

**AN EVALUATION OF THE PARAMETRIC AMENDMENTS OF
LEGISLATION RELATING TO THE DISTRIBUTION OF RETIREMENT
BENEFITS UPON DIVORCE**

BY



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ABSTRACT

An evaluation of the parametric amendments of legislation relating to the distribution of retirement benefits upon divorce

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This thesis will examine the effects of divorce on the benefit payable to a member of a retirement fund, where divorce has occurred before the member has reached retirement age. In particular, parametric (that is, piecemeal) amendments to the relevant legislation will be analysed in order to outline the development of the legislation relating to divorce and the consequent distribution of assets (including retirement savings).

The previous and current legal position in South Africa relating to divorce and retirement savings will be set out and critically analysed to determine whether the current position can be regarded as an improvement upon the previous legal position, or whether other and/or new problems in this area have been created. Parametric amendments to relevant legislation have thus far been the subject of many cases in our courts and adjudicative tribunals.

A systemic overhaul of a particular area of law is a useful tool in providing legal certainty and clarifying the laws applicable to that area. This thesis will

therefore argue in favour of a systemic overhaul of the legislation applicable to the allocation of retirement benefits at divorce, as opposed to the ineffectual parametric (i.e. piecemeal) amendments that have been implemented thus far.

An essential aspect of this study is a comparative study of South African legal principles relating to retirement benefits and divorce with the legal principles of this subject in the United Kingdom (UK).



DECLARATION

I declare that *An evaluation of the parametric amendments of legislation relating to the distribution of retirement benefits upon divorce* is my own work, that it has not been submitted for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

Yvette Wiid

3 January 2011

Signed:
UNIVERSITY of the
WESTERN CAPE



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CHAPTER 1

INTRODUCTION

1.1 BACKGROUND TO THESIS

The occupational retirement fund industry in South Africa is large – as of December 2006, there were 13 132 registered private retirement funds in South Africa.¹ The number of members of registered private pension funds is approximately 9.5 million.²



Unfortunately, South Africa also boasts a high divorce rate. According to Statistics South Africa (Stats SA), in 2003 there were 520 divorces per 100 000 married females.³ The latest available figures for divorce provide that there were approximately 60 000 divorces in total in 2007 and 2008.⁴

¹ Registrar of Pension Funds (2006) *Forty – eighth annual report* 4; National Treasury (2007) *Social security and retirement reform; second discussion paper* 5.

² Registrar of Pension Funds (2006) *Forty – eighth annual report* 10.

³ Statistics South Africa *Key Findings: Report-03-07-01 - Marriages and divorces, 2003*. <http://www.statssa.gov.za/publications/statskeyfindings.asp?PPN=report-03-07-01&SCH=3703> (accessed on 15/01/2010).

⁴ Statistics South Africa *Key Findings: P0307 – Marriages and Divorces 2008*. <http://www.statssa.gov.za/publications/statskeyfindings.asp?PPN=P0307&SCH=4523> (accessed on 03/03/2010).

From the abovementioned statistics it is clear that the effect of divorce on retirement benefits is a relevant topic, and one which affects a significant portion of South Africans. It is particularly appropriate to consider the effects of divorce in light of the ongoing retirement fund reform in South Africa.

Historically, women have had limited access to property as owners thereof. In addition, many women are compelled to take some time from their careers to care for their families.⁵ Indeed, the role of many women has been confined to that of homemaker and these women may have had limited (or no) time in the workplace. Consequently, the retirement savings of homemakers may have suffered as contributions to a retirement savings vehicle may have ceased or decreased as a result of the homemaker role they occupy.⁶ In other words, women who have taken up the role of homemaker or caregiver in their families are excluded from the formal social security system in South Africa.⁷

It is therefore important to ensure that women who have little or no retirement savings as a result of their homemaking role within their families are provided

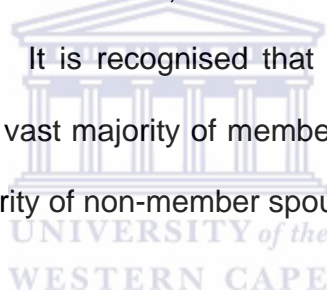
⁵ Options at Divorce http://www.oldmutual.co.za/documents/Solutions_forWomen_Options_ForMarriage.pdf (accessed on 12/11/2010).

⁶ Malherbe (2004) 'The co-ordination of social security rights in Southern Africa: Comparisons with (and possible lessons to be learnt from) the European experience' 8(1) *Law, Democracy and Development (LDD)* 63. Malherbe and Wakefield (2009) 'The effect of women's care-giving role on their social security rights' 13(2) *LDD* 59.

⁷ Liffman, Mlalazi, Moore et al (2000) 'Those who have and those who don't: An investigation into the limited scope of application of social security in South Africa' 4(1) *LDD* 15.

for financially (at least to some extent) when the family dynamic changes through divorce. In other words, women going through divorce when they have been confined to a domestic role during the subsistence of their marriages should be rewarded for the role they have played in their families at the expense of their careers, and therefore at the expense of adequate retirement savings.

For purposes of the present thesis, spouses who are members of retirement funds will be assumed to be male, whereas non-member spouses will be assumed to be female. It is recognised that non-member spouse may be male. However, as the vast majority of member spouses are male, it can be concluded that the majority of non-member spouses would be female.⁸



1.2 EXPLANATION OF SOCIAL SECURITY

Retirement fund benefits form part of social security in South Africa. There is no set definition of the concept of 'social security'.⁹ In 1997, the (then)

⁸ Sanlam Employee Benefits *Key Findings Member and Pensioner Responses* http://www.sanlam.co.za/wps/wcm/connect/f17d68804ca30d05beffbe09ce5fdfab/Article+01_I+NSIGHT+Member+and+Pensioner+responses_Aug2010.pdf?MOD=AJPERES (accessed on 30/12/2010).

⁹ Olivier, Smit, Kalula, et al (2003) *Introduction to Social Security* 14.

Department of Welfare provided an explanation of the concept in the White Paper for Social Welfare.¹⁰ The explanation reads as follows:

Social security covers a wide variety of public and private measures that provide cash or in-kind benefits or both, first, in the event of an individual's earning power ceasing, being interrupted, never developing or being exercised only at unacceptable social cost and such person being unable to avoid poverty and secondly, in order to maintain children.¹¹

From the abovementioned explanation, it appears as if there are two chief subdivisions of social security. One branch of social security in South Africa comprises grants paid by the state to individuals in need of financial assistance. The grants are paid to indigent individuals who are divided into categories, for example, older persons, disabled persons and families raising children.¹² In order to qualify for the relevant grant, the individual must satisfy a means test.¹³ In South Africa, the aforementioned branch of social security is known as 'social assistance' and is funded by general revenue, that is, tax.¹⁴

¹⁰ Department of Welfare (1997) *White Paper for Social Welfare* 49. The Department of Welfare is now known as the Department of Social Development.

¹¹ Department of Welfare (1997) *White Paper for Social Welfare* 49.

¹² Marx and Hanekom (2009) *The Manual on South African Retirement Funds and other Employee Benefits* 61; Nagtegaal, Nagtegaal, Nagtegaal (2007) *Her Law* 209.

¹³ Social Assistance Act 13 of 2004; Regulations relating to the application for and payment of social assistance and the requirements or conditions in respect of eligibility for social assistance, GN R898 in *Government Gazette* 31356 of 22 August 2008.

¹⁴ National Treasury (2007) *Social Security and Retirement Fund Reform: Second discussion Paper* 11.

The other branch of social security in South Africa operates differently from the social assistance aspect. While this branch includes private social security schemes, there are certain schemes which are state run which fall into this category.¹⁵ Regular contributions are made by or on behalf of an individual to a particular fund, in return for a financial benefit upon the occurrence of a particular social risk.¹⁶ A social risk is an event which causes one's earning capacity to diminish or cease. Some examples of social risks include the reaching of retirement age, unemployment, death and disability.¹⁷ This branch of social security is called 'social insurance'.¹⁸ Occupational retirement funds form part of social insurance within the social security provisions in South Africa.



The focus of this thesis is the social insurance aspect of social security, specifically the provision made by individuals for financial benefits upon the reaching of retirement age. In other words, occupational retirement funds form the basis of this thesis. Retirement funds are regulated by the Pension Funds Act.¹⁹

¹⁵ Examples of state administered schemes are the Compensation for Occupational Injuries and Diseases Fund as well as the Unemployment Insurance Fund.

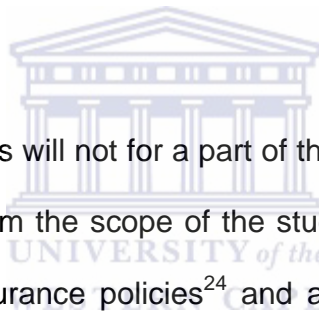
¹⁶ National Treasury (2007) *Social Security and Retirement Fund Reform: Second Discussion Paper 6*.

¹⁷ ILO (1952) *Social Security (Minimum Standards) Convention No 102*.

¹⁸ National Treasury (2007) *Social Security and Retirement Fund Reform: Second Discussion Paper 6*.

¹⁹ Act 24 of 1956. It is important to note that not all retirement funds are subject to the provisions of the Pensions Funds Act. See paragraph 2.9 below.

In particular, the division of occupational fund savings at divorce is relevant for purposes of the present thesis. Membership of an occupational fund is linked to employment.²⁰ The employment contract entered into by the employer and employee may stipulate that the employee become a member of the specific company or sector retirement fund.²¹ Occupational funds are typically either pension funds or provident funds. A pension fund is one which pays a lump sum to the member at retirement, as well as a monthly sum for life, called an annuity.²² A provident fund is one which makes a single lump sum payment to the member at retirement.²³



Retirement annuity funds will not for a part of this thesis. Retirement annuities have been excluded from the scope of the study as retirement annuities are linked to long term insurance policies²⁴ and are therefore regulated by the Long Term Insurance Act²⁵ as well as the Pension Funds Act.²⁶ The focus of the present study is largely the provisions of the Pension Funds Act and the Divorce Act²⁷ relating to the distribution of retirement fund savings at divorce.

²⁰ Marx and Hanekom (2009) *The Manual on South African Retirement Funds and other Employee Benefits* 10.

²¹ Marx and Hanekom (2009) *The Manual on South African Retirement Funds and other Employee Benefits* 634.

²² Section 1 Pension Funds Act 24 of 1956.

²³ *Ibid.*

²⁴ Marx and Hanekom (2009) *The Manual on South African Retirement Funds and other Employee Benefits* 87, 90 and 93.

²⁵ Act 52 of 1998.

²⁶ Act 24 of 1956.

²⁷ Act 70 of 1979.

Therefore, an investigation into retirement annuity funds and the related insurance legislation is excluded from the scope of this thesis.²⁸

1.3 DIVORCE IN SOUTH AFRICA

Divorces in South African are governed by the Divorce Act.²⁹ The Divorce Act sets out the grounds for divorce as well as the patrimonial consequences thereof.³⁰ Until the enactment of the Divorce Act, retirement savings were not considered part of the matrimonial assets available for distribution at divorce. The Divorce Act included retirement benefits as an asset in the matrimonial estate which could be distributed between the spouses upon divorce.³¹ In *Maharaj v Maharaj*³² it was confirmed that retirement savings indeed form part of the distributable matrimonial assets at divorce.

Since then, the division of retirement savings at divorce is an issue which has often faced South Africa courts and the Pension Funds Adjudicator.³³ Section 7 of the Divorce Act provides for the distribution of retirement savings at

²⁸ Other, purely private, retirement savings vehicles also do not form part of the scope of this thesis.

²⁹ Act 70 of 1979.

³⁰ Sections 4 and 7 respectively of the Divorce Act 70 of 1979.

³¹ Section 7(7) Divorce Act 70 of 1979.

³² *Maharaj v Maharaj* [2002] 2 All SA 34 (D).

³³ The Office of the Pension Funds Adjudicator was established by the Pension Funds Amendment Act 22 of 1996.

divorce where the marriage of the parties was in community of property,³⁴ or out of community of property including the accrual system.³⁵ Marriages out of community of property excluding the accrual system are excluded from the provisions of section 7. Marriages out of community of property excluding the accrual system will, therefore, not form part of this thesis.

1.4 RETIREMENT FUND REFORM

The process of retirement fund reform was set in motion in 2002 by the report of the Committee of Inquiry into a comprehensive system of social security for South Africa (the Taylor Committee Report).³⁶ Since then, the objectives of the retirement fund reform have been set out in Discussion Papers released by the National Treasury in 2004³⁷ and 2007³⁸. A primary aim of the retirement fund reform process is to provide low income earners with the opportunity to save for their retirement.

Various aspects of the South African retirement industry had been examined prior to the release of the Taylor Committee Report. Some of the aspects

³⁴ See paragraph 2.1.1 below.

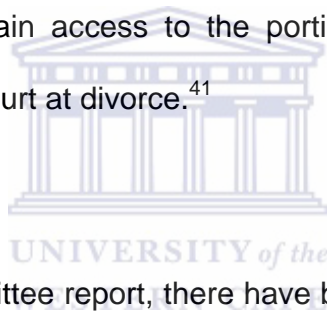
³⁵ See paragraph 2.1.2 below.

³⁶ Taylor Committee Report (2002) *Transforming the past – Protecting the future*.

³⁷ National Treasury (2004) *Retirement Fund Reform: A Discussion Paper*.

³⁸ National Treasury (2007) *Social Security and Retirement Fund Reform*

examined by selected organisations have made their way into the larger retirement fund reform process. In particular, the distribution of retirement fund savings at divorce has been considered at various stages. The Mouton Committee in 1992³⁹ made recommendations relating to the distribution of retirement fund savings at divorce, and in 1999 the South African Law Commission⁴⁰ released an extensive report and made recommendations relating to the allocation of retirement fund savings at divorce. The Taylor Committee report also dealt with the division of retirement savings upon divorce, suggesting that the provisions of the Divorce Act made it difficult for divorced spouses to gain access to the portion of the retirement savings awarded them by the court at divorce.⁴¹



Since the Taylor Committee report, there have been numerous developments regarding the division of retirement savings upon divorce.⁴² Decisions made by the courts as well as the Pension Funds Adjudicator have had an important role in the development of the legislation relating to the allocation of retirement savings at divorce.

³⁹ Mouton Committee (1992) *Report of the Committee of Investigation into a Retirement Provision System for South Africa*.

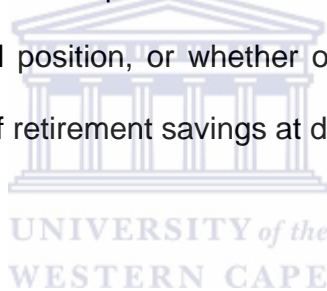
⁴⁰ South African Law Commission (1999) *Report on sharing of pension benefits – Project 112*.

⁴¹ Divorce Act 70 of 1979; Taylor Committee Report (2002) *Transforming the past – Protecting the future* 267.

⁴² National Treasury (2004) *Retirement Fund Reform: a discussion paper* 45. See paragraph 2.5 below.

Amendments to legislation relating to divorce and the consequent distribution of retirement have lead to some confusion. For example, the retrospective application of section 37D of the Pension Funds Act has been the subject of numerous decisions and determinations and has necessitated the introduction of much legislation in an attempt to clarify its effect.

The previous and current legal position in South Africa relating to divorce and retirement savings will be set out⁴³ and critically analysed⁴⁴ in this thesis to determine whether the current position can be regarded as an improvement upon the previous legal position, or whether other (possibly new) problems relating to the division of retirement savings at divorce have been created.



Parametric, or piecemeal, amendments to legislation are made when existing legislation is inadequate. Instead of enacting entirely new legislation, only the relevant provisions in existing legislation are amended. Repeated parametric amendments to the same statute may cause uncertainty to shroud the relevant legislation and can therefore be problematic. Parametric legislative amendments to legislation relating to the distribution of retirement fund

⁴³ See Chapter 2 below.

⁴⁴ See Chapter 4 below.

savings at divorce have thus far been the subject of many cases in our courts and adjudicative tribunals.⁴⁵

The area of company law was faced with a similar problem in terms of parametric amendments to major legislation. The legislature has opted for a systemic overhaul of company law and has introduced an entirely new Companies Act, which will replace its 1973 predecessor.⁴⁶ The introduction of new legislation is largely thought to be a positive shift, although there are some matters that need addressing before the 2008 Act will come into operation.



It is thus clear that a systemic⁴⁷ overhaul of a particular area of law is a useful tool in providing legal certainty and clarifying the laws applicable to that area. This thesis will therefore argue in favour of a systemic overhaul of the legislation applicable to the allocation of retirement savings at divorce, as opposed to the ineffectual parametric, or piecemeal,, amendments that have been implemented thus far.

⁴⁵ See paragraph 2.5.3 below.

⁴⁶ Companies Act 61 of 1973; Companies Act 71 of 2008.

⁴⁷ Systemic means 'comprehensive' or 'complete'.

1.5 COMPARATIVE ELEMENT OF THESIS

An essential aspect of this thesis is a comparative study of South African legal principles relating to retirement benefits and divorce with the legal principles of this area applicable in the United Kingdom (UK).

The influences of English law have been felt in South African since 1806, when the Cape of Good Hope passed into British control.⁴⁸ Many principles from English law remain an important part of South African law to this day. For example, the South African Bills of Exchange Act⁴⁹ is based largely on the English Bills of Exchange Act.⁵⁰ In South African company law, the English Turquand rule formed part of the common law, and has subsequently become statutory law.⁵¹ Most importantly for purposes of the present study, South Africa's retirement funding system has been significantly influenced by the UK retirement funding system.⁵²

⁴⁸ Barratt and Snyman (2005) 'Researching South African Law' http://www.nyulawglobal.org/globalex/South_Africa.htm (accessed on 24/03/2010).

⁴⁹ Act 34 of 1964.

⁵⁰ Bills of Exchange Act 1882 (c. 61).

⁵¹ *Royal British Bank v Turquand* (1856) 6 E&B 327; Section 19 Companies Act 71 of 2008.

⁵² Marx and Hanekom (2009) *The Manual on South African Retirement Funds and other Employee Benefits 2*.

The present inclination in South Africa is to move towards one national retirement fund as part of a reformed retirement funding system, as opposed to the current fragmented occupational retirement system.⁵³ The proposed national retirement fund is similar to the National Insurance in the UK,⁵⁴ which is a further indication that the retirement provisions of the UK have some influence on those of South Africa.

Most importantly, the legislation relating to the distribution of retirement fund savings in both South Africa and the UK have undergone parametric amendments, with challenging consequences.⁵⁵ It would be particularly valuable to determine how the problems created by parametric amendments in the UK have been dealt with. It is for this reason that the UK has been selected as the comparative jurisdiction in this thesis, as opposed to numerous other jurisdictions that have already been useful in the retirement fund reform process. The National Treasury has examined the retirement legislation in the United States, Chile and Canada, in addition to the UK system.⁵⁶ However, none of these jurisdictions have experienced similarly extensive parametric amendments to the legislation relating to the distribution

⁵³ National Treasury (2004) *Retirement fund reform: a discussion paper* 22.

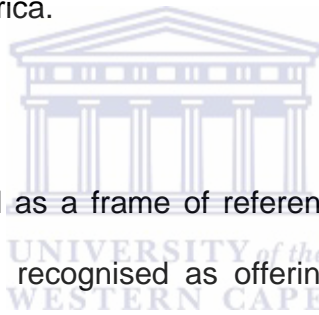
⁵⁴ See paragraph 3.2.2 below.

⁵⁵ The parametric amendments implemented in South Africa will be discussed extensively in Chapter 2 below. The parametric amendments to UK legislation will be discussed in Chapter 3 below.

⁵⁶ National Treasury (2004) *Retirement fund reform: a discussion paper*.

of retirement fund savings at divorce and have therefore been excluded from the scope of this thesis.

It is, therefore, useful to examine the legislation of the UK relating to the distribution of retirement fund benefits upon divorce to determine whether similar legislation has been implemented in South Africa, and the success of such implementation. If that has not been the case, it will similarly be useful to determine whether legislation operating in the UK could in future be applied successfully in South Africa.



The UK has been used as a frame of reference in various works on social security, and has been recognised as offering feasible solutions to South African problems.⁵⁷ In other areas of South African law which have been found to be unsatisfactory, the laws of the UK of that area of law have also proved helpful.⁵⁸ Case law from the UK has persuasive value in our courts,

⁵⁷ Taylor Committee Report (2002) *Transforming the past – Protecting the future* 243, 262, 265; National Treasury (2004) *Retirement fund reform* 56, 64; Department of Social Development (2007) *Reform of Retirement Provisions Feasibility Studies* 80.

⁵⁸ Bracher (2005) 'Can we repay the debt?' <http://www.roylaw.co.za/index.cfm?fuseaction=home.article&PageID=1703597&ArticleID=7060282> (accessed on 24/2010); Farisani (2009); 'Corporate homicide: what can South Africa learn from recent developments in English law?' <http://www.unisa.ac.za/default.asp?Cmd=ViewContent&ContentID=23214> (accessed on 24/03/2010) CILSA 42(2).

and has thus frequently been used by legal representatives in South African cases.⁵⁹

Retirement funding legislation of the UK can, therefore, be studied in order to consider practical alternatives for current South African legislation which is problematic. It is particularly relevant to study UK legislation in the light of the fact that both South Africa and the UK are currently undertaking an extensive retirement fund reform.⁶⁰

1.6 AIMS OF THESIS



The primary aim of the thesis is to clarify and assess the legislation relating to the division of retirement fund savings upon divorce. The thesis will also name solutions or alternatives to problems with the current legal position relating to the division of retirement savings at divorce. In particular, the thesis will present arguments in favour of a systemic overhaul of the legislation currently affecting the division of retirement savings upon divorce.

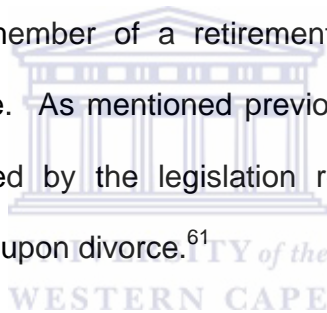
⁵⁹ Bracher (2005) 'Can we repay the debt?' <http://www.roylaw.co.za/Index.cfm?fuseaction=home.article&PageID=1703597&ArticleID=7060282> (accessed on 24/2010).

⁶⁰ National Treasury (2007) *Social Security and Retirement Fund Reform* 3; Department of Works and Pensions (2006) *Security in retirement: towards a new pensions system* 31.

The thesis will contribute towards the provision of legal certainty with regards to the allocation of retirement savings upon divorce and will be a useful tool for those working in the retirement industry as well as those in the judiciary who may be faced with a case relating to this issue.

1.7 SIGNIFICANCE OF THESIS

This thesis will examine the effects of divorce on retirement savings in situations where the member of a retirement fund has divorced prior to reaching retirement age. As mentioned previously, a substantial number of people may be affected by the legislation relating to the distribution of retirement fund savings upon divorce.⁶¹



The focus of this thesis is the series of parametric amendments that have affected the legislation relating to the allocation of retirement savings at divorce. While previous papers have examined specific aspects of the legislation relating to the distribution of retirement savings at divorce and the amendments to specific provisions,⁶² this thesis will focus on the numerous

⁶¹ Paragraph 1.1 above.

⁶² Mouton Committee (1992) *Report of the Committee of Investigation into a Retirement Provision System for South Africa*; Taylor Committee Report (2002) *Transforming the past – Protecting the future*; South African Law Commission (1999) *Report on sharing of pension benefits – Project 112*.

parametric amendments made to retirement funding legislation and divorce legislation to the extent that the legislation impacts on the distribution of retirement savings at divorce. In other words, the development of the provisions relating to the allocation of retirement benefits at divorce will be examined in their entirety and evaluated.

1.8 LITERATURE REVIEW

The means by which the thesis will be completed is through an extensive literature review. There are an array of sources that provide information on the current position relating to retirement savings and divorce in South Africa.

There are various pieces of legislation dealing with the allocation of retirement savings upon divorce, such as the Pension Funds Act,⁶³ the Pension Funds Amendment Act⁶⁴ as well as the Divorce Act.⁶⁵ The aforementioned statutes are the primary source of information relating to division of retirement savings at divorce.⁶⁶

⁶³ Act 24 of 1956.

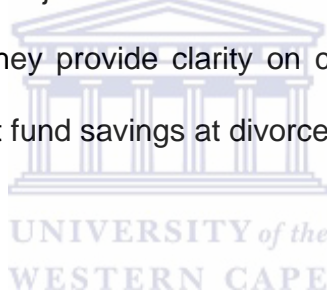
⁶⁴ Act 11 of 2007.

⁶⁵ Act 70 of 1979.

⁶⁶ Divorce Act 70 of 1979; Pension Funds Act 24 of 1956; Pension Funds Amendment Act 11 of 2007.

Secondly, policy documents from various government divisions, such as the Department of Social Development and the National Treasury, will be examined as the documents released by the respective departments are significant to the retirement fund reform process.⁶⁷

Another source which is of great importance is the decisions made by South African courts and the Pension Funds Adjudicator which deal with specific instances of division of retirement savings.⁶⁸ Decisions made by the courts and the Pension Funds Adjudicator will therefore be analysed and compared to determine whether they provide clarity on certain aspects relating to the distribution of retirement fund savings at divorce.



Legislation from the UK will also be examined and compared with legislation from South Africa to establish the similarities and differences between them.⁶⁹ Selected case law from the UK will also be analysed to determine how the courts interpret and apply the legislation relating to divorce and the consequent division of retirement savings.

⁶⁷ National Treasury (2004) *Retirement fund reform: a discussion paper*; National Treasury (2007) *Social Security and Retirement Fund Reform*; Department of Welfare (1997) *White Paper for Social Welfare*.

⁶⁸ Among others, *Cockcroft v Mine Employees Pension Fund* [2007] 3 BPLR 296 (PFA); *Beukes v Pepkor Retirement Fund* [2007] 3 BPLR 288(PFA); *Swart v Mittal Steel SA Selector Pension and Provident Fund* [2007] 3 BPLR 378 (PFA); *Lessing v Evergreen Pension Fund and Another* [2007] 3 BPLR 334 (PFA); *Kirchner v Kirchner* 2009 2 BPLR 135 (W).

⁶⁹ Pensions Act 1995 (c.26) Family Law Act 1996 (c.27); Matrimonial Causes Act 1973 (c.18).

Internet sources, particularly government websites, play a large part in this thesis. Many concise summaries and clear explanations of various legal principles are to be found in articles posted on government websites or the websites of well-respected organisations.

1.9 CHAPTER OUTLINE

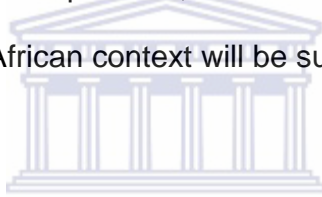
As stated above, a key element of the thesis is a comparison of the legislation relating to the division of retirement fund savings at divorce applicable in South Africa with similar legislation in the UK.⁷⁰ To this end, Chapter 2 will identify the legislation applicable to the allocation of retirement fund savings at divorce in South Africa. The historical development (specifically the parametric amendments) of the relevant legislation will be set out. In addition, the legislation will be discussed and the problematic aspects thereof will be outlined.

