTIONS

Section 37D(4)(b)(ii) of the Pension Funds Act allows the non-member spouse to choose between having the portion of the member’s pension interest that was assigned to them in terms of a court order that is binding on the fund

- paid to them directly; or
- transferred to another fund on their behalf.

If transfer is elected, paragraph 6(1)(b)(ii) of the Second Schedule to the Income Tax Act will apply. This section allows for the deduction of

*any amount transferred for the benefit of the person to any pension fund, pension preservation fund, provident fund, provident preservation fund or retirement annuity fund as a result of an election made as contemplated in section 37D (4) (b) (ii) (cc) of the Pension Funds Act, 1956 (Act No. 24 of 1956).*

Accordingly, the non-member spouse can elect a tax free transfer to any fund.

## 10. TAXATION OF DIVORCE ORDER AMOUNTS

### 10.1 Paragraph 2(1)(b)(iA) of the Second Schedule to the Income Tax Act

This paragraph provides as follows:

“(1) *Subject to section 9(2)(i) and paragraphs 2A and 2C, the amount to be included in the gross income of any person in terms of paragraph (e) of the definition of “gross income” in section 1 shall be –*

.....

(b) *any amount –*

(iA) *assigned in terms of a divorce order granted on or after 13 September 2007 under section 7(8)(a) of the Divorce Act, 1979 (Act No. 70 of 1979), to the extent that the amount so assigned –*

(aa) *constitutes a part of a pension interest, as defined in section 1 of the Divorce Act, 1979 (Act No. 70 of 1979), of a member of a pension fund, pension preservation fund, provident fund, provident preservation fund or retirement annuity fund; and*

(bb) *is due and payable on or after 1 March 2012 to a person who is the former spouse of that member by that pension fund, pension preservation fund, provident fund, provident preservation fund or retirement annuity fund;*

.....

*less any deduction permitted under paragraph 6. ”*

### 10.2 Divorce order granted before 1 March 2012

The position with regards to divorce orders granted in the following periods is dealt with in Legal Update 6-2011:

1. Before 13 September 2007
2. From 13 September 2007 until 31 October 2008
3. From 1 November 2008 until 28 February 2009
4. After 1 March 2009.

### 10.3 Divorce order granted before 13 September 2007 but accruing after 1 March 2009

Paragraph 2(1)(b)(iA) of the Second Schedule to the Income Tax Act was amended by section 80(1)(h) of the Taxation Laws Amendment Act no 7 of 2010 to provide that an amount assigned under a divorce order granted on or after 13 September 2007 that accrues after 1 March 2009 would form part of a person's gross income as contemplated in paragraph (e) of the definition of gross income and would be subject to tax. Section 92(1)(c) of the Taxation Laws Amendment Act no 22 of 2012 changed the accrual date in paragraph 2(1)(b)(iA) to 1 March 2012. The taxation of this benefit is dealt with in the next paragraph.

These changes mean that if a divorce order was granted before 13 September 2007 but payment of the amount assigned to the non-member spouse under that order is only claimed now, neither the member nor the non-member spouse will pay tax on that amount.

#### 10.4 Divorce order amounts payable from 1 March 2012

An amount assigned to a non-member spouse under a divorce order that is payable on or after 1 March 2012 forms part of the non-member spouse's gross income. This amount will be taxed in accordance with the withdrawal / resignation table.

Where the non-member spouse transfers the amount concerned to a pension fund, pension preservation fund, provident fund, provident preservation fund or retirement annuity fund, this will be a tax free transfer.

The position in respect of divorce order granted **from 1 March 2012** is as follows:

<b>When is accrual?</b>	If non-member spouse makes an election within the 120 day period	Date of election
	If non-member spouse does not make an election within the 120 day period	After expiry of the <b>45</b> day period
<b>Who pays the tax?</b>	Non-member spouse	
<b>At what rate?</b>	Withdrawal tax table	

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