The focus of Chapter 3 is the legislation relating to the division of retirement fund savings applicable in the UK. Relevant legislative provisions will be explained, and the consequences thereof will be outlined. The pension system of the UK will also be explained briefly, in order that the context in

⁷⁰ See paragraph 1.5 above.

which the legislation applicable to the division of retirement fund savings at divorce operates will be understood.

The comparison of South African and UK legislation will take place in Chapter 4. Selected problem areas in the relevant South African legislation will be discussed in detail, and the UK legislative counterpart will be studied in order to ascertain whether the UK legislation can be used to resolve the problems identified in the South African context. Where the UK provides little or no assistance for a particular problem, alternative solutions to the identified difficulties in the South African context will be suggested.



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Chapter 5 will be the conclusion of the present thesis. The conclusion will contain a summary of the findings made throughout the thesis, and a consolidation of the suggested solutions made in Chapter 4. The argument for a systemic overhaul of the South African legislation relating to the distribution of retirement fund savings at divorce will be emphasised and the timing of the proposed systemic overhaul will be addressed.

It is apparent from the chapter structure as described above that the legislation relating to the division of retirement savings at divorce applicable in

each jurisdiction will be outlined in consecutive chapters,⁷¹ where after the comparison of the relevant legislation will take place.⁷² This structure has been chosen in order that the relevant legislation in each jurisdiction is understood fully before an analysis of the legislation occurs. The abovementioned structure is considered preferable to a piecemeal comparison of the legislation of the respective jurisdictions.



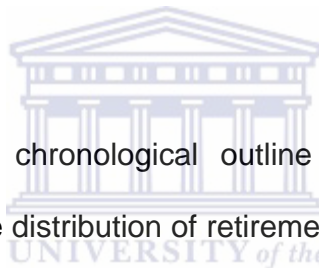
⁷¹ Chapters 2 and 3 respectively.

⁷² In Chapter 4.

CHAPTER 2

SOUTH AFRICAN LEGISLATION RELATING TO DIVORCE AND THE CONSEQUENT DISTRIBUTION OF RETIREMENT SAVINGS

In this chapter, the South African legislation relating to divorce and the division of retirement benefits thereon will be discussed in order to determine the problematic areas.



Chapter 2 contains a chronological outline of the development of the legislation relating to the distribution of retirement fund savings. The common law position will be examined,⁷³ as well as the changes brought about by the introduction of the Divorce Act and the amendments thereto.⁷⁴ The South African Law Commission Report relating to the sharing of retirement savings at divorce will be discussed⁷⁵ and the effect of the recommendations made in the report will be examined. The Pension Funds Act⁷⁶ and the amendments to the Pension Funds Act (including the introduction of the clean break principle) will be discussed, along with relevant case law relating to selected

⁷³ Paragraph 2.2 below.

⁷⁴ Paragraph 2.3 below.

⁷⁵ Paragraph 2.4 below.

⁷⁶ Act 24 of 1956.

sections of the Act.⁷⁷ The tax legislation relating to the taxation of retirement savings awarded to a non-member spouse will be outlined briefly.⁷⁸ Other issues which will be discussed include the practical implications of the clean break principle⁷⁹ and the exclusion of certain spouses from the scope of application of the clean break principle.⁸⁰

In South Africa, the matrimonial property regime selected by parties determines how the matrimonial assets will be distributed upon divorce.⁸¹ It is therefore necessary to understand how the relevant matrimonial property regimes operate in South Africa. The following paragraphs will outline the matrimonial property regimes applicable in South Africa.



2.1 MATRIMONIAL PROPERTY REGIMES

2.1.1 Marriage in community of property

In South Africa, the most common matrimonial property regime is that of community of property.⁸² This is also the default matrimonial property system, as all marriages are presumed to be in community of property unless

⁷⁷ Paragraph 2.5 below.

⁷⁸ Paragraph 2.6 below.

⁷⁹ Paragraph 2.8 below.

⁸⁰ Paragraphs 2.9 and 2.10 below.

⁸¹ Cronje and Heaton (2004) *South African Family Law* 128.

⁸² Cronje and Heaton (2004) *South African Family Law* 69.

there is a clear indication to the contrary.⁸³ Upon marriage, the estates of the parties merge to form one, joint estate comprising all the assets each of the parties owned prior to the marriage.⁸⁴

Upon divorce, this joint estate is divided into two equal portions. Each party will receive one of these portions, which is essentially half of the joint estate.⁸⁵

2.1.2 Marriage out of community of property including the accrual system

It is also possible to enter into a marriage out of community of property. With this regime, the separate estates of the parties prior to marriage do not merge.⁸⁶ In other words, there is no joint estate. An ante-nuptial agreement is entered into by parties prior to marriage, and this agreement deals with the distribution of assets upon divorce.⁸⁷

⁸³ Hahlo (1985) *The South African Law of Husband and Wife* 157. See also *Edelstein v Edelstein* NO 1952 (SA) 1 (A) 10.

⁸⁴ Hahlo (1985) *The South African Law of Husband and Wife* 157. See also *Thom v Worthman* 1962 (4) SA 83 (N) 88.

⁸⁵ *Maharaj v Maharaj and others* [2002] 2 All SA 34 (D) 36; Hahlo (1985) *The South African Law of Husband and Wife* 382.

⁸⁶ Cronje and Heaton (2004) *South African Family Law* 97.

⁸⁷ Cronje and Heaton (2004) *South African Family Law* 92.

The parties may choose to include the accrual system in their marriage out of community of property.⁸⁸ The ante-nuptial contract entered into by the parties includes a valuation of the estate of each party. Upon divorce, the separate estates are valued again.⁸⁹ The estate which has shown the most growth will have the value of the growth of the other estate subtracted from it.⁹⁰ This difference in the growths of the respective estates is then divided equally between the parties.⁹¹

2.2 THE DIVISION OF RETIREMENT BENEFITS AT DIVORCE: POSITION BEFORE THE DIVORCE ACT 70 OF 1979

According to the common law, a spouse's retirement benefits did not automatically form part of the joint estate of spouses married in community of property.⁹² The reason for this is that a member of a retirement fund was not entitled to claim his benefit until his employment contract terminated.⁹³ In other words, there was no right to claim the benefit included in the member's estate. Since some divorces would occur before a termination of an

⁸⁸ Visser and Potgieter (1998) *Introduction to Family Law* 147.

⁸⁹ Section 4 Matrimonial Property Act 88 of 1984.

⁹⁰ Visser and Potgieter (1998) *Introduction to Family Law* 149; Paralegal Advice Website <http://www.paralegaladvice.org.za/> (accessed on 21/04/2010).

⁹¹ Section 3 Matrimonial Property Act 88 of 1984.

⁹² *De Kock v Jacobson and another* 1999 (4) SA 346 (W) 348.

⁹³ Jeram (2008) 'Pension law overview: Part 2' 23 (2) *Insurance and Tax* para 2.

employment contract, the right to claim the benefit could not form part of the joint estate.⁹⁴

Should a divorce occur after the member spouse's employment contract had terminated, the retirement benefit would be included when dividing the joint estate, as the member spouse would have the right to claim the retirement benefits.⁹⁵

Therefore, upon divorce occurring before the termination of the member spouse's employment contract, the party wishing to claim a portion of their spouse's retirement benefits had to make a separate application to the court to award them the portion sought.⁹⁶ It is submitted that the need for an application relating to the division of retirement benefits at divorce was superfluous, as it created additional litigation for the parties.

2.3 POSITION IN TERMS OF THE DIVORCE ACT 70 OF 1979

As a result of dissatisfaction with the common law position, the Divorce Act 70 of 1979 was amended.⁹⁷ This amendment brought about wholesale changes in the law concerning the distribution of retirement benefits at divorce. The

⁹⁴ *Cockroft v Mine Employees Pension Fund* [2007] 3 BPLR 296 (PFA) 298. See also *Mouton v Southern Staff Pension Fund* [2003] 4 BPLR 4581 (PFA) and *Schenk v Schenk* 1993 (2) SA 346 (E).

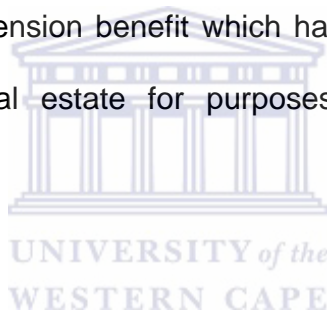
⁹⁵ *De Kock v Jacobson and another* 1999 (4) SA 346 (W) 350.

⁹⁶ *Sempapalele v Sempapalele and Another* [2002] 2 BPLR 3035 (O) 3037.

⁹⁷ Marx and Hanekom (2009) *The Manual on South African Retirement Funds and other Employee Benefits* 703; The Divorce Amendment Act 7 of 1989.

introduction of the definition of 'pension interest' was the first in a series of parametric amendments to the Divorce Act as it relates to the division of retirement savings at divorce.⁹⁸

Prior to 1989, there was no definition of 'pension interest' owing to the fact that the retirement benefit of spouses was not a right in their joint estate as it had not yet accrued to the member spouse.⁹⁹ The introduction of this definition was the first legislative step towards including the retirement benefits of spouses in their joint estate, although the courts had previously acknowledged that a pension benefit which had not yet accrued could form part of the matrimonial estate for purposes of division of property at divorce.¹⁰⁰



Pension interest¹⁰¹

'in relation to a party to a divorce action who—

(a)

is a member of a pension fund (excluding a retirement annuity fund), means the benefits to which that party as such a member would have been entitled in terms of the rules of that fund if his membership of the fund would have been terminated on the date of the divorce on account of his resignation from his office...'

⁹⁸ Section 1 Divorce Act 70 of 1979.

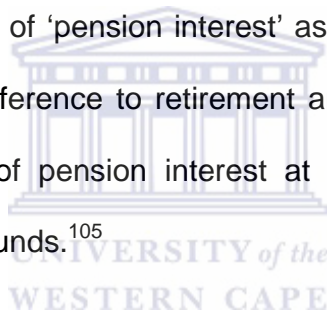
⁹⁹ *Kirchner v Kirchner* [2009] 2 BPLR 135 (W).

¹⁰⁰ *De Kock v Jacobson and another* 1999 (4) SA 346 (W) at 350; *Clark v Clark* 1949 (3) SA 226 (D); *Commissioner for Inland Revenue v Nolan's Estate* 1962 (1) SA 785 (A) 791.

¹⁰¹ Section 1 Divorce Act 70 of 1979.

The value of a pension interest for purposes of divorce would be calculated as if the member spouse had resigned at the date of divorce.¹⁰² This is sometimes called a 'notional benefit'.¹⁰³ Section 1 of the Pension Funds Act provides additional information relating to the definition of pension interest. 'Pension interest' would, by definition, include a lump sum payment received at retirement (that is, a provident fund payout).¹⁰⁴ The phrase 'pension interest' in this thesis will therefore include the lump sum payout made by a provident fund at retirement.

The extended definition of 'pension interest' as contained in section 1 of the Divorce Act includes reference to retirement annuity funds. This thesis will focus on the division of pension interest at divorce only as it relates to pension and provident funds.¹⁰⁵



2.3.1 Section 7 of the Divorce Act

Section 7 of the Divorce Act¹⁰⁶ governs the division of assets of divorcing parties. In particular, section 7(7) and (8) relate to distribution of pension interest between parties at divorce.

¹⁰² Section 1(1) Divorce Act 24 of 1956.

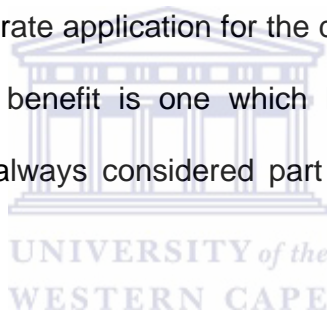
¹⁰³ *Maharaj v Maharaj and others* [2002] 2 All SA 34 (D) 36; *Mashilo v Basil Read Group Provident Fund* [2005] 1 BPLR 51 (PFA) 54; *Mouton v Southern Staff Pension Fund* [2003] 4 BPLR 4581 (PFA) 4585.

¹⁰⁴ Pension Funds Act 24 of 1956; Marx and Hanekom (2009) *The Manual on South African Retirement Funds and other Employee Benefits* 705.

¹⁰⁵ See paragraph 1.2 above.

¹⁰⁶ Section 7(7)(a) Divorce Act 70 of 1979.

Section 7(7)(a) unequivocally states that the pension interest of either party is deemed to be part of his or her assets, despite the fact that it may not yet have accrued to the member spouse. In other words, the pension interest of a party forms part of the joint estate of a marriage in community of property.¹⁰⁷ This is a clear departure from the common law position.¹⁰⁸ Section 7(8) also gives the court granting the divorce the power to make an order in respect of the division of the pension interest of a party at divorce.¹⁰⁹ There is thus no longer a need for a separate application for an order detailing the division of pension interest.¹¹⁰ It should be noted that there was never a need for a separate application for the division of a pension benefit at divorce, as a pension benefit is one which has accrued to the member spouse and was thus always considered part of the matrimonial assets at divorce.¹¹¹



2.3.2 Case law

Despite the inclusion of pension interest as an asset in the joint estate of a marriage in community of property by the Divorce Act, the court erroneously held in *Sempapalele v Sempapalele*¹¹² that a separate application should be

¹⁰⁷ Divorce Act 70 of 1979.

¹⁰⁸ See paragraph 2.2 above.

¹⁰⁹ Section 7(8) Divorce Act 70 of 1979.

¹¹⁰ *Maharaj v Maharaj and others* [2002] 2 All SA 34 (D) 36.

¹¹¹ *Government Employees Pension Fund v Naidoo and another* [2007] 2 BPLR 147 (SCA) 149; *De Kock v Jacobson* 1999 (4) SA 346 (W) 349.

¹¹² *Sempapalele v Sempapalele and Another* [2002] 2 BPLR 3035 (O) 3039.

made when the division of a pension interest was sought by one of the divorcing parties. The court therefore implied that section 7 of the Divorce Act did not alter the common law in this regard. In other words, where the pension benefit had not yet accrued to the member spouse, the non-member spouse was compelled to make a separate application to court for the division of the pension interest at divorce.

In the later case of *Maharaj v Maharaj*,¹¹³ the court recognised the error made by the court in the *Sempapalele* decision and stated that it is proper to include the pension interests held by the parties when making an order regarding the division of assets in the joint estate. In other words, a separate application for the division of retirement benefits is no longer necessary. This case also determined that the value of the pension interest to be divided is the value it holds as at the date of divorce.¹¹⁴

2.3.3 Section 7(8)(c)

Section 7(8)(c) of the Divorce Act¹¹⁵ provides that the preceding parts of subsection 7 do not apply to marriages where community of property and loss and the accrual system have been excluded. The reason for this is simple: in

¹¹³ *Maharaj v Maharaj and others* [2002] 2 All SA 34 (D).

¹¹⁴ *Maharaj v Maharaj and others* [2002] 2 All SA 34 (D) 37.

¹¹⁵ Divorce Act 70 of 1979.

such marriages, no joint estate is created upon the marriage. There is thus no joint estate to be dissolved upon divorce.¹¹⁶

Another reason for this exclusion is that it is unnecessary for the court to make a determination relating to the distribution of matrimonial assets, as the distribution of these assets and other issues such as maintenance would be dealt with in full in the ante-nuptial contract entered into by the parties.¹¹⁷ In instances where the parties choose to exclude the accrual system completely, they cannot agree at divorce that certain assets will be redistributed.¹¹⁸ One of these assets is pension interest. This is a direct result of section 7(8)(c) of the Divorce Act.



2.3.4 Accrual of benefit

Section 7(8)(a)(i) provides that the portion of the pension interest awarded to the spouse not being a member of the pension fund (non-member spouse) is payable to the non-member spouse when the benefit accrues to the spouse who is a member of the pension fund (member spouse).

¹¹⁶ Cronje and Heaton (2004) *South African Family Law* 92.

¹¹⁷ Visser and Potgieter (1998) *Introduction to Family Law* 144.

¹¹⁸ Reed (2010) 'What impact does an antenuptial contract have on a pension?' *De Rebus* (October) 31.

The benefit would only accrue to the member spouse at the date of retirement, resignation or retrenchment.¹¹⁹ This meant that the non-member spouse in many instances would have to wait until her former spouse retired to receive her portion of the pension interest. There were many problems with this position.

Firstly, the non-member spouse could be forced to wait many years for her portion of the pension interest.¹²⁰ This delay prolongs contact between former spouses, which may be difficult, particularly if the divorce was acrimonious.

Secondly, and more importantly for the non-member spouse, the portion awarded to her at divorce would generally not grow from date of divorce until date of accrual of the benefit to the member spouse.¹²¹ This presents an obvious problem for the non-member spouse, in that the amount awarded to her at date of divorce would not have the same value at date of accrual of the benefit. It has been suggested that the court granting the divorce may have the authority to order the member spouse to pay to the non-member spouse the interest that her portion of the pension interest has earned,¹²² although

¹¹⁹ Section 7(8)(a)(i) of the Divorce Act 70 of 1979; Jeram (2007) 'How the Pension Funds Act will benefit you' <http://www.moneyweb.co.za/mw/view/mw/en/page38?oid=150478&sn=Detail> (accessed on 1/07/2010).

¹²⁰ *Cockroft v Mine Employees Pension Fund* [2007] 2 BPLR 378 (PFA) at 299.

¹²¹ *Old Mutual Life Assurance Co (SA) Ltd v Swemmer* 2004 (5) SA 373 (SCA) para 20; Jeram (2008) 'Pension law overview: Part 2' 23 (2) *Insurance and Tax* para 2.1.

¹²² *Schenk v Schenk* 1993 (2) SA 346 (E) 349.

this has not been confirmed. For instance, where the member spouse's pension interest is R500 000 at divorce, and the non-member spouse has been awarded R250 000, she will only receive that R250 000 at the time of retirement of the former spouse. There will be no growth added to that amount. As a result of inflation, the value of money decreases over a passage of time, and the amount awarded to the non-member spouse at divorce would not have the same buying power at accrual.¹²³ Should the non-member spouse invest the R250 000 she was awarded at an interest rate of 5%, and the inflation rate was 6%, she would need to supplement her income constantly in order to counter the deficit caused by inflation.¹²⁴

The non-member spouse is thus disadvantaged by being forced to wait until the accrual of the benefit to receive her portion thereof. It should also be noted that in certain circumstances the non-member spouse may not be entitled to enforce her claim to the member spouse's pension interest against the fund.¹²⁵ The non-member in such a situation would merely have a personal right enforceable against the member spouse for the payment of her portion of the pension benefit. This in itself is problematic, as there is no

¹²³ Financial Planning South Africa <http://www.financialplanningsouthafrica.com/effects-of-inflation.html> (accessed on 05/10/2010). See also Nevondwe (2009) 'The law regarding the division of the retirement savings of a retirement fund member on his or her divorce with specific reference to *Cockroft v Mine Employees Pension Fund*, [2007] 3 BPLR 296 (PFA)' 13(1) *Law, Democracy and Development* 6.

¹²⁴ This is an adaptation of an example found at Financial Planning South Africa <http://www.financialplanningsouthafrica.com/effects-of-inflation.html> (accessed on 05/10/2010).

¹²⁵ See paragraph 2.8 below.

guarantee that the member spouse will be willing to pay such amount to the non-member spouse. This could lead to further litigation to compel the member spouse to adhere to the terms of the divorce order.

2.3.5 Summary of position in terms of Divorce Act

The position in terms of the Divorce Act, prior to any amendments and/or subsequent legislation, is that pension interest is incontrovertibly included in the joint estate resulting from a marriage in community of property.¹²⁶ Pension interest is also included in that portion of the estate which is available for distribution at the conclusion of a marriage out of community of property where the accrual system is included.¹²⁷

It is also clear that the court is empowered to order the division of such pension interest at the granting of a divorce order. That portion of the pension interest awarded to the non-member spouse at divorce would be payable only at the date of retirement of the member spouse.¹²⁸

¹²⁶ See paragraph 2.3.1 above.

¹²⁷ *Ibid.*

¹²⁸ See paragraph 2.3.4 above.

2.4 PROJECT 112 OF THE SOUTH AFRICAN LAW COMMISSION

The ongoing retirement fund reform process¹²⁹ in South Africa has its roots in the Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa (the Taylor Committee Report).¹³⁰ However, the South African Law Commission (SALC) realised some time prior to this report that the law relating to the division of retirement fund benefits at divorce was inadequate. In a report by the SALC in 1999, the division of retirement fund benefits upon divorce came under scrutiny.¹³¹ Various recommendations were made by the SALC in this report, many of which were accepted to some extent by the legislature.

The SALC recognised that divorce legislation did not resolve the problems relating to pension sharing at divorce. Indeed, the position in terms of the Divorce Act, as amended, was in conflict with the clean break principle and, as such, was untenable.¹³² It can be argued that the recommendations made by the SALC led to the introduction of the clean break principle into South African law.

¹²⁹ See paragraph 1.4 above.

¹³⁰ Report by the Committee of Inquiry into a Comprehensive System of Social Security for South Africa (Taylor Committee report) (2002) *Transforming the past – Protecting the future*. The Taylor Committee was established to investigate various issues relating to poverty and the improvement of the South African social security system.

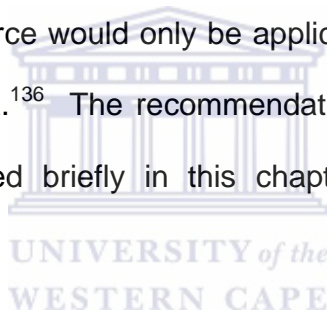
¹³¹ South African Law Commission (1999) *Report on sharing of pension benefits – Project 112*.

¹³² South African Law Commission (1999) *Report on sharing of pension benefits – Project 112 44*.

Some of the recommendations made by the SALC in this report are that:

- the division of retirement benefits at divorce be governed by legislation other than the existing divorce legislation;¹³³
- payment of the portion of pension interest awarded to a non-member spouse at divorce be deferred;¹³⁴ and
- the proposed legislation apply only to divorces occurring after the implementation of such legislation.¹³⁵

The SALC also recognised that the proposed legislation implementing pension sharing at divorce would only be applicable to marriages recognised as valid in South Africa.¹³⁶ The recommendations made in the Project 112 report will be discussed briefly in this chapter in areas which they are relevant.¹³⁷



¹³³ South African Law Commission (1999) *Report on sharing of pension benefits – Project 112* 44. It is submitted that this recommendation was made with the intention that funds not established in terms of the Pension Funds Act 24 of 1956 would also be subject to the proposed amendments. See paragraph 2.9 below.

¹³⁴ South African Law Commission (1999) *Report on sharing of pension benefits – Project 112* 46.

¹³⁵ South African Law Commission (1999) *Report on sharing of pension benefits – Project 112* 49.

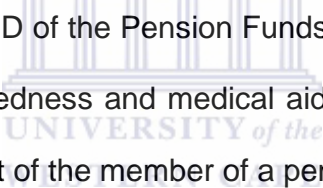
¹³⁶ South African Law Commission (1999) *Report on sharing of pension benefits – Project 112* 36.

¹³⁷ South African Law Commission (1999) *Report on sharing of pension benefits – Project 112*. See paragraph 2.5.2 and 2.5.3.5 below.

2.5 PENSION FUNDS ACT 24 OF 1956

The Pension Funds Act did not make any express provision for division of pension interest at divorce prior to 2007. Section 37D of the Pension Funds Act did, however, make provision for certain deductions from the pension interest of a member of a pension fund, and also made provision for the distribution of pension interest at death or insolvency.

2.5.1 Section 37D of the Pension Funds Act



Prior to 2007, section 37D of the Pension Funds Act¹³⁸ provided that amounts relating to loans, indebtedness and medical aid schemes could be deducted from the pension interest of the member of a pension fund.¹³⁹

2.5.2 Section 37D as amended

In 2007, the Pension Funds Amendment Act¹⁴⁰ amended section 37D of the Pension Funds Act to allow a further deduction from the pension interest of a

¹³⁸ Act 24 of 1956.

¹³⁹ Section 37D Pension Funds Act 24 of 1956.

¹⁴⁰ Pension Funds Amendment Act 11 of 2007.

member at retirement.¹⁴¹ Section 28(b) of the Pension Funds Amendment Act provides that the fund administrators may

deduct from a member's benefit or minimum individual reserve, as the case may be, any amount assigned from his or her pension interest to a non-member spouse or any other person in terms of a valid order made by a competent court...

It appears as if the Pension Funds Amendment Act was enacted as a result of the SALC recommendation¹⁴² that the distribution of pension interest at divorce be governed in legislation other than the Divorce Act.¹⁴³ This amendment of section 37D was also the initial parametric amendment that required numerous additional amendments in order to be clarified.

The amendment of section 37D allows the court granting a divorce to deduct an amount awarded to the non-member spouse from the pension interest of the member spouse. More importantly, the amendment provides that the portion awarded to the non-member accrues to the non-member at the date of the order granting the divorce.¹⁴⁴ The retirement of a member spouse could potentially be many years after the divorce. Forcing a non-member spouse to wait until such retirement was prejudicial to the non-member

¹⁴¹ Section 28(b) of the Pension Funds Amendment Act 11 of 2007.

¹⁴² The recommendation was included in the South African Law Commission (1999) *Report on sharing of pension benefits – Project 112* iv. See paragraph 2.4 above.

¹⁴³ Divorce Act 70 of 1979.

¹⁴⁴ Mothupi (2010) 'Some Practical Effects of the Financial Services Laws General Amendment Act 2008 on amending Section 37D(4) of the Pension Funds Act' 22(2) *SA Merc LJ* 216.

spouse, and there was general unhappiness with this position.¹⁴⁵ The amendment of section 37D is a clear departure from the prior position that the portion awarded to the non-member spouse was payable at the date of retirement of the member spouse.

In other words, the non-member spouse would be entitled to receive the portion of the member spouse's awarded to her at the time of finalisation of the divorce. The legislation has theoretically accelerated the date of the accrual of the benefit to the member spouse, thereby enabling the non-member spouse to claim her portion immediately as well.¹⁴⁶ This is the introduction of the so-called 'clean break' principle into South African law.¹⁴⁷ The premise behind the 'clean break' principle is to minimise disputes relating to the pension interest after the divorce has been finalised, as well as to prevent the non-member spouse suffering prejudice by being compelled to wait some time before receiving her portion of the member spouse's pension interest.¹⁴⁸ Should the non-member spouse be required to wait until the member spouse's retirement to receive her portion of the pension interest,

¹⁴⁵ *Old Mutual Life Assurance Co (SA) Ltd and another v Swemmer* 2004 (5) SA 373 (SCA) 386.

¹⁴⁶ *Cockroft v Mine Employees Pension Fund* [2007] 2 BPLR 296 (PFA) 299; *Swart v Mittal Steel SA Selector Pension and Provident Fund* [2007] 3 BPLR 378 (PFA) 381.

¹⁴⁷ Du Preez (2007) 'All former spouses to get their share of pension benefits' <http://www.persfin.co.za/index.php?fSectionId=591&fArticleId=4067546> (accessed on 8/12/2009).

¹⁴⁸ *Cockroft v Mine Employees Pension Fund* [2007] 3 BPLR 296 (PFA) 299.

this would prolong contact between former spouses which may be painful and disagreeable.¹⁴⁹

It should be noted that, initially, the clean break principle was not applicable to preservation funds, as the definition of 'pension interest' in the Divorce Act effectively excluded preservation fund savings.¹⁵⁰ This exclusion was remedied by inserting into the Pension Funds Act section 37D(6)¹⁵¹ which reads

Despite paragraph (b) of the definition of 'pension interest'...the portion of the pension interest of a member of a pension preservation fund or provident preservation fund...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 on the date on which the decree was granted.

Preservation funds are therefore also subject to the clean break principle.

2.5.3 Retrospectivity of section 37D

In South African law, there is a general presumption that laws enacted do not apply retrospectively.¹⁵² In other words, there is a presumption that Acts of Parliament come into operation after they are promulgated.

¹⁴⁹ See paragraph 2.3.4 above.

¹⁵⁰ Botha (2009) 'Preservation funds – divorce-benefit deductions' *De Rebus* (September) 56.

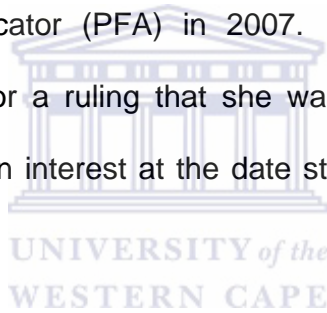
¹⁵¹ Section 37D(6) inserted by the Financial Services Laws General Amendment Act 22 of 2008.

¹⁵² De Ville (2000) *Constitutional and statutory interpretation* 67.

Section 37D of the Pension Funds Act¹⁵³ and the retrospective application thereof has been the subject of many disputes in South Africa.¹⁵⁴ Since the amendment of section 37D was introduced on 13 September 2007, the question is thus whether section 37D will apply to divorce orders granted prior to that date.

2.5.3.1 *Cockroft v Mine Employees Pension Fund*

The matter in *Cockroft v Mine Employees Pension Fund*¹⁵⁵ came before the Pension Funds Adjudicator (PFA) in 2007. The complainant (Cockroft) approached the PFA for a ruling that she was entitled to a portion of her former spouse's pension interest at the date stipulated by the court granting the divorce order.



The date in the divorce order upon which Cockroft would be entitled to her portion of her former spouse's pension interest was at the finalisation of the divorce, or at the date of the benefit accruing, whichever was earlier. The divorce order was granted in July 2003.¹⁵⁶

¹⁵³ Act 24 of 1956.

¹⁵⁴ See *Cockroft v Mine Employees Pension Fund* [2007] 3 BPLR 296 (PFA); *Beukes v Pepkor Retirement Fund* [2007] 3 BPLR 288 (PFA).

¹⁵⁵ *Cockroft v Mine Employees Pension Fund* [2007] 3 BPLR 296 (PFA).

¹⁵⁶ *Cockroft v Mine Employees Pension Fund* [2007] 3 BPLR 296 (PFA) 297.

The PFA reiterated the rule that a court granting a divorce may make an order as to the division of pension interest. The PFA found that the divorce order would entitle the non-member spouse to a portion of the pension interest as awarded when the benefit accrued to the member spouse i.e. at the time of retirement of the member spouse.¹⁵⁷

It was established that the position of non-member spouses in terms of the Divorce Act¹⁵⁸ undermined the 'clean break' principle in South African law and therefore needed addressing.¹⁵⁹ Section 28 of the Pension Funds Amendment Act was introduced as a result of unhappiness with this provision.¹⁶⁰ The PFA then explained that section 37D, as amended, causes the date of accrual of the benefit to the member spouse to be moved forward.¹⁶¹ The accrual of the portion of the benefit awarded to the non-member spouse is thus similarly accelerated. The operation and implications of section 37 as it applied to divorce orders granted after 13 September 2007 was thus clarified by the PFA.

However, the main problem in the *Cockcroft* dispute was whether section 37D applied to this particular divorce order, as it had been granted prior to 13

¹⁵⁷ *Cockcroft v Mine Employees Pension Fund* [2007] 3 BPLR 296 (PFA) 298.

¹⁵⁸ Act 70 of 1979.

¹⁵⁹ *Cockcroft v Mine Employees Pension Fund* [2007] 3 BPLR 296 (PFA) 299.

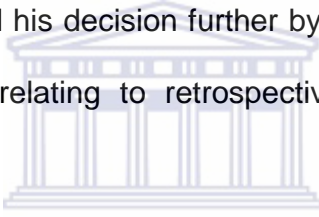
¹⁶⁰ *Cockcroft v Mine Employees Pension Fund* [2007] 3 BPLR 296 (PFA) 299.

¹⁶¹ *Ibid.*

September 2007.¹⁶² The PFA therefore had to make a finding as to the retrospective application of section 37D.

The PFA recognised the difficulty in determining whether legislation applied retrospectively.¹⁶³ It was found that section 28(b) (the section that amended section 37D) did not impede any rights already vested in a party, and there was consequently no ground for an objection against the retrospective application of the section.¹⁶⁴

The PFA then explained his decision further by referring to *dicta* by Thirion J in an earlier decision relating to retrospectivity of legislation. Thirion J remarked:



The conclusion that a statute was intended to operate with retrospective effect may be more readily arrived at in a case where vested rights would not be affected by a retrospective operation and also where the intention of the legislature was clearly to bestow a benefit or to effect evenhandedness in the operation of the law.¹⁶⁵

As per the abovementioned remarks, the intention of the legislature is of paramount importance when determining whether legislation applies retrospectively.¹⁶⁶

¹⁶² This was the date of the coming into effect of Section 37D of the Pension Funds Act 24 of 1956, as amended by the Pension Funds Amendment Act 11 of 2007.

¹⁶³ *Cockcroft v Mine Employees Pension Fund* [2007] 3 BPLR 296 (PFA) 300.

¹⁶⁴ *Ibid.*

¹⁶⁵ *Kruger v President Insurance Co Ltd* 1994 (2) SA 495 (D) 503.

¹⁶⁶ *Cockcroft v Mine Employees Pension Fund* [2007] 3 BPLR 296 (PFA) 301.

It was then found that the legislature intended to address the inequity in the non-member spouse being compelled to wait until the retirement of her former spouse to receive her portion of the pension interest. Section 37D was thus found to have been intended to apply to divorce orders existing at the time of the amendment introduced by section 28(b).¹⁶⁷

Section 37D consequently applied to the divorce order granted in July 2003. Cockroft was accordingly entitled to her portion of the pension interest as awarded immediately.¹⁶⁸

2.5.3.2 *Beukes v Pepkor Retirement Fund*

The facts of *Beukes v Pepkor Retirement Fund*¹⁶⁹ were largely similar to those of the *Cockroft* case. In 2007, prior to 13 September, Mrs Beukes had been awarded a portion of her husband's pension interest upon the divorce. The portion awarded was payable to Mrs Beukes at the finalisation of the divorce. The relevant pension fund had, however, refused to pay Mrs Beukes her portion of the pension interest upon her request. The justification for this refusal was that Mr Beukes was still an active member of the fund. In other words, Mr Beukes had not yet retired and the benefit therefore had not accrued to him. Since the benefit had not yet accrued to Mr Beukes, Mrs

¹⁶⁷ *Ibid.*

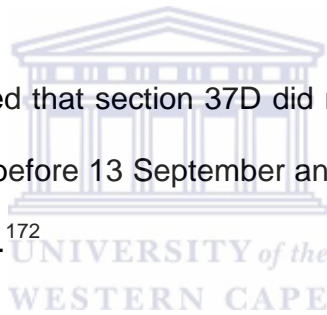
¹⁶⁸ *Ibid.*

¹⁶⁹ *Beukes v Pepkor Retirement Fund* [2007] 3 BPLR 288 (PFA).

Beukes was similarly not yet entitled to claim her portion of the pension interest.¹⁷⁰

Mrs Beukes was unhappy with the refusal of the retirement fund to release her portion of the pension interest and approached the PFA for a ruling on the pension fund's refusal to release her portion of the benefit, alleging that section 37D of the Pension Funds Act was applicable to her divorce order and that she was entitled to make her election as to the form of payment of her portion of the pension interest in terms of that section.¹⁷¹

The pension fund argued that section 37D did not apply to her divorce order as it had been granted before 13 September and therefore before the coming into effect of the section.¹⁷²



The PFA concluded that, while section 37D did in fact apply to Mrs Beukes' divorce order, this was not because of the retrospective application of the section. Instead, the section applied to the divorce order because the calculation of the benefit would remain the same, whether it occurred immediately or at the time of retirement of the member spouse.¹⁷³ The non-

¹⁷⁰ *Beukes v Pepkor Retirement Fund* [2007] 3 BPLR 288 (PFA) 289.

¹⁷¹ *Beukes v Pepkor Retirement Fund* [2007] 3 BPLR 288 (PFA) 290.

¹⁷² *Ibid.*

¹⁷³ *Beukes v Pepkor Retirement Fund* [2007] 3 BPLR 288 (PFA) 292.

member spouse was therefore entitled to make her election as per the section.

2.5.3.3 Criticism of *Beukes v Pepkor Retirement Fund*

It is submitted that the decision of the PFA in *Beukes v Pepkor Retirement Fund*¹⁷⁴ is somewhat confusing.

It is submitted that the reasoning in this case is flawed in that the PFA is effectively applying section 37D retrospectively but has seemingly attempted to disguise this retrospective application of legislation as something else. The test for retrospectivity of legislation is whether the legislation affects vested rights in terms of the existing legislation.¹⁷⁵ The PFA in this instance has justified a retrospective application of legislation not by determining the intention of the legislature, but by examining the practical implications of the retrospective application.

The decision in the *Beukes* determination could lead to confusion as to the implementation of divorce orders. The PFA in the *Cockroft* determination clearly established that section 37D of the Pension Funds Act applies retrospectively, as per the intention of the legislature. The PFA refrained from setting a limit to the retrospective application of section 37D or stating that

¹⁷⁴ *Beukes v Pepkor Retirement Fund* [2007] 3 BPLR 288 (PFA).

¹⁷⁵ De Ville (2000) *Constitutional and statutory interpretation* 205.

certain divorce orders already granted would not be subject to the application of the section. This means, practically, that section 37D applies to every divorce order that awarded a non-member spouse a portion of her former spouse's pension interest where that former spouse has not yet retired. There is no way of knowing how many former spouses are now entitled to approach the court for immediate payment of her portion of her former spouse's pension interest.

It seems as if the PFA in the *Beukes* decision was attempting to prevent an influx of such cases to tribunals and/or courts by refusing to acknowledge the retrospective application of section 37D.



2.5.3.4 *Lessing v Evergreen Pension Fund* and *Swart v Mittal Steel SA Selector Pension and Provident Fund*

The facts in the *Lessing v Evergreen Pension Fund*¹⁷⁶ and *Swart v Mittal Steel SA Selector Pension and Provident Fund*¹⁷⁷ determinations are similar to the facts in the *Cockroft* and *Beukes* determinations. There are no material differences in the facts. The issue in each of these cases was a refusal by a pension fund to pay an awarded portion of a member spouse's pension interest to a non-member spouse as per a divorce order granted prior to 13

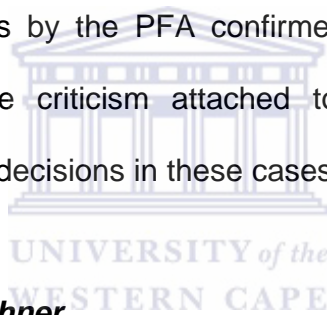
¹⁷⁶ *Lessing v Evergreen Pension Fund* [2007] 3 BPLR 334 (PFA).

¹⁷⁷ *Swart v Mittal Steel SA Selector Pension and Provident Fund* [2007] 3 BPLR 378 (PFA).

September 2007. The non-member spouse relied on section 37D for an entitlement to receive a payout, and the PFA was accordingly called upon to make a determination as to the retrospectivity of section 37D.

In both instances, the PFA held that section 37D did not apply retrospectively, but that the non-member spouse was nonetheless entitled to make an election as to the form of the payout of the portion of pension interest awarded to her.¹⁷⁸

Both of these decisions by the PFA confirmed the reasoning used in the *Beukes* decision. The criticism attached to the *Beukes* determination therefore applies to the decisions in these cases as well.



2.5.3.5 *Kirchner v Kirchner*

As with the previous decisions, the decision in *Kirchner v Kirchner*¹⁷⁹ relates to a divorce order granted which awarded a non-member spouse a portion of her husband's pension interest. The non-member spouse relied on section

¹⁷⁸ *Lessing v Evergreen Pension Fund* [2007] 3 BPLR 334 (PFA) 338; *Swart v Mittal Steel SA Selector Pension and Provident Fund* [2007] 3 BPLR 378 (PFA) 383. See also *Barnard v Municipal Gratuity Fund* PFA/GA/24186/2008/SM.

¹⁷⁹ *Kirchner v Kirchner* [2009] 2 BPLR 135 (W).

37D and claimed immediate payment of that portion of the pension interest awarded to her.¹⁸⁰

The question of the retrospective application of section 37D was once again raised. The court found that section 37D did not apply retrospectively, and put forward various arguments in support of this finding.¹⁸¹

The first of these is that section 29 of the Pension Funds Amendment Act¹⁸² provides for the retrospective application of various amendments introduced by that act. Section 37D is not one of these. Gildenhuis J then proceeds to submit that the finding by the PFA in the *Cockroft* decision as to the retrospectivity of section was incorrect. The learned Judge then illustrates by way of example the effect on a member spouse's pension interest should the section be applied retrospectively and comes to the conclusion that the member spouse's rights would be negatively impacted.¹⁸³ For this reason as well, Gildenhuis J feels that the section was not intended to apply retrospectively.¹⁸⁴

Finally, the court held that section 37D required the relevant pension fund to be named in the divorce order distributing the pension interest. Since

¹⁸⁰ *Kirchner v Kirchner* [2009] 2 BPLR 135 (W) 136.

¹⁸¹ *Kirchner v Kirchner* [2009] 2 BPLR 135 (W) 139.

¹⁸² Pension Funds Amendment Act 11 of 2007.

¹⁸³ *Kirchner v Kirchner* [2009] 2 BPLR 135 (W) 139.

¹⁸⁴ *Kirchner v Kirchner* [2009] 2 BPLR 135 (W) 140.

numerous divorce orders existing before the enactment of the section did not include the name of the relevant pension fund, the court held that the legislature could not have intended section 37D to apply to these orders.¹⁸⁵

The approach of the court in this decision is in accordance with the suggestion made by the SALC in 1999 that the clean break principle should apply only to divorces occurring after the implementation of the proposed legislation.¹⁸⁶

Despite the coming into operation of the legislative provisions confirming the retrospective application of section 37D¹⁸⁷ shortly before¹⁸⁸ judgment was made in the *Kirchner* case, the learned Judge Gildenhuys does not appear to have considered the abovementioned legislation in making the judgment. The application made in the *Kirchner* case was dismissed on the basis that section 37D did not apply retrospectively. However, the Financial Services Laws General Amendment Act clearly provides for the retrospective application of section 37D. It is therefore respectfully submitted that the application in the *Kirchner* case was incorrectly dismissed.

¹⁸⁵ *Kirchner v Kirchner* [2009] 2 BPLR 135 (W) 141.

¹⁸⁶ South African Law Commission (1999) *Report on sharing of pension benefits – Project 112*.

¹⁸⁷ Financial Services Laws General Amendment Act 22 of 2008.

¹⁸⁸ The Financial Services Laws General Amendment Act 22 of 2008 came into operation on 1 November 2008 and judgment in *Kirchner v Kirchner* [2009] 2 BPLR 135 (W) was delivered on 5 November 2008.

2.5.4 Problems arising from the amendment of section 37D

The most obvious difficulty that exists with section 37D, as amended, is the uncertainty regarding its potential retrospective application.¹⁸⁹ While there have been various PFA determinations as well as a clear and concise judgment by the Witwatersrand High Court on this issue, none of these amounted to binding law. At best, these decisions will have persuasive value in other divisions of the High Court, but are not binding on them. In other words, there was still no clear indication as to whether the section is to be applied retrospectively,¹⁹⁰ or whether the later determinations and the decision in *Kirchner v Kirchner*¹⁹¹ is the preferable approach.

On 1 November 2008, the legislation was once again amended¹⁹² to provide for the application of section 37D to divorces granted dating from 1989.¹⁹³ In other words, section 37D, as amended, does in fact apply to divorces granted before the coming into operation of the section. The retrospective application of the section has now been confirmed by the legislature,¹⁹⁴ although the extent of the retrospectivity has not been addressed.

¹⁸⁹ Mothupi (2010) Some Practical Effects of the Financial Services Laws General Amendment Act 2008 on amending Section 37D(4) of the Pension Funds Act 22(2) *SA Merc LJ* 216.

¹⁹⁰ As per the determination in *Cockcroft v Mine Employees Pension Fund* [2007] 3 BPLR 296 (PFA).

¹⁹¹ *Kirchner v Kirchner* [2009] 2 BPLR 135 (W).

¹⁹² Financial Services Laws General Amendment Act 22 of 2008.

¹⁹³ The definition of pension interest was introduced in 1989.

¹⁹⁴ Financial Services Laws General Amendment Act 22 of 2008.

The lack of certainty in this regard leads to difficulty for retirement fund administrators and divorcing spouses alike. The administrators may be unsure whether they are permitted to release a portion of a member's retirement benefit to a non-member spouse, while both member and non-member spouses may be unsure of their rights in this regard.

2.5.5 The introduction of a national retirement savings fund

The South African retirement fund reform process was set in motion by the Taylor Committee Report in 2002.¹⁹⁵ However, prior to the release of this report, the need for an overhaul of the retirement industry in South Africa was recognised by various organizations. For example, as long ago as 1992 the Mouton Committee released a report relating to necessary improvements needed in the South African retirement industry.¹⁹⁶

One of the proposed outcomes of the retirement fund reform process is the establishment of 'a new savings vehicle, the National Savings Fund ("NSF")', which is intended to promote access to social security for individuals who are low – income earners, or whose income may be irregular.¹⁹⁷

¹⁹⁵ Taylor Committee Report (2002) *Transforming the past – Protecting the future*.

¹⁹⁶ Mouton Committee (1992) *Report of the Committee of Investigation into a Retirement Provision System for South Africa*.

¹⁹⁷ National Treasury (2004) *Retirement Fund Reform: A Discussion Paper* 20.

The proposed national retirement fund appears to form part of an attempted systemic overhaul of the South African retirement industry. Since the retirement industry in its entirety will be overhauled as part of the retirement fund reform process currently underway in South Africa, it is submitted that the legislation related to the distribution of retirement savings at divorce should simultaneously be revisited.

2.6 TAX PAYABLE ON RETIREMENT BENEFITS DISTRIBUTED AT DIVORCE

Recent amendments¹⁹⁸ to the tax legislation affecting retirement benefits¹⁹⁹ distributed at divorce have brought about substantial changes. From the outset it should be understood that any payment made to a non-member spouse from the member spouse's pension is treated as an early withdrawal from the relevant fund.²⁰⁰ The portion paid out to a non-member spouse is therefore taxed as if the member has withdrawn a portion of his pension before retiring. When determining which tax laws apply to the paying of a portion of member spouse's pension interest to a non-member (former) spouse, one must have regard to two dates. The date of divorce, as well as

¹⁹⁸ Revenue Laws Amendment Act 35 of 2007; Revenue Laws Amendment Act 60 of 2008; Taxation Laws Amendment Act 3 of 2008.

¹⁹⁹ Income Tax Act 58 of 1962.

²⁰⁰ Marx and Hanekom (2009) *The Manual on South African Retirement Funds and other Employee Benefits* 710 and 715.

the date of the non-member spouse's election as to the form of the payout of her portion of the pension interest, determines the tax deductions.²⁰¹

2.6.1 Options available to non-member spouse

In terms of the Pension Funds Act, the non-member spouse may choose what to do with the portion of the pension interest awarded to her.²⁰² The non-member may elect to have the portion paid directly to her in cash, or have the portion transferred to a retirement fund of her choice.

If the non-member spouse chooses to transfer her portion of the pension interest to another retirement fund, tax is not immediately payable on that portion.²⁰³ Upon the withdrawal of that portion from the new retirement fund, the non-member spouse will be liable for all tax due on the benefit, as she would be a normal member of that fund.

The following explanation of who is liable for tax on the portion withdrawn by the non-member spouse accordingly only applies where the benefit has been paid directly to the non-member spouse in cash.

²⁰¹ Du Plessis (2009) 'Your retirement fund and divorce' <http://www.jmca.co.za/south-africa/newsletter-february-2009> (accessed on 14/07/2009).

²⁰² Section 37D (1)(d)(iii) of the Pension Funds Act 24 of 1956, as amended.

²⁰³ Revenue Laws Amendment Act 35 of 2007; Marx and Hanekom (2009) *The Manual on South African Retirement Funds and other Employee Benefits* 711; Cameron and Du Preez (2009) 'Big tax penalty if you take your retirement benefits early' <http://www.persfin.co.za/index.php?fsectionId=&fArticleId=4888681> (accessed on 8/12/2009).

2.6.2 Divorces granted before 13 September 2007

Where the divorce order has been granted prior to 13 September 2007,²⁰⁴ the member spouse will be responsible for the tax owing on the portion of the pension interest awarded to the non-member spouse.²⁰⁵ The divorce order may, however, include a provision that the non-member is responsible for paying the tax on her portion of the pension interest.²⁰⁶ The tax due on the non-member spouse's portion is paid from the remaining benefit which belongs to the member spouse.²⁰⁷ This remains the position for divorces granted during this period, regardless of when the non-member makes her election as to the form of the payout of the pension interest.²⁰⁸

2.6.3 Divorces granted on / after 13 September 2007 until 28 February 2009

The abovementioned time frame is that period after the introduction of the clean break principle (that is, 13 September 2007)²⁰⁹ until the coming into

²⁰⁴ The date of the amendment to section 37D of the Pension Funds Act 24 of 1956.

²⁰⁵ Paragraph 2B of the Second Schedule to the Income Tax Act 58 of 1962; Sliglingh, Koekemoer, Van Schalkwyk et al (2010) *Silke on South African Income Tax* 371.

²⁰⁶ Paragraph 2B of the Second Schedule to the Income Tax Act 58 of 1962; Huxman and Haupt (2008) *Notes on Income Tax* 556.

²⁰⁷ Du Plessis (2009) 'Your retirement fund and divorce' <http://www.jmca.co.za/south-africa/newsletter-february-2009> (accessed on 14/07/2009).

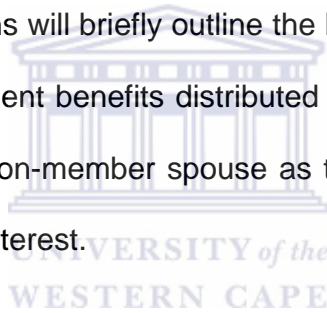
²⁰⁸ Sliglingh, Koekemoer, Van Schalkwyk et al (2010) *Silke on South African Income Tax* 371.

²⁰⁹ See paragraph 2.6.2 above.

application of new tax legislation relating to the taxation of the non-member spouse's portion of the pension interest (on 28 February 2009).²¹⁰

The calculation of the amount of tax payable on a non-member's portion of the pension interest, as awarded in a divorce order granted in this time period, depends on when the non-member spouse makes the election as to the form of the payout.²¹¹ Determining which spouse pays the tax due on that portion also depends on the date of election by the non-member spouse.²¹²

The following paragraphs will briefly outline the liability of the divorcing parties in paying tax on retirement benefits distributed at divorce, based on the time of the election by the non-member spouse as to the form of payment of her portion of the pension interest.



2.6.3.1 Election by non-member spouse before 1 March 2009

The tax liability is the same as for divorces occurring before 13 September 2007.²¹³ Where the non-member spouse makes her election as to the form of the payout of the pension interest awarded to her before 1 March 2009, the

²¹⁰ Revenue Laws Amendment Act 60 of 2008.

²¹¹ Du Plessis (2009) 'Tax changes relevant to the Retirement Fund Industry' <http://www.jmca.co.za/south-africa/newsletter-february-2009/tax-changes-relevant-to-the-retirement-fund-indu.php> (accessed on 19/05/2010).

²¹² Paragraph 2(b)(i) of the Second Schedule to the Income Tax Act 58 of 1962, as amended by the Taxation Laws Amendment Act 3 of 2008; Marx and Hanekom (2009) *The Manual on South African Retirement Funds and other Employee Benefits* 712.

²¹³ See paragraph 2.6.2 above.

member spouse will be liable for the tax payable on the non-member spouse's portion.²¹⁴ The timing of the election by the non-member spouse determines where the liability for the tax due on her portion of the pension interest rests.

2.6.3.2 Election by non-member spouse after 1 March 2009

In instances where the non-member spouse has made her election as to the form of the payout of her portion of the member spouse's pension interest after 1 March 2009, the non-member spouse herself becomes liable for any tax payable on that portion.²¹⁵ In other words, if the non-member spouse elects to receive her portion of the pension interest in cash, and that election is made after 1 March 2009, the non-member is liable for the tax amount due on her portion of the pension interest. This position is the same as for divorces occurring after 1 March 2009.²¹⁶

²¹⁴ Sliglingh, Koekemoer, Van Schalkwyk et al (2010) *Silke on South African Income Tax* 371; Du Plessis A (2009) 'Tax changes relevant to the Retirement Fund Industry' <http://www.jmca.co.za/south-africa/newsletter-february-2009/tax-changes-relevant-to-the-retirement-fund-indu.php> (accessed on 19/05/2010).

²¹⁵ Paragraph 2(b)(i) of the Second Schedule to the Income Tax Act 58 of 1962.

²¹⁶ See paragraph 2.6.4 below.

2.6.4 Divorces granted on or after 1 March 2009

Regardless of the time of election of the non-member spouse, if the divorce order is granted on or after 1 March 2009, the non-member is responsible for any tax owed on her portion of the pension interest of the member spouse.²¹⁷

2.6.5 Consequences of treating payout to non-member spouse as early withdrawal

Should the non-member spouse withdraw her portion immediately, the member spouse is disadvantaged financially. This is because a portion of his retirement savings, which may have grown substantially in value, has now been removed and can therefore no longer gain value. The non-member spouse was not previously entitled to the growth on her portion of the pension interest, and that amount would therefore accrue to the member spouse.²¹⁸ In other words, the member spouse's pension interest will only grow in proportion to the amount left in his savings after the non-member spouse's portion has been deducted.

For divorces occurring before 13 September 2007, the portion withdrawn by the non-member spouse also has an impact upon the amount that the

²¹⁷ Revenue Laws Amendment Act 60 of 2008.

²¹⁸ *Old Mutual Life Assurance Co (SA) Ltd and another v Swemmer* 2004 (5) SA 373 (SCA).

member spouse may withdraw upon reaching retirement age.²¹⁹ For example, if the member spouse was entitled to a R100 000 lump sum at retirement and the portion withdrawn by the non-member spouse was R80 000, the member spouse will only be entitled to a R20 000 lump sum upon retirement.

This position appears to disadvantage the member spouse. The amount withdrawn by the non-member spouse may be such that, in the case of a provident fund, the member spouse is left with a lump sum at retirement that is insufficient to cover his financial requirements or, in the case of a pension fund, a lump sum which is smaller than anticipated.

In addition, for divorces granted after 1 March 2009, should the non-member spouse be a member of another retirement fund, any amount received by her from her former spouse's retirement fund may affect the amount that she is entitled to receive from her additional retirement fund upon reaching retirement age.²²⁰ It is submitted that this may be unfair to the non-member spouse, in that situations may arise where the non-member spouse is severely financially disadvantaged at her retirement as a result of a cash withdrawal from the former spouse's retirement fund, possibly taken many years prior to her own retirement.

²¹⁹ Cameron and Du Preez (2009) 'Big tax penalty if you take your retirement benefits early' <http://www.persfin.co.za/index.php?fsectionId=&fArticleId=4888681> (accessed on 8/12/2009).

²²⁰ *Ibid.*

2.6.6 Actual calculation of tax payable on non-member's portion

2.6.6.1 Divorces before 13 September 2007

The tax payable on the non-member spouse's portion of the member spouse's pension interest is deducted from the member's minimum reserve amount in terms of the rules of the fund.²²¹ The tax on the amount awarded is first calculated according to the member's average rate of income tax. This amount is then multiplied by the difference between the member's average rate of tax (in percent) and 100%.²²² From this amount is then subtracted the initial amount calculated according to the average rate of tax of the member. One then has the total tax amount payable by the member.²²³

The member's remaining savings are therefore reduced by the portion awarded to the non-member spouse as well as the tax amount due on the non-member's portion of the pension interest. Both tax amounts are payable to the South African Revenue Service (SARS).²²⁴ For this reason, the

²²¹ Paragraph 2B of the Second Schedule to the Income Tax Act 58 of 1962.

²²² Du Plessis (2009) 'Your retirement fund and divorce' <http://www.jmca.co.za/south-africa/newsletter-february-2009> (accessed on 14/07/2009); Joubert (2009) 'When is a divorce order binding on the fund?' FundsAtWork Legal update 5 / 2009.

²²³ Joubert (2009) 'When is a divorce order binding on the fund?' FundsAtWork Legal update 5 / 2009.

²²⁴ The South African Revenue Service is a statutory body which ensures that all tax legislation in South Africa is complied with. See the SARS website <http://www.sars.gov.za/home.asp?pid=200> (accessed on 22/12/2010).

amount payable to the non-member is exactly the portion awarded to her in the divorce order, with no deductions for tax.²²⁵

2.6.6.2 Divorces from 13 September 2007 to 28 February 2009

Where the non-member spouse's election occurs before 1 March 2009,²²⁶ divorces taking place on or after 13 September 2007 until 28 February 2009 were treated the same as divorces occurring before 13 September 2007.²²⁷

Where the election has occurred after this date, the non-member spouse becomes liable for the tax payable on her award, as this election would fall within a new tax year, and new tax legislation is therefore applicable.²²⁸

2.6.6.3 Divorces after 1 March 2009

After 1 March 2009, the actual calculation of the amount of tax payable on the non-member spouse's portion of the pension interest where the divorce order states that the non-member is entitled to an amount less tax is somewhat complex. The administrators of the relevant retirement fund must obtain a tax directive setting out the tax payable on half of the pension interest of the

²²⁵ *Pelser v SA Eagle Pension Fund* PFA/WE/1348/02/LS.

²²⁶ The Revenue Laws Amendment Act 60 of 2008 comes into operation on 1 March 2009.

²²⁷ Marx and Hanekom (2009) *The Manual on South African Retirement Funds and other Employee Benefits* 712.

²²⁸ The new legislation which is applicable is the Revenue Laws Amendment Act 60 of 2008. See Du Plessis (2009) 'Your retirement fund and divorce' <http://www.jmca.co.za/south-africa/newsletter-february-2009> (accessed on 14/07/2009).

member spouse.²²⁹ This tax amount is then subtracted from the amount assigned to the non-member spouse. The initial tax directive is then cancelled. From this remaining amount, tax is calculated again in order to have an indication of the tax due on the non-member spouse's portion of the pension interest.²³⁰

It is submitted that this 'double' taxation is prejudicial to the non-member spouse, as the non-member's benefit is unduly eroded by this second taxation. The percentage of tax payable on amounts withdrawn by non-member spouses remains the same, irrespective of the wording of the divorce order.

The first R22 500 withdrawn is exempt from tax.²³¹ However, after this initial amount is withdrawn, the tax due increases in increments as the amount withdrawn by the non-member spouse increases. The larger the withdrawal becomes, the higher the percentage of tax payable becomes.

²²⁹ Huxman and Haupt (2008) *Notes on Income Tax* 556.

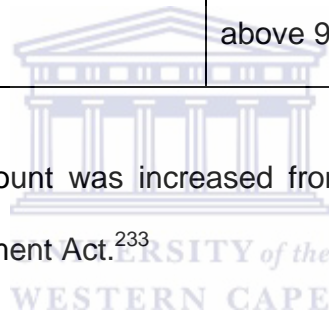
²³⁰ Joubert (2009) 'When is a divorce order binding on the fund?' FundsAtWork Legal update 5 / 2009.

²³¹ Du Plessis (2009) 'Tax changes relevant to the Retirement Fund Industry' <http://www.jmca.co.za/south-africa/newsletter-february-2009/tax-changes-relevant-to-the-retirement-fund-indu.php> (accessed on 19/05/2010); Du Plessis (2009) 'Your retirement fund and divorce' <http://www.jmca.co.za/south-africa/newsletter-february-2009> (accessed on 14/07/2009).

The following is a representation of the increases in tax payable associated with an increase in the amount withdrawn.²³²

Amount withdrawn (R)	Tax payable (R)
1 – 22 500	0
22 500 – 600 000	18%
600 001 – 900 000	103 950 as well as 27% for amount above 600 000
900 001 and more	184 950 as well as 36% for amount above 900 000

The initial tax free amount was increased from R1800 to R22 500 by the Revenue Laws Amendment Act.²³³



2.6.7 Concluding remarks relating to taxation of pension interest awarded to non-member spouse

After the amendment to the Pension Funds Act in 2007,²³⁴ the legislation relating to the taxation of early withdrawals from retirement savings have

²³² Section 5(1) Income Tax 58 of 1962; Marx and Hanekom (2009) *The Manual on South African Retirement Funds and other Employee Benefits* 773.

²³³ Act 60 of 2008.

²³⁴ Pension Funds Amendment Act 11 of 2007.

been amended numerous times.²³⁵ Because the tax liability on the non-member's portion shifts from the member spouse to the non-member spouse, these amendments have an effect on the amount the non-member receives. It is submitted that these amendments are generally favourable, although certain aspects thereof appear to be disadvantageous to the non-member spouse. These aspects will be discussed fully in Chapter 4.²³⁶

2.7 CALCULATION OF NON-MEMBER SPOUSE'S ENTITLEMENT

In the divorce order awarding the non-member spouse a portion of the member spouse's pension interest, the court must give some indication as to the actual amount she is entitled to.²³⁷ This amount may be reflected in various ways. The court usually awards a portion to the non-member spouse in the form of a particular percentage or by stating what portion of the benefit the non-member spouse is entitled to. In other words, the divorce order will contain a clause stating that the non-member spouse is entitled to (for example) half of the value of the member's pension interest.²³⁸

²³⁵ Revenue Laws Amendment Act 60 of 2008 and the Taxation Laws Amendment Act 3 of 2008.

²³⁶ See paragraph 4.2.2.1 below.

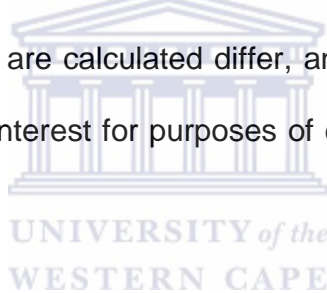
²³⁷ Section 37D(4) of the Pension Funds Act 24 of 1956; Du Plessis (2009) 'Your retirement fund and divorce' <http://www.jmca.co.za/south-africa/newsletter-february-2009> (accessed on 14/07/2009).

²³⁸ Section 37D of the Pension Funds Act 24 of 1956 requires the inclusion of a clear indication as to the portion of the pension interest awarded to the non-member spouse.

The Pension Funds Act makes it clear that the value of the member spouse's pension interest is that which he would receive had he resigned at the date of the divorce.²³⁹ This is the 'notional benefit', as discussed above.²⁴⁰

2.7.1 Calculation of pension interest of member spouse

The calculation to determine the value of the pension interest of the member spouse at date of divorce depends on whether the fund is a defined benefit fund, or a defined contribution fund.²⁴¹ The manner in which the benefits payable by these funds are calculated differ, and therefore the calculation of the member's pension interest for purposes of divorce differ according to the type of fund.



2.7.1.1 Defined benefit fund

As implied by the name of the fund, the benefit the member will receive at retirement is guaranteed.²⁴² The benefit is calculated as per a predetermined formula, which is to be found in the rules of the particular fund.²⁴³

²³⁹ Section 37D (1)(d) of the Pension Funds Act 24 of 1956.

²⁴⁰ See paragraph 2.3 above.

²⁴¹ Marx and Hanekom (2009) *The Manual on South African Retirement Funds and other Employee Benefits* 706.

²⁴² Swart (2003) *Managing your money* 120.

²⁴³ Jeram (2008) 'Pension law overview: Part 1' 23(1) *Insurance and Tax* para 5.

The abovementioned formula will be based on the years of pensionable service of the member, the member's pensionable salary and a factor by which the aforementioned amounts are multiplied.²⁴⁴ It is the responsibility of the member's employer to ensure that he receives the benefit as guaranteed. 'Pensionable service' refers to the time period during which the member was employed by a participating employer and a member of the fund.²⁴⁵ The 'pensionable salary' of a member can be either the final salary earned by the member or the average salary earned over the final two years of service.²⁴⁶

At divorce, the non-member spouse's portion of the member's pension interest will be deducted from the member's pension interest, that is, his minimum individual reserve.²⁴⁷ The minimum individual reserve is that amount to which the member would be entitled if he were to leave the fund before reaching the requisite age of retirement. The member's minimum individual reserve is the greater of two amounts, namely

... the fair value equivalent of the present value of the member's accrued deferred pension...²⁴⁸

or

...an amount equal to the value of the member's contributions, less such expenses as the board deems appropriate to deduct from the contributions, augmented as from the commencement date by interest at a rate which is reasonable in relation to the gross investment return earned by the fund on the assets backing the fund's liability in respect of the member, nett of such

²⁴⁴ *Ibid.*

²⁴⁵ *Sekul v Seventh-Day Adventist Church Pension Fund* PFA/GA/895/2001.

²⁴⁶ Jeram (2008) 'Pension law overview: Part 1' 23(1) *Insurance and Tax* para 5.2.

²⁴⁷ *Beukes v Pepkor Retirement Fund* [2007] 3 BPLR 288 (PFA) 292.

²⁴⁸ Section 14B(2)(a)(i) Pension Funds Act 24 of 1956.

expenses as the board determines should be offset against the gross investment return, plus such share of the employer contributions paid in respect of the member as has vested in the employee in terms of the rules of the fund, augmented with the same rate of interest...²⁴⁹

The member's pension interest for purposes of distribution at divorce is therefore the greater of one of the abovementioned amounts.

2.7.1.2 Defined contribution fund

Defined contribution funds are defined in the Pension Funds Act as a fund in terms of which the member's retirement benefit will comprise

...(a) the fixed-rate contributions paid by the member and by the employer on behalf of the member, where such fixed rates are defined in the rules;

(b) less such expenses as the board determines should be deducted from the contributions paid;

(c) augmented by such investment returns and any share of actuarial surplus or transfer from a contingency reserve account as the board determines...²⁵⁰

The member's retirement benefit is thus calculated by adding the contributions made to the fund by the employer and the member to the investment return on those contributions.²⁵¹ These contributions are a fixed

²⁴⁹ Section 14B(2)(a)(ii) Pension Funds Act 24 of 1956.

²⁵⁰ The definition of a defined contribution fund was inserted into section 1 of the Pension Funds Act 24 of 1956 by section 1(d) of the Pension Funds Second Amendment Act 39 of 2001.

²⁵¹ Jeram (2008) 'Pension law overview: Part 1' 23(1) *Insurance and Tax* para 6 .

percentage of the salary of the member.²⁵² The amount payable to the member at retirement depends entirely on the investment returns earned on the contributions made by or on behalf of the member.²⁵³ The risk of receiving a lower than anticipated benefit at retirement, therefore, rests with the member.²⁵⁴ The member is kept up to date with the value of his account with the fund, as the fund provides its members with an annual statement of their account with the fund.

For purposes of distribution at divorce, the non-member spouse's portion of the pension interest is deducted from the member's minimum individual reserve, which is calculated as per the Pension Funds Act.²⁵⁵ The minimum individual reserve of a member amounts to the value of the member's individual account with the fund.²⁵⁶ The individual account of a member of a defined contribution fund comprises all the contributions made by or on behalf of the member, as well as any fund return earned by those amounts and a portion of selected reserve funds of the specific retirement fund.²⁵⁷

²⁵² Swart (2003) *Managing your money* 122.

²⁵³ Jeram (2008) 'Pension law overview: Part 1' 23(1) *Insurance and Tax* at para 6 .

²⁵⁴ Malherbe (2009) *Intergenerational solidarity and the provision of support and care to older persons* 46.

²⁵⁵ Marx and Hanekom (2009) *The Manual on South African Retirement Funds and other Employee Benefits* 706.

²⁵⁶ Section 14B(2)(b) Pension Funds Act 24 of 1956.

²⁵⁷ Section 14B(1) Pension Funds Act 24 of 1956.

2.7.1.3 Minimum individual reserve: difference between defined benefit and defined contribution funds

The calculation of a member's minimum individual reserve differs depending on whether he is a member of a defined benefit fund or a defined contribution fund. In a defined benefit fund, the minimum individual reserve is somewhat constant, in that all the variables involved are known quantities and would not necessarily fluctuate greatly. The member spouse (and therefore also the non-member spouse) therefore has some idea of the amount the court will award to the non-member spouse.

However, in a defined contribution fund, the value of the member's minimum individual reserve (that is, the member's individual account) depends on the investment return earned by the contributions made by him or on his behalf.²⁵⁸ The investment return cannot be guaranteed. The member therefore cannot predict with certainty the amount of his individual account for purposes of distribution at divorce.²⁵⁹ The non-member spouse may therefore also be uncertain of the amount of the member's pension interest she could be awarded at divorce.

²⁵⁸ Malherbe (2009) *Intergenerational solidarity and the provision of support and care to older persons* 46.

²⁵⁹ *Ibid.*

2.7.2 Gross and nett value of pension interest

Once the amount of the pension interest is established, one can then determine how much of this pension interest is payable to the non-member spouse. Generally, where the marriage was one in community of property, the court will award half (or 50%) of the member's pension interest to the non-member spouse.²⁶⁰ What is not clear, however, is whether one should calculate half of the gross value of the member spouse's pension interest, or of the nett value of the pension interest.

The term 'gross value' of the pension interest refers to the amount the member spouse would be entitled if he had resigned at date of divorce, before any deductions had been made from his pension interest.²⁶¹ Accordingly, the 'nett value' of the pension interest is the amount the member spouse would receive after certain deductions had been made.

The deductions spoken of here are primarily mortgage bonds granted and loans which have been guaranteed by the retirement fund.²⁶² The wording of the Pension Funds Act does not offer clear guidance in this respect, as

²⁶⁰ See paragraph 2.1.1 above.

²⁶¹ Cameron (2008) 'Splitting pension benefits may beggar divorced fund members' www.persfin.co.za/index.php?fSectionId=595&fArticleId=4455548 (accessed on 28/06/2010).

²⁶² Section 37D(1)(a) of the Pension Funds Act 24 of 1956; Du Plessis (2009) 'Your retirement fund and divorce' <http://www.jmca.co.za/south-africa/newsletter-february-2009> (accessed on 14/07/2009).

Section 37D merely provides that a retirement fund registered in terms of the Act may

... deduct from a member's benefit or minimum individual reserve, as the case may be, any amount assigned from his pension interest to a non-member spouse or any other person in terms of a valid order made by a competent court. For purposes of section 7(8)(a) of the Divorce Act, 1979 (Act No. 70 of 1979) the pension benefit referred to in that section is deemed to accrue to the member on the date of the court order.²⁶³

It seems as if the Act refers to the gross value of the member's pension interest. However, one cannot make this determination for certain and the section is open to interpretation.

Indeed, the retirement industry has interpreted the section to mean the nett value of the member's pension interest.²⁶⁴ In practice, therefore, the hypothetical half share awarded to the non-member spouse would be calculated on the amount left over once the amounts for mortgage bonds and secured loans have been deducted.

The deductions made prior to the division of the pension interest have far-reaching consequences for the non-member spouse, as it may significantly decrease the value of the portion awarded to her. In a simple example, if the member's pension interest is R500 000 and the value of a mortgage bond is

²⁶³ Section 37D(1)(a) Pension Funds Act 24 of 1956.

²⁶⁴ Du Plessis (2009) 'Your retirement fund and divorce' <http://www.jmca.co.za/south-africa/newsletter-february-2009> (accessed on 14/07/2009). In *Maharaj v Maharaj and others* [2002] 2 BPLR 3030 (D) 3033, Magid J awarded a non-member spouse a portion of the nett value of the member's pension interest.

R300 000, the non-member spouse is entitled to half of R200 000 if the mortgage bond is deducted before division of the pension interest. This is as opposed to half of R500 000, should the mortgage bond not be deducted prior to division of the pension interest.

There may, however, also be an advantage to both spouses in first deducting any mortgage bonds or home loans before dividing the pension interest. The advantage is that the asset encumbered by the mortgage bond would then become the property of one of the spouses (depending on the terms of the divorce order) and that particular debt would be erased.

Where there are numerous maintenance and divorce claims against a particular member's interest as result of the member having married and been divorced a number of times, the administrators of the retirement fund will deduct these orders in chronological order once all mortgage bonds and guarantees have been satisfied.²⁶⁵ Maintenance orders granted at the same time as a divorce order take precedence and are deducted first.²⁶⁶ If,

²⁶⁵ Section 37D(3) of the Pension Funds Act 24 of 1956; Du Plessis (2009) 'Your retirement fund and divorce' <http://www.jmca.co.za/south-africa/newsletter-february-2009> (accessed on 14/07/2009).

²⁶⁶ Du Plessis (2009) 'Your retirement fund and divorce' <http://www.jmca.co.za/south-africa/newsletter-february-2009> (accessed on 14/07/2009). See also Hunter, Esterhuizen, Jithoo et al (2010) *The Pension Funds Act: A commentary* 712; See also paragraph 2.11 below.

however, the member owes any income tax to SARS, the amount owed to SARS is deducted before any other deductions will be permitted.²⁶⁷

This clearly leads to another problem. A situation may arise where the deductions from a member's pension interest are such that there may not be enough left to allow the non-member spouse's claim. Obviously if there is a very small amount left, the member spouse is also disadvantaged as his retirement savings are eroded gradually by the amounts deducted as a result of prior divorce and/or maintenance orders.

The Pension Funds Act is therefore not entirely clear as to whether the non-member spouse is entitled to a portion of the member's net or gross pension interest. Section 37D(3) refers to permissible deductions (indicating the net value is to be split between the spouses) whereas section 37D(1) makes no reference to deductions. The definition of pension interest in section 1 of the Divorce Act also appears to refer to the gross value of pension interest, as the definition does not specify whether deductions are to be made before a portion of the pension interest is allocated to the non-member spouse.

²⁶⁷Section 37D(1)(a) of the Pension Funds Act 24 of 1956; Hunter, Esterhuizen, Jithoo et al (2010) *The Pension Funds Act 24 of 1956: A commentary* 712.

2.8 PRACTICAL PROBLEMS ARISING FROM SECTION 37D OF THE PENSION FUNDS ACT

Section 37A of the Pension Funds Act sets out the situations in which a member's pension interest may be reduced.²⁶⁸ Section 37A(3)(c) indicates that the member's pension interest may be reduced in accordance with section 37D. The requirements that must be met in order for a divorce order to be binding and enforceable against the member spouse's retirement fund are thus found in section 37D(4)(a) of the Pension Funds Act, read with section 7(8) of the Divorce Act.



These requirements are the following:

- The retirement fund must be named or identifiable from the order.²⁶⁹
- The amount or percentage of the pension interest which has been awarded to the non-member spouse must be specified in the divorce order,²⁷⁰ and
- A clear instruction in the divorce order that the relevant fund should pay the particular amount to the non-member spouse is required.²⁷¹

²⁶⁸ Section 37A of the Pension Funds Act 24 of 1956.

²⁶⁹ Section 37D(4)(a)(i) Pension Funds Act 24 of 1956; 'Identifiable' included by the Financial Services Laws General Amendment Act 22 of 2008. See also *L Dossou v Cape Municipal Pension Fund* PFA/WE/21917/08/KM.

²⁷⁰ Section 37D(a) Pension Funds Act 24 of 1956.

²⁷¹ Section 7(8)(a) Divorce Act 70 of 1979.

Various problems arise from these requirements. Many divorce orders pre-dating the amendment of section 37D may not contain information naming the relevant retirement fund, or making the fund identifiable.²⁷² Non-member spouses who have been awarded portions of the member spouses' pension interest in terms of such divorce orders have no option but to have the orders rectified or to wait until their former spouses' retirement to claim their benefits.

The requirement of including an amount or percentage of pension interest awarded is perhaps the least problematic, as it is submitted that most orders would include some indication of the portion of the pension interest awarded to the non-member spouse. However, it is important that the divorce order states that the non-member spouse is entitled to a portion of the pension *interest* of the member spouse.

*Mashilo v Basil Read Group Provident Fund*²⁷³ dealt with a divorce order stating that a portion of a member's pension fund be paid to the non-member spouse.²⁷⁴ The PFA refused to allow a retirement fund to pay the non-member spouse her portion of the member's 'pension fund'. The PFA found that 'pension benefit' had a different meaning than 'pension interest', and the

²⁷² See for example *Griffin v Central Retirement Annuity Fund* [2004] 5 BPLR 5700 (PFA).

²⁷³ *Mashilo v Basil Read Group Provident Fund* [2005] 1 BPLR 51 (PFA).

²⁷⁴ *Mashilo v Basil Read Group Provident Fund* [2005] 1 BPLR 51 (PFA) 52.

divorce order did not satisfy the requirements for enforceability against the fund.²⁷⁵

In *Griffin v Central Retirement Annuity Fund*,²⁷⁶ the PFA refused to order the retirement fund to pay the non-member her awarded portion.²⁷⁷ The divorce order stated that the non-member spouse was entitled to a percentage 'of the defendant's pension'. The PFA found that 'pension' could have various meanings, including (but not limited to) pension interest as defined in the Pension Funds Act.²⁷⁸

In addition, this divorce order did not include a direct instruction that the retirement fund pay the non-member spouse her portion.²⁷⁹ The effect of the wording of the divorce order was that the non-member spouse merely had a personal right against the member spouse to pay her portion upon his receipt thereof.²⁸⁰

The only remedy currently available for non-member spouses in possession of such a defective divorce order is to apply to court for a rectification or variation of the divorce order.²⁸¹

²⁷⁵ *Mashilo v Basil Read Group Provident Fund* [2005] 1 BPLR 51 (PFA) 56.

²⁷⁶ *Griffin v Central Retirement Annuity Fund* [2004] 5 BPLR 5700 (PFA).

²⁷⁷ *Griffin v Central Retirement Annuity Fund* [2004] 5 BPLR 5700 (PFA) 5701.

²⁷⁸ *Griffin v Central Retirement Annuity Fund* [2004] 5 BPLR 5700 (PFA) 5703.

²⁷⁹ *Ibid.*

²⁸⁰ *Ibid.*

²⁸¹ *Ibid.*

2.9 FUNDS NOT ESTABLISHED IN TERMS OF THE PENSION FUNDS ACT

The Pension Funds Act applies only to funds that have been registered in terms of its provisions.²⁸² Retirement funds that are not established in terms of the Pension Funds Act are therefore not bound to follow its terms.²⁸³

The amendment introduced by the Pension Funds Amendment Act²⁸⁴ only affected the Pension Funds Act, and accordingly only changed the operation of the rules of retirement funds registered in terms of the Pension Funds Act.²⁸⁵ Had these amendments been made to the Divorce Act, all retirement funds would be obliged to act according to these amendments, as the Divorce Act does not differentiate between funds. Section 1 of the Divorce Act reads

“pension fund” means a pension fund as defined in section 1(1) of the Pension Funds Act, 1956 (Act No. 24 of 1956), irrespective of whether the provisions of that Act apply to the pension fund or not...

This leads to an important problem. Any retirement fund that has not been registered in terms of the Pension Funds Act is not bound to act in accordance with the amendment to Section 37D of the Pension Funds Act.

²⁸² Section 1(1) of the Pension Funds Act 24 of 1956; Hunter, Esterhuizen, Jithoo et al (2010) *The Pension Funds Act 24 of 1956: A commentary* 56.

²⁸³ Ramabulana (2009) 'Equality in divorce-benefit payments of different pension funds' *De Rebus* (September) 53.

²⁸⁴ Pension Funds Amendment Act 11 of 2007.

²⁸⁵ Section 28 of the Pension Funds Amendment Act 11 of 2007; Section 37D of the Pension Funds Act 24 of 1956.

This means that a spouse who is married to a member of a fund not registered in terms of the Pension Funds Act is not entitled to receive her portion of the member's pension interest at the date of divorce.²⁸⁶ These spouses are indeed entitled to be awarded a portion of the member spouse's pension interest at date of divorce as per the Divorce Act.²⁸⁷ However, the amendment to the Pension Funds Act introducing the 'clean break' principle does not apply to these spouses and they can therefore not benefit from it.²⁸⁸

Put differently, where a member spouse belongs to a retirement fund that has not been registered in terms of the Pension Funds Act, the non-member spouse cannot rely on the Pension Funds Act to claim her portion of the pension interest immediately. Sections 7(7) and 7(8) of the Divorce Act will be applicable to such a divorce order, but all these sections entitle the non-member spouse to is

...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...²⁸⁹

²⁸⁶ Section 7 Divorce Act 70 of 1979; Ramabulana (2009) 'Equality in divorce-benefit payments of different pension funds' *De Rebus* (September) 53.

²⁸⁷ Du Preez (2009) 'I want access to my share of benefits' <http://www.persfin.co.za/index.php?fArticleId=5188932> (accessed on 08/11/2010).

²⁸⁸ Marx and Hanekom (2009) *The Manual on South African Retirement Funds and other Employee Benefits* 707.

²⁸⁹ Section 7(8)(a)(i) Divorce Act 70 of 1979.

The non-member spouse is thus only entitled to enforce her claim of a portion of the pension interest when the member spouse is entitled to receive his pension benefit. The member spouse, in terms of these sections, is only entitled to a pension benefit at retirement. This is an unsatisfactory state of things for various reasons.²⁹⁰

The legislature has recognised the difficulty in forcing the non-member spouse to wait until the retirement of the member spouse for her pension interest. This was then addressed by the legislature in the amendment of the Pension Funds Act.²⁹¹ However, as discussed above, not all retirement funds are subject to the provisions of the Pension Funds Act.²⁹²

For this reason, further amendments to legislation need to be introduced to ensure that all retirement funds are subject to adhere to the 'clean break' principle, which is less prejudicial to the non-member spouse. The Divorce Act applies to all retirement funds, regardless of whether or not they are registered in terms of the Pension Funds

²⁹⁰ See paragraph 2.3.4 above.

²⁹¹ Pension Funds Amendment Act 11 of 2007.

²⁹² Various examples of funds which are not subject to the provisions of the Pension Funds Act 24 of 1956 will be discussed at paragraph 4.4 below.

Act.²⁹³ A possible solution is for the Divorce Act to be amended to include the 'clean break' principle.²⁹⁴

2.10 CUSTOMARY / RELIGIOUS MARRIAGES

2.10.1 Exclusion of spouses married in terms of customary law or religion from the application of the clean break principle

One of the requirements for the awarding of pension interest to a non-member spouse at divorce is that this award is made in terms of a divorce order, which is an order of the court.²⁹⁵ This means that partners whose unions are not terminated through a court order cannot benefit from the power of the court to award pension benefits to one of the partners. Such relationships include permanent life partners as well as marriages concluded solely in terms of religious or customary law. If such a partner is in fact entitled to a portion of the member partner's pension interest, that right cannot be enforced against the relevant fund, as the divorce in terms of the particular culture or religion would not be a decree of divorce as contemplated in the Pension Funds Act.²⁹⁶ The exclusion of spouses married purely in

²⁹³ Divorce Act 70 of 1979; Pension Funds Act 24 of 1956.

²⁹⁴ See paragraph 5.2.2.1 below.

²⁹⁵ Section 37D(1)(d)(ii) of the Pension Funds Act 24 of 1956.

²⁹⁶ *Ibid.*

terms of religious principles or customary law from the application of the (then proposed) clean break principle was, in fact, acknowledged by the SALC.²⁹⁷

To illustrate the effect of the exclusion of spouses married solely in terms of religion from the application of the clean break principle, one may examine a marriage concluded in terms of the Hindu religion. Hindu marriages in South Africa are not recognised unless they are also registered as civil marriages.²⁹⁸ For various transactions, parties to a Hindu marriage are regarded as unmarried partners.²⁹⁹ The dissolution of a Hindu divorce and the consequent division of property between the parties therefore takes place as per the principles of the Hindu religion.

It is submitted that the exclusion of spouses in religious or customary marriages may amount to unfair discrimination based on culture and/or religion as per section 9 of the Constitution.³⁰⁰ The legislature would therefore have to consider an amendment to the clean break principle in order for these partners to benefit from the pension sharing provisions introduced in section 37D in 2007.³⁰¹

²⁹⁷ South African Law Commission (1999) *Report on sharing of pension benefits – Project 112* at 36. See also paragraph 2.4 above.

²⁹⁸ Section 1 Civil Marriages Act 25 of 1961.

²⁹⁹ Marriages in South Africa www.meumannwhite.co.za/news-details/10/ (accessed on 14/12/2010).

³⁰⁰ Constitution of the Republic of South Africa of 1996. See also paragraph 4.5 below.

³⁰¹ Section 37D of the Pension Funds Act 24 of 1956 as amended by the Pension Funds Amendment Act 11 of 2007.

2.10.2 Polygamous marriages

Another consideration when dealing with certain religious and customary marriages is that of polygamy. A polygamous marriage is one in which one spouse (usually the male spouse) enters into numerous marriages with different people.³⁰² Polygamous marriages are permitted in various religions and cultures in South Africa, and the implications of divorce where there is more than one non-member spouse is involved need to be examined.

Customary marriages are governed by the Recognition of Customary Marriages Act.³⁰³ A customary marriage is defined as any marriage which complies with customary law.³⁰⁴ No specific reference is made to polygamous customary marriages. However, section 7 of the Act stipulates the requirements for a polygamous customary marriage. Since additional marriages entered into by either spouse may comply with customary law, it is submitted that polygamous customary marriages may be considered a 'customary marriage' as per the definition in the Act. The patrimonial consequences of the dissolution of a marriage where one spouse has additional spouses is therefore, to some extent, regulated. The Act provides that the court must approve a contract that sets out the matrimonial property regimes which will apply to all the marriages entered into by a particular

³⁰² Hiemstra and Gonin (2005) *Trilingual Legal Dictionary* 94.

³⁰³ Section 7 Recognition of Customary Marriages Act 120 of 1998.

³⁰⁴ Section 1 Recognition of Customary Marriages Act 120 of 1998.

spouse.³⁰⁵ The patrimonial consequences of the dissolution of the marriages are therefore clear from the outset. In terms of section 7(7) of the Act, the court approving such a contract must ensure that the matrimonial property will be divided equitably between all the spouses to a polygamous marriage. Such matrimonial property will include retirement savings.

For purposes of religious polygamous marriages, this thesis will focus on the Islam religion, as this religious group is the largest group in South Africa which permits polygamous marriages.³⁰⁶

Polygamous marriages concluded in terms of the Islamic religion are currently not regulated by legislation. However, the Muslim Marriages Bill aims to address this situation.³⁰⁷ In terms of the Bill, a Muslim man will be compelled to seek the approval of the court before he will be permitted to conclude an additional Muslim marriage.³⁰⁸ As part of this application, a contract detailing the matrimonial property regime applicable to the marriages must be submitted.³⁰⁹

³⁰⁵ Section 7(6) Recognition of Customary Marriages Act 120 of 1998.

³⁰⁶ 1.5% of the South African population are Islamic; Statistics SA Census 2001 Key Results available at www.statssa.gov.za/census01/html/C2001KeyResults.asp (accessed on 21/11/2010).

³⁰⁷ The South African Law Reform Commission prepared the draft Muslim Marriages Bill in 2003 as part of the report on Islamic Marriages and Related Matters Report – Project 59. The Muslim Marriages Bill 2010 has subsequently been accepted by Cabinet.

³⁰⁸ Section 8(6) of the Muslim Marriages Bill 2010.

³⁰⁹ *Ibid.*

Upon divorce, the property will be divided by the court.³¹⁰ When the court has been approached to confirm the dissolution of a Muslim marriage, such court may make an order as to the division of property between the spouses.³¹¹ The division of property will include a division of the pension interests of the spouses. When the parties have not reached a settlement agreement, the court ordering a distribution of the matrimonial assets is compelled to make such distribution in a manner which is equitable to both parties.³¹²

Muslim polygamous marriages may therefore soon be regulated by legislation similar to the Recognition of Customary Marriages Act,³¹³ provided that the Muslim Marriages Bill is accepted and promulgated. However, the draft Bill has only recently been approved by Cabinet. An application was made to the Constitutional Court in 2009 for direct access to the Court in an attempt to compel the enactment of the draft Bill, (or similar version thereof).³¹⁴ However, the application was not granted and no subsequent litigation in this regard has been undertaken.

Should the Bill³¹⁵ be enacted as it currently reads, the position of non-member spouses in polygamous marriages would be somewhat clearer. Until

³¹⁰ Section 9 of the Muslim Marriages Bill 2010.

³¹¹ *Ibid.*

³¹² Cronje and Heaton (2004) *South African Family Law* 221.

³¹³ Recognition of Customary Marriages Act 120 of 1998.

³¹⁴ *Women's Legal Trust v President of the Republic of South Africa and others* 2009 (6) SA 94 (CC) para 1.

³¹⁵ Muslim Marriages Bill 2010.

such time, the division of property upon the dissolution of a polygamous marriage is regulated by the specific marriage contract entered into by the parties, irrespective of whether such agreement is equitable.³¹⁶

It is submitted that the enactment of the Bill or similar legislation will simplify the division of matrimonial property upon the dissolution of a polygamous marriage.

2.10.3 Summary of the division of property upon the dissolution of a customary or religious marriage

In terms of the amendment to section 37D of the Pension Funds Act,³¹⁷ non-member spouses to religious or customary marriages are not entitled to receive their portion of the member spouse's pension interest at the time of divorce. This means that these non-member spouses are excluded from the application of the clean break principle.³¹⁸

The dissolution of polygamous customary marriages are regulated by the Recognition of Customary Marriages Act. The division of property upon the

³¹⁶ *Ryland v Edros* [1997] 1 BCLR 77 (C); Cronje and Heaton (2004) *South African Family Law* 216.

³¹⁷ Pension Funds Act 24 of 1956.

³¹⁸ The constitutionality of this exclusion will be examined in Chapter 4 of this thesis.

dissolution of a polygamous customary marriage is also governed by the Act and is therefore somewhat straightforward.

However, in Muslim polygamous marriages, no similar legislation applies at present. The division of property between the spouses upon divorce is therefore dependant on the marriage contract entered into by the parties at the time of the marriage.

2.11 MAINTENANCE

In South Africa, it is possible for the court granting a divorce to make a maintenance order against one party in favour of the other.³¹⁹ The person ordered to pay maintenance is known as the maintenance debtor, and the person entitled to receive the maintenance amount is known as the maintenance creditor.³²⁰ This order is made in terms of the Divorce Act. Such maintenance amounts are generally payable monthly to the maintenance creditor by the maintenance debtor.³²¹

³¹⁹ Section 7 of the Divorce Act 70 of 1979.

³²⁰ Child Maintenance & Divorce Law http://www.childmaintenancelaw.co.za/general_legal_terms.htm (accessed on 21/11/2010).

³²¹ The court granting the divorce is also permitted to award one party a lump sum maintenance amount. Van Zyl (2000) *Handbook of the South African Law of Maintenance* 39.

At the dissolution of a marriage, the reciprocal duty of support between the spouses terminates.³²² The court granting the divorce has the discretion to award one party a maintenance order, in terms of which she is entitled to receive money from her former spouse after divorce.³²³

The purpose of a maintenance order is to provide some financial security to the maintenance creditor, as the maintenance creditor would inevitably be the spouse with little or no income at divorce, as well as little or no retirement savings.³²⁴ The court is compelled to take various factors into consideration when making a maintenance order.³²⁵ It should be noted that the maintenance creditor cannot be forced to take up employment after the divorce to support herself, as it may be unreasonable to force the maintenance creditor to seek employment in certain circumstances.³²⁶

It is also possible for outstanding maintenance payments to be deducted from the pension benefit payable to the maintenance creditor (i.e. the member

³²² *Miller v Miller* 1940 CPD 466 at 469; Van Heerden, Cockrell, Keightley et al (1999) *Boberg's Law of Persons and the Family* 234.

³²³ Section 7(3) Divorce Act 70 of 1979.

³²⁴ *Crouse v Crouse* 1954 (2) SA 642 (O).

³²⁵ These factors are set out in section 7(2) of the Divorce Act 70 of 1979, and are 'the existing or prospective means of each of the parties, their respective earning capacities, financial needs and obligations, the age of each of the parties, the duration of the marriage, the standard of living of the parties prior to the divorce, their conduct in so far as it may be relevant to the break-down of the marriage, an order in terms of subsection (3) and any other factor which in the opinion of the court should be taken into account.'

³²⁶ *Grasso v Grasso* 1987 1 SA 48 (C); *Kroon v Kroon* 1986 (4) SA 616 (E) 632; *Qoza v Qoza* 1989 (4) SA 838 (Ck) 841; Cronje and Heaton (2004) *South African Family Law* 149.

spouse).³²⁷ In other words, the maintenance amount will be deducted from the benefit payable to the member spouse when the benefit accrues. A full discussion of such payments is, however, beyond the scope of this thesis as this thesis aims to clarify the distribution of retirement fund benefits specifically at the time of divorce, as opposed to the accrual of the pension benefit to the member spouse.

2.12 CONCLUSION

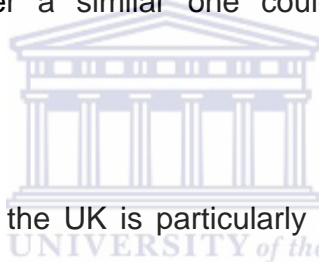
For the above discussion it is clear that various aspects of the division of retirement benefits at divorce remain unclear. Particularly in light of the ongoing retirement reform process, these areas should be addressed and clarified. In the pursuit of such clarification, the following chapters will examine the legislation relating to the division of retirement benefits at divorce applicable in the United Kingdom and compare this to the legislation in this area applicable in South Africa.

³²⁷ Section 37A of the Pension Funds Act 24 of 1956.

CHAPTER 3

THE DISTRIBUTION OF RETIREMENT BENEFITS UPON DIVORCE IN THE UNITED KINGDOM

In Chapter 3, the legislation and cases relating to the distribution of retirement benefits upon divorce in the United Kingdom (UK) will be examined. As South Africa is currently undergoing a retirement fund reform, it is useful to examine the pension system of the UK to determine whether such a system is successful and whether a similar one could be implemented in South Africa.³²⁸



The pension system of the UK is particularly relevant as the South African government appear to favour various aspects of such a system, in particular the introduction of a compulsory national retirement savings fund.³²⁹ In compiling the Second Discussion Paper on retirement fund reform, the National Treasury in fact referred to the UK pension system as one of the models for the proposed national pension fund to be introduced into the South African retirement landscape.³³⁰

³²⁸ See paragraph 1.5 above.

³²⁹ National Treasury (2004) *Retirement fund reform: a discussion paper* 20. See also paragraph 3.2.1 below.

³³⁰ National Treasury (2007) *Social Security and Retirement Fund Reform: Second discussion Paper* 9.

The National Treasury also referred to various other jurisdictions in compiling the 2004 and 2007 Discussion Papers. While it is acknowledged that these jurisdictions may offer some solutions to the problems identified in the South African context, the UK legislation relating to the division of retirement fund benefits at divorce have also undergone parametric amendments.³³¹ Since the aim of this thesis is to emphasise the difficulty arising from parametric amendments to legislation in South Africa, it is apt that the comparative element of this thesis relates to a jurisdiction that has experienced similar difficulties, in order to determine how those difficulties have been addressed elsewhere. It is for this reason that the comparative element of this thesis will be restricted to the UK.



3.1 MATRIMONIAL PROPERTY REGIMES

In order to comprehend the patrimonial consequences of divorce, it is important to understand the matrimonial property regimes applicable in the UK.

In the following paragraphs the matrimonial property regimes of the UK will be discussed briefly. It should be noted that the UK does not have a statutory

³³¹ For example, the Matrimonial Causes Act 1973 (c. 18) was amended by the Pensions Act 1995 (c. 26). Subsequent amendments were made by the Welfare Reform and Pensions Act 1999 (c. 30), the Pensions Act 2004 (c. 35) and the Pensions Act 2007 (c. 22).

matrimonial property regime.³³² This means that there is no 'default' or prescribed matrimonial property system applicable.

It is important to note the difference between the division of property at divorce when the marriage has been in community of property, as opposed to out of community of property. Marriages in community of property ending in divorce usually result in an equal distribution of matrimonial property between the parties,³³³ whereas this is not necessarily the case where the marriage was out of community of property.³³⁴ The consequences of a divorce of a marriage out of community of property may have been agreed upon by the parties prior to the marriage in the form of a pre-nuptial contract.³³⁵ A pre-nuptial contract provides for the division of matrimonial assets (including retirement savings) in specific portions upon divorce.

³³² Boele - Woelki (2000) 'Matrimonial Property Law from a Comparative Perspective' 4; *White v White* [2000] UKHL 54 para 2.

³³³ See paragraph 3.1.2 below.

³³⁴ See paragraph 3.1.1 below.

³³⁵ A pre-nuptial contract is entered into by parties intending to get married out of community of property (such contracts are known as ante-nuptial agreements in South Africa). The contract will regulate the division of matrimonial assets should the parties decide to terminate the marriage by divorce. See Contracts & Agreements <http://www.contractandagreements.co.uk/pre-nuptial-agreements.html> (accessed on 06/12/2010).

3.1.1 Marriage out of community of property

The primary matrimonial property regime in the UK is marriage out of community of property.³³⁶ The premarital rights of the parties are not affected by the marriage. There is no community of property whatsoever under this matrimonial property system. Each spouse retains the property he or she owned before the marriage,³³⁷ although assets acquired during the marriage may be considered 'matrimonial assets' and therefore should be distributed between the parties upon divorce.³³⁸ The marriage out of community of property in the UK is thus similar to a South African marriage out of community of property including the accrual system.³³⁹

Despite the abovementioned concept of complete separation of estates upon marriage, the court has the discretion to redistribute assets upon the termination of the marriage at divorce.³⁴⁰ It is therefore important to understand the patrimonial consequences of a marriage out of community of property, as the matrimonial assets will need to be divided between the

³³⁶ Boele - Woelki (2000) 'Matrimonial Property Law from a Comparative Perspective' 5; Scottish Law Commission no 86 (1984) *Family Law Report on Matrimonial Property* 2; *Radmacher v Granatino* [2010] UKSC 42 para 140.

³³⁷ Boele - Woelki (2000) 'Matrimonial Property Law from a Comparative Perspective' 13.

³³⁸ An asset will be considered a 'matrimonial asset' if it was jointly owned by the parties and if it is not specifically precluded from being a matrimonial asset. See Her Majesty's Revenue and Customs Decision Maker's Guide at http://www.hmrc.gov.uk/manuals/dmgmanual/html/DMG41001/09_0057_DMG42021.htm (accessed on 26/10/2010); See also *White v White* [2000] UKHL 54.

³³⁹ See paragraph 2.1.2 above.

³⁴⁰ Section 25 of the Matrimonial Causes Act 1973 (c. 18); *Miller v Miller and McFarlane v McFarlane* [2006] UKHL 24 para 137.

parties upon divorce. As discussed below, the retirement savings of the parties will be taken into consideration when the matrimonial assets are apportioned.³⁴¹

3.1.2 Marriage in community of property

Marriages in community of property are relatively rare in the UK.³⁴² It is thought that this matrimonial property regime will become more popular in the future.³⁴³ The effect of introducing this system as the default system for marriages in the UK has been examined,³⁴⁴ and the possibility of such introduction had been regarded favourably by both academics as well as among members of the public.³⁴⁵ Marriages in community of property in the UK operate similarly to marriages in community of property in South Africa.³⁴⁶

Should marriages in community of property become more widespread in the UK, it is submitted that this would have an impact on the division of matrimonial property (including retirement savings) upon divorce. The

³⁴¹ See paragraph 3.4 below.

³⁴² Barlow; Callus; Cooke (2006) 'Community of property a regime for England and Wales?' 4; Scottish Law Commission no 86 (1984) *Family Law Report on Matrimonial Property* 2.

³⁴³ Family Law Week <http://www.familylawweek.co.uk/site.aspx?i=ed2306> (accessed on 26/10/2010).

³⁴⁴ Barlow; Callus; Cooke (2006) 'Community of property a regime for England and Wales?'; Scottish Law Commission (1984) *Family Law Report on Matrimonial Property*.

³⁴⁵ Barlow; Callus; Cooke (2006) 'Community of property a regime for England and Wales?'; Law Commission for England and Wales (1973) *First Report on Family Law – A new approach* Law Comm 52 London HMSO; Scottish Law Commission (1984) *Family Law Report on Matrimonial Property*.

³⁴⁶ See paragraph 2.1.1 above.

division of matrimonial property in a marriage in community of property is generally equal, and each party would know from the outset what they are entitled to in terms of retirement savings. It has, in fact, been suggested that the introduction of the concept of a 'matrimonial asset'³⁴⁷ has effectively implemented a form of community of property in marriages entered into in England and Wales.³⁴⁸

3.2 THE PENSION SYSTEM OF THE UK

It is necessary to understand the workings of the UK pension system, as the South African National Treasury has recommended the inclusion of certain aspects of the UK pension system in the reformed South African retirement industry.³⁴⁹ The pension system in the UK comprises both social insurance and social assistance.³⁵⁰ The state, employers and private pension providers co-operate to ensure that this system operates well.³⁵¹ In the following paragraphs, the pension system of the UK will be discussed briefly.

³⁴⁷ See paragraph 3.1.1 above; *White v White* [2000] UKHL 54.

³⁴⁸ Family Law Week <http://www.familylawweek.co.uk/site.aspx?i=ed2306> (accessed on 26/10/2010).

³⁴⁹ National Treasury (2004) *Retirement fund reform: a discussion paper* 20, 27 and 36.

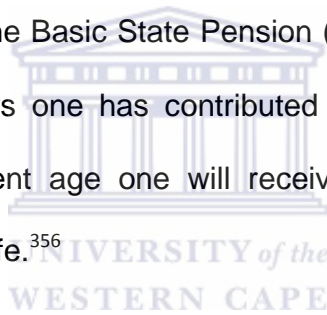
³⁵⁰ Malherbe (2009) *Intergenerational solidarity and the provision of support and care to older persons* 523. See paragraph 1.2 above for an explanation of the terms 'social insurance' and 'social assistance'.

³⁵¹ ISSA <http://www.issa.int/Observatory/Country-Profiles/Regions/Europe/United-Kingdom> (accessed on 14/12/2010); Care and the law http://www.careandthelaw.org.uk/eng/b_section11 (accessed on 07/12/2010).

3.2.1 Social insurance

The social insurance aspect of the UK pension system relates to the payment of contributions by employees to a national retirement savings fund known as the National Insurance.³⁵² Contributions to the National Insurance are compulsory for all employees as well as self-employed individuals, provided that these individuals earn a certain minimum amount.³⁵³

Provided that contributions have been made to the National Insurance, the employee will receive the Basic State Pension (BSP) at retirement.³⁵⁴ Based on the number of years one has contributed to the National Insurance,³⁵⁵ upon reaching retirement age one will receive the weekly BSP from the National Insurance for life.³⁵⁶



³⁵² Malherbe (2009) *Intergenerational solidarity and the provision of support and care to older persons* 523. The National Insurance was re-named by the National Insurance Act 1946 (c. 67) as it was formerly known as the 'Old Age Pension' established by the Old Age Pensions Act 1908 (c. 40).

³⁵³ HM Revenue & Customs <http://www.hmrc.gov.uk/ni/intro/basics.htm> (accessed on 26/10/2010).

³⁵⁴ Pensions Act 2007 (c. 22).

³⁵⁵ HM Revenue & Customs <http://www.hmrc.gov.uk/ni/basic-state-pension.htm> (accessed on 26/10/2010).

³⁵⁶ The retirement age until 5 April 2010 was 60 years of age for women and 65 years for men. The retirement age for women will be increased to 65 years by 2020, after which the retirement age for men and women will be increased over a period of 22 years (starting on 6 April 2024) in terms of section 13 of the Pensions Act 2007 (c. 22) read with schedule 3 of the Pensions Act 2007 (c.22).

Should an individual earn less than the specified amount, he will not be required to make contributions to the National Insurance.³⁵⁷ Instead, qualifying employees make contributions to the State Second Pension (S2P).³⁵⁸

Contributions to the S2P are not strictly compulsory as contributions may be contracted out in certain situations.³⁵⁹ S2P contributions may be contracted out by employees in a particular income bracket who contribute to occupational funds,³⁶⁰ stakeholder pensions³⁶¹ or private (also called personal) pension plans.³⁶²



³⁵⁷ ISSA <http://www.issa.int/Observatory/Country-Profiles/Regions/Europe/United-Kingdom> (accessed on 14/12/2010).

³⁵⁸ S2P replaced the State Earnings Related Pension Scheme (SERPS) as per the provisions of the Child Support, Pensions and Social Security Act 2000 (c. 19). See ISSA <http://www.issa.int/aiss/Observatory/Country-Profiles/Regions/Europe/United-Kingdom> (accessed on 26/10/2010).

³⁵⁹ Malherbe (2009) *Intergenerational solidarity and the provision of support and care to older persons* 525; Directgov http://www.direct.gov.uk/en/Pensionsandretirementplanning/StatePension/AdditionalStatePension/DG_4017827 (accessed on 07/12/2010).

³⁶⁰ Occupational funds are provided by a particular employer to its employees, and can be either final salary schemes or money purchase schemes. See paragraphs 3.6.3.2.1 and 3.6.3.2.2 below.

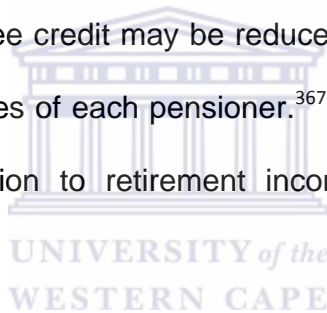
³⁶¹ A stakeholder pension scheme is established in terms of a trust and must meet certain requirements as set out in section 1 of the Welfare Reform and Pensions Act 1999 (c. 30).

³⁶² The earlier legislation relating to private pension plans was updated by the Pension Schemes Act 1993 (c. 48) and these plans are offered by various financial institutions. See http://www.pensionsorter.co.uk/pensions_how_work.html#howdoesppwork (accessed on 25/10/2010).

3.2.2 Social assistance

The social assistance aspect of the UK pension system is apparent in the payment of certain benefits by the state from the National Insurance.³⁶³ These payments are known as pension credits.³⁶⁴ There are two types of pension credit, namely a guarantee credit and a savings credit.³⁶⁵

Guarantee credits are intended to assist pensioners who receive some income during retirement which is not sufficient to cover their financial needs.³⁶⁶ This guarantee credit may be reduced or increased, depending on the unique circumstances of each pensioner.³⁶⁷ The guarantee credit is paid as a pension in addition to retirement income already received by the pensioner.³⁶⁸



Savings credits supplement the retirement income for those pensioners who are older than 65 and have contributed to a retirement savings vehicle.³⁶⁹

³⁶³ Malherbe (2009) *Intergenerational solidarity and the provision of support and care to older persons* 523.

³⁶⁴ State Pension Credit Act 2002 (c. 16).

³⁶⁵ Sections 2 and 3 of the State Pension Credit Act 2002 (c. 16).

³⁶⁶ ISSA <http://www.issa.int/Observatory/Country-Profiles/Regions/Europe/United-Kingdom> (accessed on 14/12/2010).

³⁶⁷ Malherbe (2009) *Intergenerational solidarity and the provision of support and care to older persons* 527.

³⁶⁸ Malherbe (2009) *Intergenerational solidarity and the provision of support and care to older persons* 527.

³⁶⁹ Directgov http://www.direct.gov.uk/en/Pensionandretirementplanning/PensionCredit/DG_10018692 (accessed on 25/10/2010); A retirement savings vehicle is any scheme which provides for the saving and investment of money with a view to utilising those funds to support oneself after reaching retirement age. Examples would therefore include

The savings credit takes the form of a cash payment in addition to any other retirement benefits received.³⁷⁰

3.2.3 Three tier pension system

The pension system as described briefly above can be organised into three tiers.³⁷¹ These three tiers together make up the income received by an individual at retirement.³⁷²

The first tier consists of the Basic State Pension paid from the National Insurance.³⁷³ National Insurance contributions are paid in various classes, depending on the amount earned by the individual.³⁷⁴ Various benefits payable as a result of satisfying the relevant means test also form part of tier one.³⁷⁵ These benefits include the Jobseeker's Allowance, the Incapacity Benefit, Bereavement Benefits as well as Maternity Allowance.³⁷⁶

occupational schemes, personal pension plans and stakeholder pensions. See paragraph 3.2.1 above.

³⁷⁰ NHS Choices <http://www.nhs.uk/CarersDirect/moneyandlegal/otherbenefits/Pages/PCsavingscredit.aspx> (accessed on 20/09/2010).

³⁷¹ Blundell and Emmerson (2003) 'Fiscal Effects of Reforming the UK Pension System' 6.

³⁷² Explanatory Notes to the Welfare Reform and Pensions Act 1999 <http://www.legislation.gov.uk/ukpga/1999/30/notes/division/2/2> (accessed on 17/08/2010).

³⁷³ Blundell and Emmerson (2003) 'Fiscal Effects of Reforming the UK Pension System' 6

³⁷⁴ Advice Guide http://www.adviceguide.org.uk/index/life/benefits/national_insurance_contributions_and_benefits.htm (accessed on 07/12/2010).

³⁷⁵ Blundell and Emmerson (2003) 'Fiscal Effects of Reforming the UK Pension System' 6; NHS Choices <http://www.nhs.uk/CarersDirect/moneyandlegal/disabilitybenefits/Pages/Means-testedbenefits.aspx> (accessed on 07/12/2010).

³⁷⁶ These allowances and others are paid to insured employees in certain circumstances. For example, Bereavement Benefits are payable at the death of one's spouse. These benefits and the qualifying criteria are set out in sections 53 – 67 of the Welfare Reform and Pensions

The next tier is made up of both state and privately funded pension income.³⁷⁷

This tier includes contributions made to retirement savings vehicles which are made by an individual to the S2P, in addition to the contributions made to the National Insurance.³⁷⁸ The third and final tier encompasses private pension coverage, which is selected by individuals on a voluntary basis.³⁷⁹

From this arrangement of tiers, the combination of social insurance and social assistance in the UK system is clear. The first and second tiers comprise social insurance by virtue of the contributions made by individuals, and social assistance by virtue of state involvement.

The third tier may be considered social insurance, although this is debatable. Social security schemes are traditionally based on the concept of solidarity, which involves some form of support of vulnerable individuals by other members of the community.³⁸⁰ It may be argued that this tier is not based on solidarity, as each person contributes to a retirement savings vehicle purely for their own benefit upon reaching retirement age.

Act 1999 (c. 30). See also ISSA <http://www.issa.int/Observatory/Country-Profiles/Regions/Europe/United-Kingdom> (accessed on 14/12/2010).

³⁷⁷ Blundell and Emmerson (2003) 'Fiscal Effects of Reforming the UK Pension System' 7.

³⁷⁸ S2P replaced the State Earnings Related Pension Scheme (SERPS) as per the provisions of the Child Support, Pensions and Social Security Act 2000 (c. 19).

³⁷⁹ Directgov http://www.direct.gov.uk/en/Pensionsandretirementplanning/Companyandpersonalpensions/CompanyPensions/DG_10028150 (accessed on 07/12/2010).

³⁸⁰ Malherbe (2009) *Intergenerational solidarity and the provision of support and care to older persons* 25.

3.2.4 Summary of the UK pension system

The pension system operating in the UK may therefore be summarised briefly as follows. The UK pension system consists of state – run retirement savings vehicles, viz the Basic State Pension³⁸¹ and S2P.³⁸² Individuals are compelled to contribute to either the Basic State Pension or S2P,³⁸³ depending on their income.³⁸⁴

In order to supplement these retirement savings, it is recommended that individuals contribute to an additional retirement savings scheme, which may be an occupational pension scheme, a stakeholder pension scheme or a private pension plan.³⁸⁵



The UK pension system also comprises a social assistance aspect, in that certain benefits are payable to qualifying individuals by the state.³⁸⁶

³⁸¹ See paragraph 3.2.1 above.

³⁸² See paragraph 3.2.1 above.

³⁸³ This includes the possibility of contracting out of the S2P, as discussed in paragraph 3.2.1 above.

³⁸⁴ See paragraph 3.2.1 above.

³⁸⁵ See paragraph 3.2.1 above.

³⁸⁶ See paragraph 3.2.2 above.

3.3 POSITION REGARDING THE DIVISION OF PENSION BENEFITS AT DIVORCE PRIOR TO THE INTRODUCTION OF THE PENSIONS ACT OF 1995

As the legislation relating to this topic differed in the countries making up the UK prior to 1995, the position in England and Wales, Northern Ireland and Scotland will be discussed separately in this section.

3.3.1 England and Wales

The Matrimonial Causes Act³⁸⁷ was introduced in 1973 as a result of recommendations made by the Law Commission of England and Wales relating to and ancillary to marriage proceedings.

In terms of the Matrimonial Causes Act, a court approached by parties in order to obtain a decree of divorce³⁸⁸ was given the authority to vary any divorce settlement agreements concluded by divorcing parties.³⁸⁹ The Matrimonial Causes Act also permits the court granting a divorce to exercise its discretion when allocating matrimonial assets to the respective parties.³⁹⁰

³⁸⁷ Matrimonial Causes Act 1973 (c. 18).

³⁸⁸ It should be noted that county courts usually handle divorce proceedings. Any further reference to 'a' or 'the' court, or 'the court granting a decree of divorce' therefore implies the relevant county court. See Divorce <http://www.hmcourts-service.gov.uk/infoabout/divorce/index.htm> (accessed on 07/12/2010).

³⁸⁹ Section 24 Matrimonial Causes Act 1973 (c. 18).

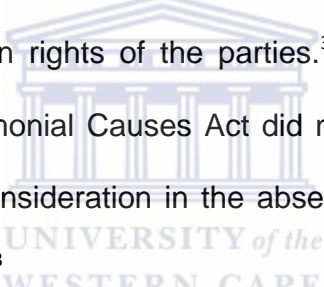
³⁹⁰ *Miller v Miller and McFarlane v McFarlane* [2006] UKHL 24 para 1.

Section 24(1)(c) of the Matrimonial Causes Act reads:

On granting a decree of divorce, a decree of nullity of marriage or a decree of judicial separation or at any time thereafter...the court may make any one of the following orders, that is to say - ...an order varying for the benefit of the parties to the marriage and of the children of the family or either or any of them any ante-nuptial or post-nuptial settlement...made on the parties to the marriage.

This potential power of the court was the subject of the case *Brooks v Brooks*, in which it was disputed that a court granting a decree of divorce in fact had this power in terms of section 24 of the Act.³⁹¹

The court interpreted the section and came to the conclusion that the section extended to the variation of settlement agreements when such variation pertained to the pension rights of the parties.³⁹² The authority created by section 24 of the Matrimonial Causes Act did not extend to the court taking pension benefits into consideration in the absence of the parties reaching a settlement agreement.³⁹³

The logo of the University of the Western Cape, featuring a classical building facade with columns and the text 'UNIVERSITY of the WESTERN CAPE' below it.

The authority of the court to include pension rights in a variation of a divorce order in terms of section 24 of the Matrimonial Causes Act was eliminated by the Welfare Reform and Pensions Act of 1999,³⁹⁴ which introduced pension sharing into the UK pension system.³⁹⁵

³⁹¹ *Brooks v Brooks* [1995] UKHL 19 available at <http://www.bailii.org/uk/cases/UKHL/1995/19.html> (accessed on 7/09/2010).

³⁹² *Brooks v Brooks* [1995] UKHL 19.

³⁹³ *Brooks v Brooks* [1995] UKHL 19.

³⁹⁴ Welfare and Pensions Reform Act 1999 (c. 30).

³⁹⁵ See paragraph 3.6 below.

3.3.2 Northern Ireland

In Northern Ireland, the Matrimonial Causes Order³⁹⁶ provided the court with an authority similar to that provided in England and Wales by the Matrimonial Causes Act.³⁹⁷ In other words, pension rights could be included when varying a divorce order but could not be allocated when granting the divorce order.³⁹⁸ The introduction of this authority indicates an attempt to bring the legislation in Northern Ireland in line with the Matrimonial Causes Act applicable in England and Wales.



3.3.3 Scotland

The Family Law Act of 1985 provided that courts approached to grant a decree of divorce could only do so if the matrimonial property would be divided in a manner that was equitable to both parties.³⁹⁹ The Act provided that when parties were divorced by a Scottish court, pension rights had to be included in the division of the matrimonial property, as such rights in fact formed a part of the matrimonial property.⁴⁰⁰ Prior to the introduction of the

³⁹⁶ Matrimonial Causes Order of 1978 (No. 1045 (NI)).

³⁹⁷ Matrimonial Causes Act 1973 (c. 18).

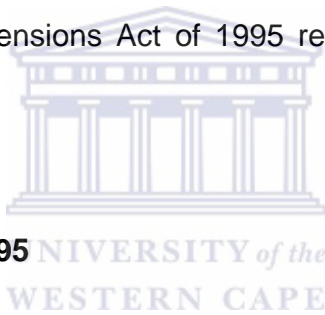
³⁹⁸ See paragraph 3.3.1 above.

³⁹⁹ Section 9 Family Law (Scotland) Act 1985 (c. 37).

⁴⁰⁰ Sections 8 - 10 Family Law (Scotland) Act 1985 (c. 37).

Pensions Act in 1995, divorcing parties in Scotland were compelled to offset the value of the pension benefit against a matrimonial asset.⁴⁰¹

It is clear that the Scottish legislation prior to 1995 in this regard was somewhat advanced when compared to the Matrimonial Causes Act of England and Wales and the Matrimonial Causes Order applicable in Northern Ireland.⁴⁰² It is submitted that this was indicative of dissatisfaction relating to the courts⁴⁰³ inability to include pension savings when allocating matrimonial assets upon divorce.⁴⁰⁴ As will become apparent in the following paragraph, the provisions of the Pensions Act of 1995 reflected the existing principles applicable in Scotland.



3.4 PENSIONS ACT 1995

Before the introduction of the Pensions Act,⁴⁰⁵ pension rights could not be taken into account by the court which was approached to grant a divorce.⁴⁰⁶ The result of this was that the non-member spouse could not be awarded a portion of the member spouse's pension benefits at divorce.⁴⁰⁷

⁴⁰¹ See paragraph 3.5.1 below.

⁴⁰² Matrimonial Causes Act 1973 (c. 18); Matrimonial Causes Order of 1978 (No. 1045 (NI)).

⁴⁰³ In England, Wales and Northern Ireland.

⁴⁰⁴ See paragraphs 3.3.1 and 3.3.2 above.

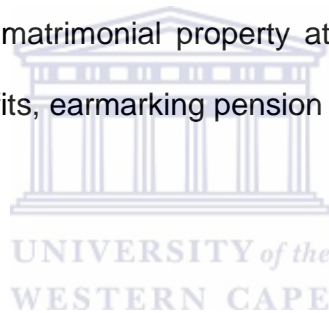
⁴⁰⁵ Pensions Act 1995 (c. 26).

⁴⁰⁶ *Brooks v Brooks* [1995] UKHL 19 available at <http://www.bailii.org/uk/cases/UKHL/1995/19.html> (accessed on 7/09/2010).

⁴⁰⁷ *Brooks v Brooks* [1995] UKHL 19.

The Pension Act of 1995⁴⁰⁸ amended the Matrimonial Causes Act,⁴⁰⁹ and permitted the court to make an order regarding the division of pension benefits when granting a divorce.⁴¹⁰ The Pensions Act introduced the earmarking principle for divorcing couples in England, Wales, Northern Ireland and Scotland.⁴¹¹ This act provided a uniform procedure to be followed in all these countries, as opposed to separate pieces of legislation applicable in each.

The following paragraphs will set out the options available to spouses relating to the division of their matrimonial property at divorce. These options are offsetting pension benefits, earmarking pension benefits and pension sharing.



⁴⁰⁸ Pensions Act 1995 (c. 26).

⁴⁰⁹ See paragraph 3.3.1 above.

⁴¹⁰ The Pensions Act of 1995 (c. 26) inserted sections 25B - 25D into the Matrimonial Causes Act of 1973 (c. 18). See also paragraph 3.3.1 above.

⁴¹¹ Pensions Act 1995 (c. 26). See paragraph 3.5.2 below for an explanation of the earmarking of pension benefits.

3.5 OPTIONS AVAILABLE AT DIVORCE

Prior to the introduction of the clean break principle in 1999,⁴¹² there were two options available to divorcing spouses relating to the division of pension benefits.⁴¹³ The following options, namely offsetting and earmarking pension benefits, are available to divorcing couples in England, Wales, Scotland as well as Northern Ireland.⁴¹⁴

3.5.1 Offsetting

In terms of the principle of offsetting, the value of the pension benefit assigned to the non-member spouse could be 'off-set' against an asset in the matrimonial estate. If, for example, the pension benefit assigned to the non-member spouse amounted to £50 000, and the matrimonial home was valued at £50 000, the non-member would be entitled to retain the property, and would not have a claim for the pension benefits of the member spouse.⁴¹⁵

⁴¹² See paragraph 3.6 below.

⁴¹³ Earmarking UK http://www.sharingpensions.co.uk/earmarking_directory.htm (accessed on 14/07/2010).

⁴¹⁴ Divorce & Pensions <http://www.pruadviser.co.uk/content/acrobat.P523.PDF> (accessed on 17/09/2010).

⁴¹⁵ This example is an adaptation of the example found at http://www.invidion.co.uk/pensions_and_divorce.php (accessed on 14/07/2010).

Offsetting was the only option available to divorcing spouses prior to the introduction of earmarking in 1996.⁴¹⁶

Offsetting is quite problematic in practice. The above example is simple, in that the pension benefit and an asset in the matrimonial estate happen to have the same value. However, this is not always the case. The difficulty lies in determining exactly how to offset the value of the pension benefit against an asset which does not have the same value.⁴¹⁷ For example, where the pension benefit awarded amounts to £50 000, and the only other asset in the estate is valued at £30 000, this means that after offsetting the value of the pension benefit awarded the non-member spouse against the value of the other asset, the non-member spouse is still 'owed' £20 000.⁴¹⁸ The opposite may also occur, where the value of the asset exceeds the value of the pension benefit awarded. In such a situation, after offsetting has taken place, the non-member spouse may 'owe' the member spouse that amount of the value of the asset which exceeds the amount of the pension benefit.⁴¹⁹

⁴¹⁶ The Pensions Advisory Service <http://www.pensionsadvisoryservice.org.uk/workplace-pension-schemes/final-salary-schemes/divorce> (accessed on 14/07/2010). See paragraph 3.5.2 for a discussion of the earmarking principle.

⁴¹⁷ The Pensions Advisory Service http://www.pensionsadvisoryservice.org.uk/pension_rights/divorce (accessed on 26/10/2010).

⁴¹⁸ This example is an adaptation of the example found at http://www.invidion.co.uk/pensions_and_divorce.php (accessed on 14/07/2010).

⁴¹⁹ Divorce & Pensions <http://www.pruadviser.co.uk/content/acrobat.P523.PDF> (accessed on 17/09/2010).

Another difficulty inherent in off-setting the amount awarded the member spouse against one of the matrimonial assets is that the value of the pension benefit may fluctuate,⁴²⁰ whereas the value of property may remain quite constant over a period of time.⁴²¹ This may lead to one of the parties receiving an unfair financial gain.⁴²²

As a result of the abovementioned difficulties relating to the offsetting of matrimonial assets against pension benefits, the earmarking principle was introduced as an additional option for the division of pension benefits at divorce.

3.5.2 Earmarking



The Pensions Act of 1995⁴²³ introduced an additional method of dividing pension benefits between spouses, called earmarking, into the Matrimonial Causes Act.⁴²⁴ The Pensions Act allows the court granting the decree of divorce to ' earmark' the pension rights of the member spouse.⁴²⁵ 'Pension

⁴²⁰ For example, the investment return on the pension savings of the member spouse may not be a constant amount, leading to a greater or lesser pension benefit.

⁴²¹ The Pensions Advisory Service <http://www.pensionsadvisoryservice.org.uk/workplace-pension-schemes/final-salary-schemes/divorce> (accessed on 14/07/2010).

⁴²² *Ibid.*

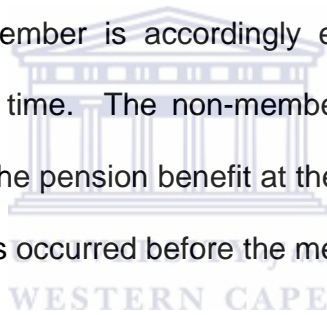
⁴²³ Pensions Act 1995 (c. 18).

⁴²⁴ Section 166 Pensions Act of 1995 (c. 26) introduced sections 25B – 25D into the Matrimonial Causes Act of 1973.

⁴²⁵ Section 166 of the Pensions Act 1995 (c. 26). Earmarking became an option for divorcing couples in the UK as follows: 1 July 1996 in England and Wales, 19 August 1996 in Scotland

rights' in this context refer to both lump sum payments and the pension income received by a member.⁴²⁶

The earmarking of a pension benefit is essentially an endorsement made on the records of the pension fund to the effect that the non-member spouse is entitled to a portion of the member spouse's pension benefit.⁴²⁷ The non-member spouse is entitled to the earmarked portion of the pension benefit at the time the member spouse would be entitled to receive the pension benefit himself.⁴²⁸ The member spouse is entitled to receive the benefit when he retires, and the non-member is accordingly entitled to her portion of the pension benefit at that time. The non-member spouse may be entitled to receive their portion of the pension benefit at the time of death of the member spouse where death has occurred before the member's retirement.⁴²⁹



There are numerous problems with earmarking as a form of dividing pension benefits. Firstly, the non-member spouse may be forced to wait some time

and on 10 August 1996 in Northern Ireland. See Divorce & Pensions <http://www.pruadviser.co.uk/content/acrobat.P523.PDF> (accessed on 17/09/2010).

⁴²⁶ Earmarking UK http://www.sharingpensions.co.uk/earmarking_directory.htm (accessed on 14/07/2010).

⁴²⁷ Pensions and divorce / dissolved civil partnership <http://www.insolvency.gov.uk/freedomofinformatin/technical/technicalmanual/Ch61-72/Chapter61/Part2/Part2.htm> (accessed on 25/10/2010).

⁴²⁸ Earmarking UK http://www.sharingpensions.co.uk/earmarking_directory.htm (accessed on 14/07/2010).

⁴²⁹ Local Government Pension Scheme <http://www.lgps.org.uk/lge/core/page.do?pagelid=102040> (accessed on 26/10/2010).

before receiving their portion of the pension benefit.⁴³⁰ This in turn necessitates contact between the spouses after their divorce, which may be objectionable for both parties.⁴³¹

Secondly, the costs involved with implementing an earmarking order are quite high,⁴³² which make earmarking orders impractical for those with little retirement savings. It is submitted that it is not clear which party is liable for these costs, and that it may be unduly burdensome on either party should they be compelled to pay these costs.

A third problematic aspect of earmarking orders is that the order may lapse in certain situations.⁴³³ The lapsing of an order may occur where the non-member spouse remarries before the retirement of the member spouse, or if the member dies before retiring.⁴³⁴

An earmarking order clearly prevents the parties from making a 'clean break' from the marriage (and each other). For these reasons, earmarking orders

⁴³⁰ The Pensions Advisory Service <http://www.pensionsadvisoryservice.org.uk/workplace-pension-schemes/final-salary-schemes/divorce> (accessed on 14/07/2010).

⁴³¹ Independent Direct Financial Management (City Office) <http://www.idfmcity.co.uk/index.php?pg=6&sn=35&sub=27> (accessed on 26/10/2010).

⁴³² Divorce and Pensions http://www.invidion.co.uk/pensions_and_divorce.php (accessed on 14/07/2010).

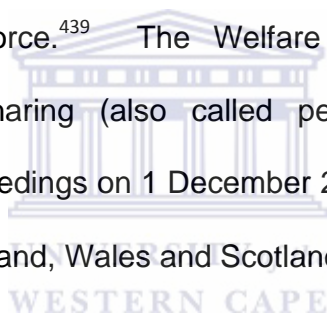
⁴³³ Divorce and Pensions http://www.invidion.co.uk/pensions_and_divorce.php (accessed on 14/07/2010).

⁴³⁴ Pensions and divorce / dissolved civil partnership <http://www.insolvency.gov.uk/freedomofinformatin/technical/technicalmanual/Ch61-72/Chapter61/Part2/Part2.htm> (accessed on 25/10/2010).

tend to be less popular⁴³⁵ than offsetting pension benefits.⁴³⁶ The Welfare Reform and Pensions Act of 1999 amended the earmarking provisions and also renamed earmarking orders pension attachment orders.⁴³⁷

3.6 THE CLEAN BREAK PRINCIPLE

The clean break principle was introduced into UK divorce law by the Welfare Reform and Pensions Act of 1999,⁴³⁸ which provides that the non – member spouse may claim her portion of the pension benefit of the member spouse immediately upon divorce.⁴³⁹ The Welfare Reform and Pensions Act introduced pension sharing (also called pension splitting) for couples instituting divorce proceedings on 1 December 2000 or thereafter.⁴⁴⁰ This Act finds application in England, Wales and Scotland.⁴⁴¹



⁴³⁵ Warwick Wright Financial Services Ltd <http://www.warwickwright.com/pension.html> (accessed on 26/10/2010).

⁴³⁶ See paragraph 3.5.1 for a discussion of offsetting pension benefits at divorce.

⁴³⁷ Schedule 4 of the Welfare Reform and Pensions Act 1999 (c.30). Earmarking orders are now referred to as attachment orders outside of Scotland. See also *Smith R (on the application of) v Secretary of State Defence and another* [2004] EWHC 1979 (Admin). However, for purposes of this thesis the term 'earmarking' will be used in order to prevent confusion.

⁴³⁸ Welfare Reform and Pensions Act 1999 (c. 30); The Pensions Advisory Service <http://www.pensionsadvisoryservice.org.uk/workplace-pension-schemes/final-salary-schemes/divorce> (accessed on 14/07/2010).

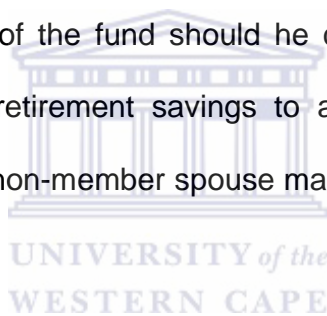
⁴³⁹ Section 19 Welfare Reform and Pensions Act 1999 (c. 30).

⁴⁴⁰ Welfare Reform and Pensions Act 1999 (c. 30); Divorce & Pensions <http://www.pruadviser.co.uk/content/acrobat.P523.PDF> (accessed on 17/09/2010).

⁴⁴¹ Sections 19 and 20 of the Welfare Reform and Pensions Act 1999 (c.30).

Pension sharing in Northern Ireland was introduced by the Pensions (Northern Ireland) Order of 1995.⁴⁴² The pension sharing provisions in Northern Ireland are applied similarly to the pension sharing provisions introduced in England, Wales and Scotland.

The pension benefit is valued as at date of divorce, and it is this value which may then be divided by the court. The value given to the pension benefit as at date of divorce is known as the cash equivalent transfer value (CETV).⁴⁴³ As the name implies, this value is the one to which the member would be entitled to transfer out of the fund should he cease his membership of the fund and transfer his retirement savings to a new pension fund.⁴⁴⁴ The portion awarded to the non-member spouse may take the form of a lump sum benefit, or a pension.⁴⁴⁵



⁴⁴² The Pensions (Northern Ireland) Order of 1995 No 3213 (N.I. 22); Divorce & Pensions <http://www.pruadviser.co.uk/content/acrobat.P523.PDF> (accessed on 17/09/2010).

⁴⁴³ The Pensions Advisory Service <http://www.pensionsadvisoryservice.org.uk/workplace-pension-schemes/final-salary-schemes/divorce> (accessed on 14/07/2010). See also paragraph 3.6.3.2 below.

⁴⁴⁴ CETV Valuations UK <http://www.sharingpensions.co.uk/valuations.htm> (accessed on 20/09/2010).

⁴⁴⁵ Divorce and Pensions http://www.invidion.co.uk/pensions_and_divorce.php (accessed on 14/07/2010).

3.6.1 Pensions which may not be split

Certain pension benefits in the UK may not be split by the court in a divorce order.⁴⁴⁶ These are the following:

- a) The Basic State Pension;⁴⁴⁷
- b) Spouse's pension from a previous marriage;
- c) The second tier State Pension predating 1978;⁴⁴⁸
- d) Pensions already subject to an earmarking order;⁴⁴⁹ and
- e) Certain public service pension schemes.⁴⁵⁰

Pensions which may therefore be shared at divorce are all money purchase schemes,⁴⁵¹ final salary schemes,⁴⁵² pensions already in payment, small self administered pension schemes, as well as S2P⁴⁵³ benefits.⁴⁵⁴

⁴⁴⁶ Section 27 Welfare Reform and Pensions Act 1999 (c. 30).

⁴⁴⁷ See paragraph 3.2.1 above.

⁴⁴⁸ Divorce and Pensions http://www.invidion.co.uk/pensions_and_divorce.php (accessed on 14/07/2010).

⁴⁴⁹ Sections 25B – D of the Matrimonial Causes Act 1973 (c. 18). See also paragraph 3.5.2 above.

⁴⁵⁰ Section 27(1) of the Welfare Reform and Pensions Act 1999 (c. 30).

⁴⁵¹ See paragraph 3.6.3.2.2 below.

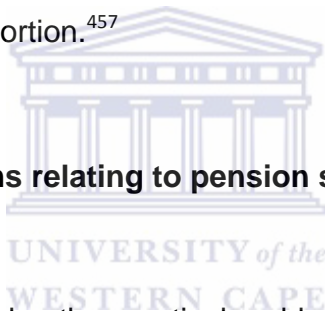
⁴⁵² See paragraph 3.6.3.2.1 below.

⁴⁵³ See paragraph 3.2.1 above.

⁴⁵⁴ Divorce and Pensions http://www.invidion.co.uk/pensions_and_divorce.php (accessed on 14/07/2010).

3.6.2 Options available to the non-member spouse

Depending on the type of pension scheme, the non-member spouse may be entitled to transfer her portion to another fund (known as external transfer) or may be permitted to leave the portion in the existing pension fund as a new member of the fund.⁴⁵⁵ The non-member spouse's portion of the pension benefit is referred to as a pension credit, while the remaining portion belonging to the member spouse is referred to as a pension debit.⁴⁵⁶ Certain pension funds make provision for either internal or external transfer of the non-member spouse's portion.⁴⁵⁷



3.6.3 Practical problems relating to pension sharing

In the following paragraphs, the practical problems relating to pension sharing orders will be discussed. The advantages of pension sharing orders will also be outlined below.⁴⁵⁸

⁴⁵⁵ This is also known as an internal transfer, or shadow membership of the pension scheme. See the Pensions Advisory Service <http://www.pensionsadvisoryservice.org.uk/workplace-pension-schemes/final-salary-schemes/divorce> (accessed on 14/07/2010).

⁴⁵⁶ Section 29 Welfare Reform and Pensions Act 1999 (c. 30).

⁴⁵⁷ Mercer Select UK http://uk.select.mercer.com/article/MPNUP00001/?article_id=MPNUP00001&url=http%3a%2f%2fuk.select.mercer.com%2farticle%2fMPNUP00001%2f%3farticle_id%3dMPNUP00001#item1 (accessed on 26/10/2010).

⁴⁵⁸ See paragraph 3.6.4 below.

3.6.3.1 *Cost of implementation of order*

As with earmarking orders, one of the problems relating to the implementation of pension sharing orders is the cost thereof. Pension scheme trustees⁴⁵⁹ are permitted to charge fees when executing a pension sharing order, as this process requires some administration.⁴⁶⁰ It is thought that the average cost of implementing a pension sharing order starts at £750 per order,⁴⁶¹ exclusive of VAT.⁴⁶² The parties to the divorce are liable for all fees incurred in the implementing of a pension sharing order.⁴⁶³ Should the trustees be asked to perform additional functions relating to the implementation of the order, they will similarly be permitted to charge additional fees in this regard.⁴⁶⁴

The abovementioned administration fees are in addition to the solicitor's fees,⁴⁶⁵ the Independent Financial Advisor's fees⁴⁶⁶ as well as potential

⁴⁵⁹ Trustees are tasked with various important duties in relation to pension schemes, which include making decisions relating to the investment of funds. See sections 32 to 39 of the Pensions Act 1995 (c. 18). In addition, trustees are responsible for the implementing of pension sharing orders.

⁴⁶⁰ Section 41 Welfare Reform and Pensions Act 1999 (c. 30).

⁴⁶¹ The Pensions Advisory Service <http://www.pensionsadvisoryservice.org.uk/workplace-pension-schemes/final-salary-schemes/divorce> (accessed on 14/07/2010).

⁴⁶² HM Revenue & Customs <http://www.hmrc.gov.uk/vat/start/introduction.htm> (accessed on 26/10/2010); VAT in the UK is currently 17.5%, although this will be increased to 20% on 4 January 2011. See HM Revenue & Customs <http://www.hmrc.gov.uk/vat/forms-rates/rates/index.htm> (accessed on 06/12/2010).

⁴⁶³ Mercer Select UK http://uk.select.mercer.com/article/MPNUP00001/?article_id=MPNUP00001&url=http%3a%2f%2fuk.select.mercer.com%2farticle%2fMPNUP00001%2f%3farticle_id%3dMPNUP00001#item1 (accessed on 26/10/2010).

⁴⁶⁴ The Pensions Advisory Service <http://www.pensionsadvisoryservice.org.uk/workplace-pension-schemes/final-salary-schemes/divorce> (accessed on 14/07/2010).

⁴⁶⁵ A solicitor will need to be consulted when parties decide to divorce in the UK, thereby incurring fees. See Legal Education <http://www.legaleducation.org.uk/solicitor.html>

actuarial fees.⁴⁶⁷ The circumstances in which these fees may be incurred will be discussed briefly below.

Should the pension sharing involve a pension credit and pension debit system,⁴⁶⁸ the pension credit may need to be transferred out of the current scheme into another scheme of the non-member's choice.⁴⁶⁹ In this instance, an Independent Financial Adviser will need to be appointed to oversee such transfer.⁴⁷⁰ In addition, where the CETV⁴⁷¹ has been calculated unsatisfactorily, the spouses may require the services of an actuary⁴⁷² for another valuation of the pension benefits.⁴⁷³

The number of professional services involved with the implementation of a pension sharing order may therefore lead to the incurring of great costs by the parties. It is clear that pension sharing should only be considered where

(accessed on 07/12/2010). The role of a solicitor in the UK is similar to that of an attorney in South Africa.

⁴⁶⁶ Independent Financial Advisors provide unbiased advice relating to financial planning, and such advice may be required when dealing with a large sum of money (in this instance, pension benefits). See Consilium Asset Management <http://www.consilium-ifa.co.uk/> (accessed on 07/12/2010).

⁴⁶⁷ Divorce and pensions http://www.invidion.co.uk/pensions_and_divorce.php (accessed on 14/07/2010).

⁴⁶⁸ See paragraph 3.6.2 above.

⁴⁶⁹ *Ibid.*

⁴⁷⁰ The Pensions Advisory Service <http://www.pensionsadvisoryservice.org.uk/workplace-pension-schemes/final-salary-schemes/divorce> (accessed on 14/07/2010).

⁴⁷¹ See paragraph 3.6.3.2 above.

⁴⁷² An actuary is permitted to calculate the value of the CETV where the parties are dissatisfied with the initial calculation thereof.

⁴⁷³ Divorce and Pensions http://www.invidion.co.uk/pensions_and_divorce.php (accessed on 14/07/2010).

the actual pension benefit has significant value, or the fees involved in implementing the pension sharing order may deplete the pension benefit.

3.6.3.2 Calculation of the Cash Equivalent Transfer Value

The cash equivalent transfer value (CETV)⁴⁷⁴ of the member spouse's pension fund for purposes of transfer of the non-member's portion thereof is calculated the day before the divorce order providing for pension sharing is to be implemented.⁴⁷⁵

For purposes of calculating the CETV of a particular pension scheme in England and Wales, all the contributions made by the member will be included in the calculations, irrespective of whether these were made before or during the marriage.⁴⁷⁶ In Scotland, only those contributions made during the subsistence of the marriage are included in the calculation of the CETV, therefore excluding contributions made by the member spouse prior to entering into the marriage.⁴⁷⁷

⁴⁷⁴ The CETV concept was introduced in the Social Security Act 1985 (c. 53), and the provisions relating to the CETV can now be found in Sections 90 – 101 of the Pension Schemes Act 1993 (c. 48).

⁴⁷⁵ The Pensions Advisory Service <http://www.pensionsadvisoryservice.org.uk/workplace-pension-schemes/final-salary-schemes/divorce> (accessed on 14/07/2010).

⁴⁷⁶ Pensions sharing on divorce made easy <http://www.scottishlife.co.uk/scotlife/nmsruntime/saveasdialog.asp?IID=1108&5ID=19089> (accessed on 05/09/2010).

⁴⁷⁷ Pensions sharing on divorce made easy <http://www.scottishlife.co.uk/scotlife/nmsruntime/saveasdialog.asp?IID=1108&5ID=19089> (accessed on 05/09/2010).

Furthermore, the calculation of the CETV depends on the type of pension scheme involved. There are two primary types of pension scheme in the UK.⁴⁷⁸ These two primary schemes, namely, final salary pension schemes and money purchase schemes will be discussed in the following paragraphs.

3.6.3.2.1 *Final salary pension scheme*

The benefit payable to a member of a final salary scheme is calculated according to a formula as determined by the specific fund. The variables involved in this calculation are generally the member's final salary or earnings and the years of service of the member.⁴⁷⁹ This is similar to the South African defined benefit fund, and is also known as a 'career average' scheme.⁴⁸⁰

The contributions by members are invested in a group until the member retires and becomes entitled to his benefit.⁴⁸¹ Upon reaching retirement age, the final salary scheme is required to pay the calculated benefit to the member.⁴⁸² However, should the total investments of the fund be less than

⁴⁷⁸ Divorce Aid <http://www.divorceaid.co.uk/financial/pension.htm> (accessed on 16/08/2010).

⁴⁷⁹ NIDirect <http://www.nidirect.gov.uk/index/information-and-services/pensions-and-retirement-planning/pensions-and-retirement/company-pension-schemes/what-to-do-if-your-company-pension-scheme-is-closed-or-wound-up.htm> (accessed on 27/10/2010).

⁴⁸⁰ The Pensions Advisory Service <http://www.pensionsadvisoryservice.org.uk/workplace-pension-schemes/final-salary-schemes/divorce> (accessed on 14/07/2010).

⁴⁸¹ NIDirect <http://www.nidirect.gov.uk/index/information-and-services/pensions-and-retirement-planning/pensions-and-retirement/company-pension-schemes/what-to-do-if-your-company-pension-scheme-is-closed-or-wound-up.htm> (accessed on 27/10/2010).

⁴⁸² Directgov http://www.direct.gov.uk/en/Pensionsandretirementplanning/Companyandpersonalpensions/CompanyPensions/DG_10026635 (accessed on 26/10/2010).

the benefit owing to the member or the employer becomes insolvent, the member may be able to claim the amount owing to him from the Pension Protection Fund.⁴⁸³

In a final salary scheme, the CETV is determined by the scheme trustees.⁴⁸⁴

The CETV estimation is a conservative estimate of the amount available to a member should he decide to transfer out of the relevant fund. The estimation is based on the issues identified by the trustees and which will then be provided to an actuary for consideration.⁴⁸⁵



3.6.3.2.2 *Money purchase pension scheme*

The benefit payable from a money purchase pension scheme is calculated according to the contributions paid by the member and contributions made by his employer, taking the returns on those contributions as a result of investment into consideration.⁴⁸⁶

⁴⁸³ The Pension Protection Fund was established by the Pensions Act 2004 (c. 35).

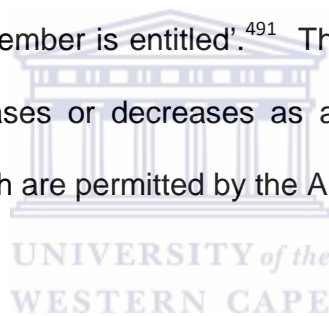
⁴⁸⁴ Regulation 7 Occupational Pension Schemes (Transfer Values) (amendment) Regulations 2008 (SI 2008/1050).

⁴⁸⁵ Regulation 7A Occupational Pension Schemes (Transfer Values) (amendment) Regulations 2008 (SI 2008/1050).

⁴⁸⁶ The Pensions Advisory Service <http://www.pensionsadvisoryservice.org.uk/workplace-pension-schemes/final-salary-schemes/divorce> (accessed on 14/07/2010); Pensions on Divorce UK <http://www.sharingpensions.co.uk/marbreak6.htm> (accessed on 17/09/2010).

The amount contributed per member is invested separately from the contributions of other members.⁴⁸⁷ For this reason, there should generally not be a lack of funds to pay the benefit to the member upon reaching retirement age.⁴⁸⁸ However, the possibility exists for a shortfall in a money purchase scheme, for example where funds are stolen or misappropriated.⁴⁸⁹ Should this in fact occur, an affected member may be able to claim the amount owing to him from the Pension Protection Fund.⁴⁹⁰

In money purchase schemes, the CETV is the 'realisable value of any benefits to which the member is entitled'.⁴⁹¹ This value must make provision for any possible increases or decreases as a result of fluctuations in the investment market which are permitted by the Amendment Regulations.⁴⁹²



⁴⁸⁷ Directgov http://www.direct.gov.uk/en/Pensionsandretirementplanning/Companyandpersonalpensions/CompanyPensions/DG_10026635 (accessed on 26/10/2010).

⁴⁸⁸ Business Link <http://www.businesslink.gov.uk/bdotg/action/detail?itemId-1074456892&type-RESOURCES> (accessed on 27/10/2010).

⁴⁸⁹ Directgov http://www.direct.gov.uk/en/Pensionsandretirementplanning/Companyandpersonalpensions/CompanyPensions/DG_10026635 (accessed on 26/10/2010).

⁴⁹⁰ See the Pensions Act 2004 (c. 35); Directgov http://www.direct.gov.uk/en/Pensionsandretirementplanning/Companyandpersonalpensions/CompanyPensions/DG_10026635 (accessed on 26/10/2010). It is important to note that the member may not claim from the Pension Protection Fund if his benefits are lower than expected as a result of poor investment return.

⁴⁹¹ Schedule 2 Occupational Pension Schemes (Transfer Values) (amendment) Regulations 2008 (SI 2008/1050).

⁴⁹² Paragraph 4 of Schedule 2 Occupational Pension Schemes (Transfer Values) (amendment) Regulations 2008 (SI 2008/1050).

3.6.3.3 *Where more than one scheme is involved*

It is possible that one spouse is a member of various separate pension schemes. The court granting the decree of divorce will have to decide which of the schemes will be subject to pension sharing, after which the order will have to be applied to these funds.⁴⁹³ This leads to considerable cost implications, as each of these schemes will have to be valued, and the trustees will be involved in the implementation of the pension sharing order.⁴⁹⁴ In situations where a pension credit arises,⁴⁹⁵ the rules of each scheme may differ as to the process of transfer of the pension credit to another scheme, and it is submitted that this further complicates the implementation of pension sharing orders and may lead to delays.

The rules of pension schemes provide for the administration of the pension scheme, which includes the procedure to be followed when transferring monies out of the particular scheme, in addition to any legislative provisions in this regard.⁴⁹⁶ It is therefore imperative that the rules of the relevant scheme be taken into consideration when opting for pension sharing at divorce.

⁴⁹³ Divorce and Pensions http://www.invidion.co.uk/pensions_and_divorce.php (accessed on 14/07/2010).

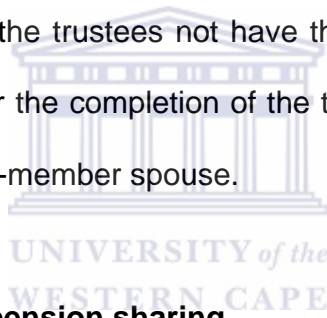
⁴⁹⁴ See paragraph 3.6.3.4 below.

⁴⁹⁵ The pension credit referred to in this context is the one created as a result of a pension sharing order in terms of section 29 of the Welfare Reform and Pensions Act 1999 (c. 30). See paragraph 3.6.2 above. It is not related to the pension credit payable from the National Insurance as described in paragraph 3.2.2 above.

⁴⁹⁶ Sections 36 – 38 of the Welfare Reform and Pensions Act 1999 (c. 30).

3.6.3.4 Time limit for implementation

Generally, the trustees of the scheme are entrusted with implementing the pension sharing order. These trustees have four months to complete the process after receipt of the pension sharing order.⁴⁹⁷ However, this four month period may be extended if the trustees are owed fees relating to the implementation of the order.⁴⁹⁸ It is submitted that it is the responsibility of the non-member spouse to ensure that the trustees of the member's pension scheme are aware of the scheme her portion of the pension benefit should be transferred to. Should the trustees not have this information, it is submitted that the time needed for the completion of the transfer could be extended, to the detriment of the non-member spouse.



3.6.4 Advantages of pension sharing

Despite the abovementioned difficulties relating to the practicalities of pension sharing, it is submitted that pension sharing is largely an attractive option for divorcing parties. By making use of pension sharing, prolonged contact between the spouses may be avoided. In addition, the member spouse generally retains an equitable portion of his retirement savings and the non-

⁴⁹⁷ The Actuary <http://www.the-actuary.org.uk/697707> (accessed on 27/10/2010); Mercer Select UK http://uk.select.mercer.com/article/MPNUP00001/?article_id=MPNUP00001_&url=http%3a%2f%2fuk.select.mercer.com%2farticle%2fMPNUP00001%2f%3farticle_id%3dMPNUP00001#item1 (accessed on 26/10/2010).

⁴⁹⁸ Divorce and Pensions http://www.invidion.co.uk/pensions_and_divorce.php (accessed on 14/07/2010).

member spouse is not deprived of a financial benefit to which she may have contributed indirectly. Pension sharing is also relatively straightforward to implement when compared to earmarking pension benefits⁴⁹⁹ and, even more so, offsetting matrimonial assets against pension benefits.⁵⁰⁰

3.7 TAXATION

In the following paragraphs the taxation of the amounts awarded to non-member spouses in terms of earmarking orders as well as pension sharing orders in the UK will be outlined. The taxation of the amount awarded to a non-member spouse in terms of a pension sharing order appears less complex than the taxation of the non-member spouse's portion of the pension interest awarded as per divorce orders in South Africa. These provisions will be compared at a later stage.⁵⁰¹

⁴⁹⁹ See paragraph 3.5.2 above.

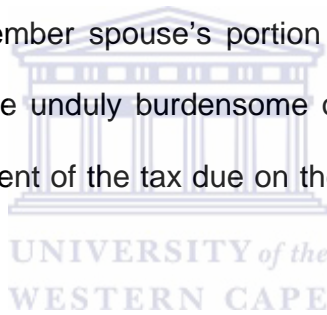
⁵⁰⁰ See paragraph 3.5.1 above.

⁵⁰¹ Paragraph 4.2.2 below.

3.7.1 Earmarking orders

3.7.1.1 *England and Wales*

Before an earmarking order⁵⁰² is given effect and the non-member spouse's portion is released to her, the entire pension benefit is taxed as if it were the member spouse's income.⁵⁰³ The remaining portion is then divided as per the earmarking order, and the percentage payable to the non-member spouse is then paid.⁵⁰⁴ In other words, the member spouse is liable for the tax amount payable on the non-member spouse's portion of the pension benefit. It is submitted that it may be unduly burdensome on the member spouse to be held liable for the payment of the tax due on the portion awarded to the non-member spouse.



⁵⁰² See paragraph 3.5.2 above.

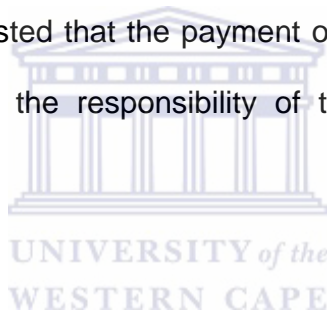
⁵⁰³ Section 569 read with section 572 of the Income Tax (Earnings and Pensions) Act 2003 (c. 1).

⁵⁰⁴ Section 166 Pensions Act 1995 (c. 26).

3.7.1.2 Northern Ireland

Earmarking orders applicable in Northern Ireland are dealt with similarly to those applicable in England and Wales. The entire pension will be taxed as if it were to be paid to the member.⁵⁰⁵ After this amount has been deducted, the portion awarded to the non-member spouse will be paid to her.⁵⁰⁶ This means that the member is liable for the tax on the earmarked portion of his pension.

Once again, it is suggested that the payment of tax due on the non-member spouse's portion being the responsibility of the member spouse may be unduly burdensome.



3.7.1.3 Scotland

Upon reaching retirement age, members of a retirement fund are entitled to receive a tax free lump sum.⁵⁰⁷ The maximum lump sum one may receive is 25% of the pension benefit.⁵⁰⁸ In Scotland, only this tax free lump sum

⁵⁰⁵ Section 569 read with section 572 of the Income Tax (Earnings and Pensions) Act 2003 (c. 1).

⁵⁰⁶ Section 166 Pensions Act 1995 (c. 26).

⁵⁰⁷ Section 167(3) Pensions Act 1995 (c. 26).

⁵⁰⁸ What investment? <http://www.whatinvestment.co.uk/saving-money/tax-planning/tax-planning-in-depth/262073/your-pension-pot-of-gold.shtml> (accessed on 21/09/2010).

payable to a member may be earmarked.⁵⁰⁹ No tax is therefore payable on earmarking orders in Scotland.

The fact that only the tax free lump sum may be earmarked seems somewhat problematic. In essence, only a portion of the tax free lump sum may be awarded to the non-member spouse, which may be a small amount and therefore not provide sufficient financial support. Despite the fact that the court granting the divorce may choose to award the entire tax free lump sum to the non-member spouse, that amount would certainly be less than balance of the retirement savings belonging to the member spouse.

While it is advantageous that no tax is payable on earmarking orders in Scotland, this benefit would have to be weighed against the disadvantage raised above.

3.7.2 Pension sharing

The pension sharing provisions, and therefore the rules relating to the taxation of pension benefits which are shared, apply to the entire UK.⁵¹⁰

⁵⁰⁹ Divorce & Pensions <http://www.pruadviser.co.uk/content/acrobat.P523.PDF> (accessed on 17/09/2010).

⁵¹⁰ Sections 19 and 20 of the Welfare Reform and Pensions Act 1999 (c. 30).

Where the pension sharing order has led to the creation of a pension credit in favour of the non-member spouse, the person in receipt of a pension credit is liable for all the tax payable thereon once the benefit is paid.⁵¹¹ The pension payable as a result of the creation of that pension credit is therefore taxed as if it is the earnings of the non-member spouse.⁵¹²

It is submitted that the liability of the non-member spouse for the tax amount due on her portion of the pension benefit is not unduly burdensome on the non-member spouse, and that the provisions relating to the taxation of pension benefits which are shared are more equitable than those applicable to earmarking.



3.8 RELIGIOUS MARRIAGES

According to the Office for National Statistics, in 2001 the most prevalent religions in the UK were Christianity (71.6% of the population identified themselves as such), Hinduism (1%) and Islam (2.7%).⁵¹³ For purposes of this section on religious marriages, Christianity will be excluded, as it is submitted that Christian marriages are more common, and therefore the consequences of divorce would be easier to determine.

⁵¹¹ Section 569 read with section 572 Income Tax (Earnings and Pensions) Act 2003 (c. 1).

⁵¹² Divorce & Pensions <http://www.pruadviser.co.uk/content/acrobat.P523.PDF> (accessed on 17/09/2010).

⁵¹³ Office for National Statistics <http://www.statistics.gov.uk/cci/nugget.asp?id=293> (accessed on 26/10/2010).

The following paragraphs will therefore focus on the division of property in marriages in accordance with the Hindu, Islamic and Jewish faiths. Despite the fact that only 0.5% of the UK population identified themselves as Jewish,⁵¹⁴ the divorce of couples married in terms of the Jewish faith has been addressed to some extent in legislation, and is therefore a necessary inclusion in this chapter.

3.8.1 General comments relating to religious marriages in the UK

In order for any religious marriage to be recognised in the UK, the person performing the marriage ceremony must be authorised to register the marriage and the marriage must be reflected in the marriage register and signed by various parties.⁵¹⁵ In the following paragraphs the consequences of divorce of religious marriages in the UK will be discussed, whether such marriages are officially recognised or not.

⁵¹⁴ Office for National Statistics <http://www.statistics.gov.uk/ci/nugget.asp?id=293> (accessed on 26/10/2010).

⁵¹⁵ Marriage Act 1949 (c. 76).

3.8.2 Jewish marriages

3.8.2.1 *England and Wales*

In the Jewish faith, parties may be married both in terms of civil law and religious principles.⁵¹⁶ At the time of entering into a marriage in terms of religious principles,⁵¹⁷ the parties may enter into a civil marriage as well.⁵¹⁸ However, should a couple married in terms of both civil law and religious principles divorce in terms of civil law, the divorce may not simultaneously dissolve the religious marriage.⁵¹⁹

Should a couple who have entered into a Jewish marriage as well one in terms of civil law get divorced, in essence two procedures are necessary.⁵²⁰ Firstly, there is the usual divorce procedure through the courts which will

⁵¹⁶ Faith and Levine (2002) 'Divorce, Religion and the Law' *Family Law Journal* (November) 23; Citizens Advice Bureau http://www.adviceguide.org.uk/index/your_family/family/getting_married.htm (accessed on 27/10/2010).

⁵¹⁷ The Jewish marriage is concluded in terms of a contract called the *ketubah*. This agreement regulates both the marriage and divorce of the parties. See Diamant and Cooper (1996) *Living a Jewish Life* 245.

⁵¹⁸ A civil marriage is one which is entered into by two parties who have followed the prescribed procedure prior to the marriage. See Directgov http://www.direct.gov.uk/en/Governmentcitizensandrights/Registeringlifeevents/Marriagesandcivilpartnerships/DG_175717 (accessed on 07/12/2010).

⁵¹⁹ The Movement for Reform Judaism <http://www.reformjudaism.org.uk/a-to-z-of-reform-judaism/life-cycle/divorce.html> (accessed on 07/12/2010).

⁵²⁰ *Ibid*; Faith and Levine (2002) 'Divorce, Religion and the Law' *Family Law Journal* (November) 23.

dissolve the civil marriage. In addition, the parties will need to obtain a 'get', which is the Jewish equivalent of dissolution of marriage.⁵²¹

The Divorce (Religious Marriages) Act of 2002 amends the Matrimonial Causes Act and assists couples who are married in terms of both religious principles and civil law, where one of the parties refuses to co-operate in the dissolution of the religious marriage.⁵²² In particular, the Act is aimed at assisting those whose religious spouses make financial demands relating to the obtaining of the Get which would be in excess of the portion assigned to them by a court granting a divorce.⁵²³

It should be noted that the application of the provisions introduced by the Act is not limited to marriages in accordance with the Jewish faith.⁵²⁴ There is no bar to members of other religious groups making use of the Act.⁵²⁵ However, thus far only members of the Jewish faith have made use of the provisions of the Act.⁵²⁶

⁵²¹ Diamant and Cooper (1996) *Living a Jewish Life* 247.

⁵²² Section 1(1) Divorce (Religious Marriages) Act of 2002 (c. 27) inserted section 10A into the Matrimonial Causes Act 1973 (c. 18); Faith and Levine (2002) 'Divorce, Religion and the Law' *Family Law Journal* (November) 24.

⁵²³ Section 1(1) Divorce (Religious Marriages) Act of 2002 (c. 27); Faith and Levine (2002) 'Divorce, Religion and the Law' *Family Law Journal* (November) 24; The Act permits spouses seeking a divorce to approach the court for a decree of divorce despite the refusal of the spouse to give permission for the religious divorce.

⁵²⁴ Section 10A(1)(a)(ii) Matrimonial Causes Act 1973 (c. 18).

⁵²⁵ Section 1 Divorce (Religious Marriages) Act of 2002 (c. 27).

⁵²⁶ Faith and Levine (2003) 'Religious Divorce' *Family Law Journal* (May) 11.

It is submitted that the Divorce (Religious Marriages) Act is aimed at ensuring the equitable distribution of matrimonial assets at divorce of a religious marriage, as well as simplifying the divorce procedure where parties are married in accordance with both religion and civil law. The equitable distribution of assets at dissolution of a Jewish marriage in terms of the Act should therefore include the division of the pension benefits of the parties.

3.8.2.2 Northern Ireland

In order for a Jewish marriage to be recognised in Northern Ireland, the ceremony must be performed in a synagogue by a Secretary for Marriages.⁵²⁷

In Northern Ireland, there are no specific provisions for the division of matrimonial property at the dissolution of a religious marriage. The Matrimonial and Family Proceedings (Northern Ireland) Order of 1989 simply makes provision for the court granting the divorce to exercise its discretion in distributing the matrimonial assets (including the pension benefits of the parties) at divorce.⁵²⁸ In other words, the court granting the divorce must ensure that the matrimonial property (including pension benefits) is distributed equitably between the parties, depending on the facts of each case. These

⁵²⁷ A Secretary for Marriages is appointed by the Registrar General - See Citizens Advice Bureau http://www.adviceguide.org.uk/index/your_family/family/getting_married.htm (accessed on 27/10/2010)

⁵²⁸ Section 6 Matrimonial and Family Proceedings (Northern Ireland) Order 1989 No. 677 (N.I. 4).

provisions are applicable to all couples seeking a civil divorce, and therefore include parties married in accordance with the Jewish faith.

3.8.2.3 Scotland

For purposes of religious divorce, the parties to the religious marriage must have been married in terms of the relevant provisions in the Marriage (Scotland) Act of 1977.⁵²⁹ Before a couple married in terms of both civil law and religion will be granted a civil divorce, they will be required to prove that the religious marriage has also been dissolved.⁵³⁰

Parties married in terms of civil law and religion who seek a divorce in terms of civil law are entitled to have the court exercise its discretion when dividing the matrimonial property.⁵³¹ The court granting the decree of divorce is therefore permitted to decide how the matrimonial property should be distributed between the parties in order to ensure that neither party is financially prejudiced by the divorce. The order stipulating how the matrimonial assets are to be divided would include pension benefits, as pension benefits are considered part of the matrimonial assets.

⁵²⁹ Marriage (Scotland) Act of 1977 (c. 15).

⁵³⁰ Section 15 Family Law (Scotland) Act 2006 (c. 2).

⁵³¹ Section 16 Family Law (Scotland) Act 2006 (c. 2).

3.8.3 Islamic marriages

The provisions regarding the recognition of Islamic marriage and divorce are the same throughout the UK and will therefore be discussed as a whole.

Islamic marriages (known as the *nikah*) are recognised throughout the UK if they have been solemnised in a civil ceremony as well as a religious one.⁵³²

This is an important issue which has bearing on the distribution of property should the couple separate. If the couple is married in the UK only in terms of the Islamic faith, the marriage is not recognised as valid in the UK and the parties are considered co-habitees, as opposed to spouses.⁵³³ Co-habitees do not have the same rights as spouses upon separation.⁵³⁴

Similar to the recognition of the *nikah* in the UK, the couple's divorce (or *talaq*) must be recognised in order to be valid.⁵³⁵ In order for spouses married in terms of Islamic principles to approach the court for a divorce decree, the marriage should be one which has been recognised in the UK.⁵³⁶

⁵³² Family Law Week <http://www.familylawweek.co.uk/site.aspx?i-ed2215> (accessed on 27/10/2010).

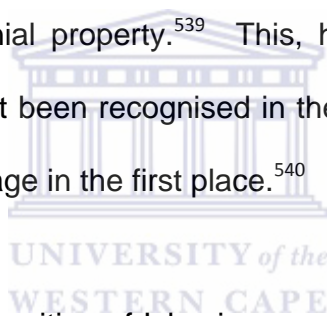
⁵³³ *Ibid.*

⁵³⁴ Legal Advice Centre <http://www.legal-advice-centre.co.uk/private/cohabitees.html> (accessed on 27/10/2010).

⁵³⁵ Family Law Week <http://www.familylawweek.co.uk/site.aspx?i-ed2215> (accessed on 27/10/2010).

⁵³⁶ Family Law Week <http://www.familylawweek.co.uk/site.aspx?i-ed2215> (accessed on 27/10/2010).

Despite the fact that both the *nikah* and the *talaq* may be recognised in the UK, there are still no guidelines as to how the property (including pension savings) should be divided between the spouses upon divorce. While there is legislation operative in the various regions of the UK that could be applied to the recognised *talaq*, these merely provide that the court may exercise its discretion when allocating assets.⁵³⁷ Where the parties are married both in terms of Islamic principles and civil law, it is unclear how the division of property would be approached.⁵³⁸ It is submitted that the division of property should be dealt with solely by the court, as this may prevent an inequitable distribution of matrimonial property.⁵³⁹ This, however, will not be possible where the *nikah* has not been recognised in the UK, as it is then considered that there was no marriage in the first place.⁵⁴⁰



It is submitted that the position of Islamic non-member spouses is precarious at divorce, in that such spouses may not have recourse to the court if they are unhappy with the division of the matrimonial property at the *talaq*. In addition, there is the possibility of unilateral divorce in the Islamic faith, which means

⁵³⁷ Section 21 Matrimonial Causes Act 1973 (c. 18); Part 3 The Matrimonial and Family Proceedings (Northern Ireland) Order 1989 No. 677 (N.I. 4); Section 16 of the Family Law (Scotland) Act 2006 (c. 2).

⁵³⁸ Islamic Sharia Council <http://www.islamic-sharia.org/divorce-talaq/what-is-the-validity-of-the-divorce-certificate-outside-and-in.html> (accessed on 28/10/2010).

⁵³⁹ Family Law Week <http://www.familylawweek.co.uk/site.aspx?i-ed2215> (accessed on 27/10/2010).

⁵⁴⁰ Family Law Week <http://www.familylawweek.co.uk/site.aspx?i-ed2215> (accessed on 27/10/2010).

that one party need not consent to the divorce.⁵⁴¹ It follows that the division of property may in unilateral divorces may not be equitable. This in turn means that the pension benefits of the parties cannot be distributed by a court and the division may therefore be inequitable.

3.8.4 Hindu marriages

In order for a Hindu marriage to be recognised in the UK,⁵⁴² the ceremony will have to be performed in a manner that satisfies the requirements for a civil marriage.⁵⁴³ Divorce is generally not permitted for couples married in accordance with Hinduism, although there may be certain limited situations in which divorce will be permitted.⁵⁴⁴

As with the *talaq*,⁵⁴⁵ the consequences of a Hindu divorce are not governed by specific legislation in the UK. The distribution of assets would therefore occur in accordance with the Hindu faith. It is submitted that the manner in which matrimonial assets should be distributed may be unclear, as divorce is generally not permitted in the Hindu faith. However, the courts in the UK have the authority to exercise discretion when dividing assets upon divorce

⁵⁴¹ Lunde (2002) *Islam: Faith, Culture, History* 38.

⁵⁴² The provisions relating to Hindu marriage and divorce are the same throughout the UK and will therefore be discussed as a whole.

⁵⁴³ Directgov http://www.direct.gov.uk/en/Governmentcitizensandrights/Registeringlife/events/Marriagesandcivilpartnerships/DG_175717 (accessed on 07/12/2010).

⁵⁴⁴ Hindu Website http://www.hinduwebsite.com/hinduism/h_divorce.asp (accessed on 27/10/2010).

⁵⁴⁵ See paragraph 3.8.3 above.

generally, which may be applied to a Hindu divorce.⁵⁴⁶ Unfortunately, the exercise of this discretion presupposes that the parties will approach the court at divorce, which may not always be the case, as the parties may only approach the court at divorce when the marriage itself was recognised.⁵⁴⁷

3.8.5 Summary of difficulties relating to the dissolution of religious marriages in the UK

It should be noted that while various pieces of legislation regulate the procedural aspects of religious divorce in the UK,⁵⁴⁸ there are no specific provisions relating to the division of the matrimonial estate at divorce. The provisions referring to the exercise of a court's discretion in relation to the distribution of property at divorce are applicable to all civil marriages, irrespective of whether the parties are also married in terms of a particular religion. This means that the division of matrimonial property in a religious marriage is not regulated.

It is submitted that the lack of uniform practice when distributing the assets of a religious marriage upon the dissolution thereof may lead to inconsistency.

⁵⁴⁶ Section 21 Matrimonial Causes Act 1973 (c. 18); Part 3 The Matrimonial and Family Proceedings (Northern Ireland) Order 1989 No. 677 (N.I. 4); Section 16 of the Family Law (Scotland) Act 2006 (c. 2).

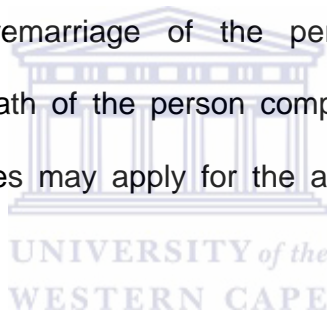
⁵⁴⁷ This is similar to the position relating to the *nikah* in Islamic marriages. See paragraph 3.8.3 above.

⁵⁴⁸ Matrimonial Causes Act 1973 (c. 18); The Matrimonial and Family Proceedings (Northern Ireland) Order 1989 No. 677 (N.I. 4); Section 16 of the Family Law (Scotland) Act 2006 (c. 2).

In essence, there would be no accepted method of asset distribution other than those of the particular religion, which may be unclear or inequitable.

3.9 MAINTENANCE

Maintenance orders are granted as a matter of course in divorce proceedings in the UK.⁵⁴⁹ A maintenance order provides for one spouse to pay a certain amount to the other spouse who is unable to provide for him- or herself adequately financially.⁵⁵⁰ Generally, however, maintenance payments terminate upon the remarriage of the person receiving maintenance payments or at the death of the person compelled to pay maintenance.⁵⁵¹ Either one of the parties may apply for the amendment of a maintenance order.⁵⁵²



The divorcing parties may agree that in lieu of immediate maintenance payments, the party who would ordinarily pay maintenance pay the maintenance amount (or a portion thereof) to a pension scheme for the benefit of the other party.⁵⁵³ Upon the reaching of retirement age, the benefit

⁵⁴⁹ Maintenance orders may be granted in terms of the Matrimonial Causes (Property and Maintenance) Act 1958 (c. 35).

⁵⁵⁰ *Miller v Miller and McFarlane v McFarlane* [2006] UKHL 24.

⁵⁵¹ Section 23 Matrimonial Causes Act 1973 (c. 18).

⁵⁵² Section 1 and 4 Maintenance Enforcement Act 1991 (c. 17).

⁵⁵³ Divorce and Pensions http://www.invidion.co.uk/pensions_and_divorce.php (accessed on 14/07/2010).

paid by that fund is the sole property of the person who would have been entitled to receive the maintenance amount.⁵⁵⁴

The payment of pension contributions *in lieu* of maintenance payments may be useful where one of the parties has little or no retirement savings. In addition, this method could be used where the pension benefit is insufficient for pension sharing at divorce,⁵⁵⁵ and where offsetting is not an option due to a lack of adequate matrimonial assets.⁵⁵⁶

Choosing to substitute maintenance payments for pension scheme contributions would only be practical where the spouse entitled to receive maintenance has a reasonable income at time of divorce, and where that person was not close to retirement. Where the person is close to retirement age, there may not be enough time for the amount paid into a pension scheme to earn investment returns.⁵⁵⁷

3.10 CONCLUSION

From the preceding paragraphs it is evident that, while the pension system in the UK is well developed and generally operates well, it is not without

⁵⁵⁴ *Ibid.*

⁵⁵⁵ See paragraph 3.6 above.

⁵⁵⁶ See paragraph 3.5.1 above.

⁵⁵⁷ Divorce and Pensions http://www.invidion.co.uk/pensions_and_divorce.php (accessed on 14/07/2010).

problems. For purposes of this thesis it is important to recognise that the UK pension system is not flawless, but may nevertheless provide the basis for solutions to problems identified within the South African retirement industry, specifically in the field of distributing retirement benefits upon divorce.

In the following chapter of this thesis, selected areas of both the UK and South African retirement industries as affected by divorce will be compared in order to determine which principles applicable in the UK could be implemented successfully in South Africa. The impact of parametric amendments of legislation related to the division of retirement fund benefits upon divorce in both countries will also be compared.



CHAPTER 4

COMPARISON OF THE LEGISLATION RELATING TO THE DISTRIBUTION OF RETIREMENT BENEFITS IN SOUTH AFRICA AND THE UK

4.1 INTRODUCTION

In this chapter, the legislation relating to the distribution of retirement benefits applicable in South Africa⁵⁵⁸ will be compared with the legislation of the UK in specific areas.⁵⁵⁹ The purpose of such comparison is to determine whether the problems identified in South Africa may be remedied by introducing any of the UK practices in this regard.

Numerous key problem areas have been identified in the South African context, which will hereafter be compared to the same areas in the UK with a view to remedying these issues. These problem areas are: the operation of the clean break principle, the taxation of retirement benefits which have been allocated as per the clean break principle, funds which have been established

⁵⁵⁸ As set out in Chapter 2 above.

⁵⁵⁹ As set out in Chapter 3 above.

in terms of legislation other than the Pension Funds Act,⁵⁶⁰ maintenance, and religious or customary marriages.

4.2 THE CLEAN BREAK PRINCIPLE

The clean break principle was introduced into South African law in order to accelerate the payment of retirement savings awarded to the non-member spouse at divorce.⁵⁶¹ Before the introduction of the clean break principle, non-member spouses were compelled to wait some time before receiving any such amounts owing to them.⁵⁶²

Both the UK and South Africa introduced the clean break principle applicable to the division of retirement savings at divorce in order to prevent prejudice to the non-member spouse.⁵⁶³ However, the introduction of the clean break principle was the culmination of a series of parametric amendment to the Pension Funds Act and, as such, has created additional difficulties in distributing retirement benefits at divorce. The following paragraphs will identify a number of these problems and consider possible solutions to them.

⁵⁶⁰ Act 24 of 1956.

⁵⁶¹ *Cockcroft v Mine Employees Pension Fund* [2007] 3 BPLR 296 (PFA) 299; *Swart v Mittal Steel SA Selector Pension and Provident Fund* [2007] 3 BPLR 378 (PFA) 381. Nevondwe (2009) 'The law regarding the division of the retirement savings of a retirement fund member on his or her divorce with specific reference to *Cockcroft v Mine Employees Pension Fund*, [2007] 3 BPLR 296 (PFA)' 13(1) *LDD* 6. See also paragraph 2.5.2.

⁵⁶² Jeram (2007) 'How the Pension Funds Act will benefit you?' <http://www.moneyweb.co.za/mw/view/mw/en/page38?oid=150478&sn=Detail> (accessed on 1/07/2010); See also paragraph 2.3.4 above.

⁵⁶³ See paragraphs 3.6 and 2.5.2 above.

4.2.1 Suggested improvements to the application of the clean break principle in South Africa

The developments leading to the implementation of the clean break principle in South Africa and the UK were outlined above.⁵⁶⁴ In the following paragraphs, the areas of concern relating to the practical application of the clean break principle will be discussed.

4.2.1.1 Requirements for enforceability of divorce order

One of the practical problems relating to the implementation of the clean break principle for division of retirement savings in South Africa is the wording of the divorce order granting the non-member spouse a portion of the member spouse's pension interest. As mentioned previously, the divorce order must name the retirement fund to which the order applies (or such fund should be identifiable from the order); the portion of the member's pension interest (as opposed to pension benefit, or pension fund) awarded to the non-member spouse must be clear, and the relevant fund must be ordered to pay the specified amount to the non-member spouse.⁵⁶⁵

⁵⁶⁴ For the South African developments, see paragraphs 2.3 – 2.5 above. For the UK developments, see paragraphs 3.3 – 3.5 above.

⁵⁶⁵ Section 37D(1)(e) of the Pension Funds Act 24 of 1956; See also paragraph 2.8 above .

The requirements for the enforceability of a divorce order against a particular fund were established in 2007.⁵⁶⁶ It is submitted that most divorce orders today should comply substantially with these requirements, as the requirements for enforceability are now widely known. Divorce orders granted after the amendment to section 37D⁵⁶⁷ may therefore be enforced against the relevant retirement fund without objection from the fund.⁵⁶⁸ The problem, however, lies with those divorce orders granted before the requirements were established. Divorce orders granted prior to 13 September 2007⁵⁶⁹ may be particularly problematic, in that none of the requirements may be met.



Prior to 13 September 2007, pension interests could be included by the court when dividing the joint estate of the parties.⁵⁷⁰ However, it is not clear whether divorce orders pre-dating 13 September 2007 would need to meet any requirements at all in order to be enforceable against the relevant fund.⁵⁷¹

It is therefore possible that divorce orders pre-dating 13 September 2007

⁵⁶⁶ The requirements were inserted into section 37D of the Pension Funds Act 24 of 1956 as per section 28 of the Pension Funds Amendment Act 11 of 2007.

⁵⁶⁷ Section 37D of the Pension Funds Act 24 of 1956, as amended.

⁵⁶⁸ It would not be accurate to state that *all* divorce orders granted after 13 September 2007 would comply with the requirements set out in section 37D of the Pension Funds Act 24 of 1956. However, it is suggested that such requirements would now be well known to the courts and would generally be adhered to.

⁵⁶⁹ This is the date of implementation of the clean break principle in South Africa. See paragraph 2.5.2 above.

⁵⁷⁰ Section 7 of the Divorce Act 70 of 1979; Nevondwe (2009) 'The law regarding the division of the retirement savings of a retirement fund member on his or her divorce with specific reference to *Cockroft v Mine Employees Pension Fund*, [2007] 3 BPLR 296 (PFA)' 13(1) *LDD* 3. See also paragraph 2.3.1 above.

⁵⁷¹ The Divorce Act 70 of 1979 did not contain any requirements for enforceability of divorce orders against a retirement fund prior to the insertion of section 37D(1)(e) in 2007.

would meet none of the requirements for enforceability as established in 2007. Such an order would be problematic for the non-member spouse, who is entitled to enforce her claim against her former spouse's retirement fund as a result of the amendment of section 37D of the Pension Funds Act.⁵⁷² Before such an order could be enforced, it would need to be rectified by the court before it would be enforceable against the relevant retirement fund.⁵⁷³

No specific requirements are needed to enforce a pension sharing order in the UK. Pension benefits are dealt with in the same manner as any other matrimonial asset.⁵⁷⁴ The court simply includes the pension benefits of the parties in the divorce order, and that inclusion is sufficient to enforce the order against the relevant pension fund.

It is submitted that the UK position in this regard is preferable. It is also submitted that when a divorce order is granted which stipulates the ratio according to which the matrimonial estate is to be divided, the allocation of pension interests should implicitly be included in that order. In cases where the pension interest is to be divided in a different manner to the remaining matrimonial assets, that percentage should be expressly stated.

⁵⁷² *Cockcroft v Mine Employees Pension Fund* [2007] 3 BPLR 296 (PFA) 301.

⁵⁷³ See paragraph 2.8 above.

⁵⁷⁴ Section 24 Matrimonial Causes Act 1973 (c. 18).

It is further submitted that the requirements for enforceability of a divorce order are unduly burdensome on the non-member spouse, who may be required to approach the court for a minor rectification of a divorce order in order to enforce it against a particular retirement fund. This could lead to additional costs and a delay in the receipt of her portion of the pension interest.

4.2.1.2 Retrospectivity of section 37D and the implications thereof for divorce orders occurring prior to the amendment

While the retrospective application of section 37D of the Pension Funds Act is no longer disputed,⁵⁷⁵ no limits have thus far been placed on the retrospective application of that section. This means that any person in possession of a divorce order which awards them a portion of their former spouse's retirement benefits who has not yet received that portion may approach the court to enforce the order against the relevant fund.

As mentioned previously,⁵⁷⁶ it is possible that divorce orders pre-dating the insertion of section 37D into the Pension Funds Act may not meet the requirements for enforceability against the relevant fund.⁵⁷⁷ This would

⁵⁷⁵ The Financial Services Laws General Amendment Act 22 of 2008 confirmed the retrospectivity of section 37D.

⁵⁷⁶ See paragraph 4.2.1.1 above. See also paragraph 2.8 above.

⁵⁷⁷ Pension Funds Act 24 of 1956.

necessitate an application to court for the rectification of the divorce order in order to enforce such order and obtain immediate payment of the awarded portion of retirement benefits.⁵⁷⁸

It would however, not be fair to limit the retrospectivity of the clean break principle. Such a limitation would prevent non-member spouses divorced earlier than the cut-off date for retrospectivity from claiming their portion of the pension interest, which is in direct conflict with the purpose of introducing the clean break principle.⁵⁷⁹

It is submitted that all divorce orders pre-dating the introduction of the clean break principle should be capable of being enforced immediately. As discussed above, there is a distinct possibility that such divorce orders would not comply with the requirements for enforceability. Therefore, it is submitted that divorce orders pre-dating the amendment of the Pension Funds Act⁵⁸⁰ which order a division of the joint estate should automatically include the division of retirement savings at the same proportion.

⁵⁷⁸ See paragraph 4.2.1.1 above; See also paragraph 2.8 above.

⁵⁷⁹ The clean break principle was introduced to benefit the non-member spouse. Therefore any provision preventing a non-member spouse from claiming her portion of the member spouse's pension interest would be in conflict with the clean break principle.

⁵⁸⁰ Amended by the Pension Funds Amendment Act 11 of 2007.

4.2.1.3 The fairness of the clean break principle

It has been suggested that the clean break principle results in the member spouse being disadvantaged financially.⁵⁸¹ This is because, as a result of the legislation applicable to the division of retirement benefits prior to 13 September 2007, the member spouse was entitled to the interest earned on the portion of his pension interest awarded to the non-member spouse. In terms of the Divorce Act, the non-member spouse was entitled to a portion of the member spouse's pension interest, but not entitled to immediate payment thereof. Her portion of the pension interest therefore remained within the fund of which her spouse was a member, and the investment return on her portion of the pension interest belonged to the member spouse.⁵⁸² The introduction of the clean break principle meant that the non-member spouse was entitled to the immediate payment of her portion of the member's pension interest, thereby depriving the member spouse of the growth the non-member spouse's portion may have earned.

However, before it can be concluded that the clean break principle is unfair to the member spouse, the rights of both spouses should be considered. By introducing the clean break principle, the legislature has sought to promote

⁵⁸¹ ITI News Newsletter (2008) <http://www.itinews.co.za/newsletters/pdf/F3B5EF61-2109-4BE3-86C7-69C58DD4A79C.pdf> (accessed on 12/11/2010).

⁵⁸² *Old Mutual Life Assurance Co (SA) Ltd v Swemmer* 2004 (5) SA 373 (SCA).

the rights of the non-member spouse upon divorce.⁵⁸³ It is suggested that the clean break principle facilitates the following constitutional rights of the non-member spouse:

i) *The right not to be deprived of property*

Section 25 of the Constitution of the Republic of South Africa entrenches the right to property. Section 25(1) reads:

'No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.'

The Pension Funds Adjudicator has concluded that 'property' as envisaged by section 25 includes a member of a pension fund's right to his pension interest.⁵⁸⁴ This view was confirmed in later PFA determinations.⁵⁸⁵ It is therefore submitted that the granting of a portion of such pension interest to a non-member spouse is in accordance with the non-member spouse's right not to be deprived of property. It follows that in circumstances where the retirement fund refuses to pay the non-member spouse's portion of the member's pension interest to her, that refusal amounts to a deprivation of property which is prohibited in terms of section 25(1) of the Constitution.

⁵⁸³ *Cockroft v Mine Employees Pension Fund* [2007] 2 BPLR 378 (PFA) 299.

⁵⁸⁴ *Atkinson and others v Southern Field Staff Pension Fund* [2000] 4 BPLR 367 (PFA).

⁵⁸⁵ *Manzini v Metro Group Retirement Fund and another (1)* [2001] 12 BPLR 2808 (PFA) and *Sebola v Johnson Tiles (Pty) Ltd* [2002] 3 BPLR 3242 (PFA).

By claiming her portion of the pension interest of the member spouse, the non-member is permitted to enforce her constitutionally protected right not to be deprived of property against the relevant retirement fund. Since this right would be enforced between a natural person and a juristic person who is not the state,⁵⁸⁶ it is submitted that this amounts to horizontal application of the non-member spouse's right to property. The horizontal application of rights under certain circumstances is permitted in terms of section 8 of the Bill of Rights.

It is important to remember that where there is a joint matrimonial estate (as with marriages in community of property), the non-member spouse has a claim to an equal share of all matrimonial assets (including pension interest).⁵⁸⁷ Where the marriage is out of community of property including the application of the accrual system, there is no joint estate.⁵⁸⁸ However, the spouses have a right to benefit from the growth in their respective estates, which would also include pension interest.⁵⁸⁹

Should the non-member spouse not be granted any portion of the member spouse's pension interest, it is submitted that that would amount to an

⁵⁸⁶ If one of the parties were the state, the enforcement of the right would amount to a vertical application of the Constitution in terms of section 8(1) of the Bill of Rights; Chirwa (2006) 'The horizontal application of constitutional rights' 10(2) *LDD* 38.

⁵⁸⁷ Cronje and Heaton (2004) *South African Family Law* 70.

⁵⁸⁸ Cronje and Heaton (2004) *South African Family Law* 97.

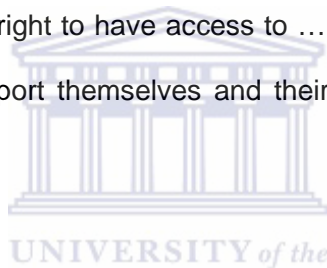
⁵⁸⁹ *Ibid.*

arbitrary deprivation of property in conflict with section 25 of the Constitution. This is similar to the abovementioned instance where the retirement fund refuses to release the non-member's portion of the member's pension interest to her.

ii) The right of access to social security

Section 27 of the Constitution guarantees individuals the right of access to social security. Section 27(1)(c) provides that:

Everyone has the right to have access to ... social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.



As mentioned above, constitutional rights may be applied horizontally as well as vertically (that is, between an individual and the state). Traditionally, the right of access to social security has been applied vertically. However, it has been suggested that socio-economic rights (including the right to social security) may also be applied horizontally in terms of section 8 of the Bill of Rights.⁵⁹⁰ For the reasons below, it is submitted that the right of access to social security may indeed be applied horizontally.

⁵⁹⁰ Du Toit (2004) 'The transfer of enterprises and the protection of employment benefits' 8(1) *LDD* 87.

The awarding of a pension interest to the non-member spouse promotes her right of access to social security, in that she is being given an amount of money which could be used to supplement her own retirement savings. It is submitted that the awarding of a portion of the member's pension interest to the non-member spouse amounts to an award of social insurance to the non-member spouse. It is further submitted that the awarding of a portion of the member's pension interest to the non-member spouse addresses the inequity created by the non-member spouse's lack of adequate retirement savings and thereby facilitates her right of access to social security.⁵⁹¹

Since the non-member spouse's claim to a portion of the member spouse's pension interest will be enforced against a retirement fund (and not the state), it is submitted that the enforcement of that claim amounts to a horizontal application of the non-member spouse's right of access to social security.

iii) The right to dignity

In terms of section 10 of the Bill of Rights, 'everyone has inherent dignity and the right to have their dignity respected and protected'.

⁵⁹¹ Taylor Committee Report (2002) *Transforming the past – Protecting the future* 31.

Most non-member spouses getting divorced today would be female.⁵⁹² Traditionally, it was the responsibility of the female spouse to end her career in order to raise the couple's offspring and provide for the successful running of the household.⁵⁹³ The result of this was that many (predominantly female) spouses could not continue contributing to a retirement savings vehicle during the marriage. Upon divorce, female non-member spouses who were compelled to cease contributions towards retirement savings were at an initial financial disadvantage because of the inadequacy of their retirement savings.

It is possible that the non-member spouse would be unable to re-enter the job market after divorce and consequently be unable to provide for herself.⁵⁹⁴ She would thus be compelled to source additional income, which may result in a reliance on friends or family financially. The forced reliance of the non-member spouse on the generosity of others would violate the dignity of the non-member spouse,⁵⁹⁵ the right to which may be enforced horizontally (against the member spouse as well as his retirement fund)⁵⁹⁶ and vertically (against the court granting the divorce).⁵⁹⁷ The non-member spouse is therefore prevented from enjoying the application of her right to dignity.

⁵⁹² Options at Divorce http://www.oldmutual.co.za/documents/Solutions_forWomen_Options_ForMarriage.pdf (accessed on 12/11/2010).

⁵⁹³ *Beaumont v Beaumont* [1987] All SA 1 (A) 18.

⁵⁹⁴ *Ibid.*

⁵⁹⁵ *Khosa and others v Minister of Social Development and others, Mahlaule and another v Minister of Social dDevelopment* 2004 (6) SA 505 (CC) para 76.

⁵⁹⁶ Section 8(2) Constitution of the Republic of South Africa, 1996.

⁵⁹⁷ Section 8(1) Constitution of the Republic of South Africa, 1996.

Should a non-member spouse be deprived of a portion of the member spouse's pension interest (either by the court granting the divorce or the retirement fund itself), there is the possibility that the non-member spouse would be subjected to a lifestyle of poverty. The deprivation of a portion of the member's pension interest may lead to the non-member having to rely on the state administered older person's grant,⁵⁹⁸ which would provide the non-member a small amount of money each month.⁵⁹⁹ The amount the non-member spouse receives through the older persons grant may be insufficient to provide for her financial needs during retirement, and she may be forced to rely on the generosity of family and friends to supplement her income during her retirement.



The clean break principle as introduced in 2007 was intended to improve the financial difficulties experienced by the non-member spouse at divorce.⁶⁰⁰

The clean break principle allows the non-member spouse to claim immediate payment of the portion of the member spouse's pension interest awarded to her. The non-member can thus utilise the amount paid to her and can invest it to ensure a measure of income for her retirement. By being given the opportunity to secure income after retirement, there is a reduced likelihood of

⁵⁹⁸ The older person's grant and the qualifying criteria are set out in the Social Assistance Act 13 of 2004 and the Regulations relating to the application for and payment of social assistance and the requirements or conditions in respect of eligibility for social assistance, GN R898 in *Government Gazette* 31356 of 22 August 2008

⁵⁹⁹ The current maximum amount of the older person's grant is R1080 per month. See South Africa Government Services http://www.services.gov.za/services/content/Home/ServicesForPeople/Retirementandoldage/Oldagepension1/en_ZA (accessed on 12/11/2010).

⁶⁰⁰ *Cockcroft v Mine Employees Pension Fund* [2007] 3 BPLR 296 (PFA) 299.

the non-member spouse having to rely on the state – administered grant for older persons or the generosity of family and community and consequently a reduced likelihood of an infringement of the non-member's dignity.

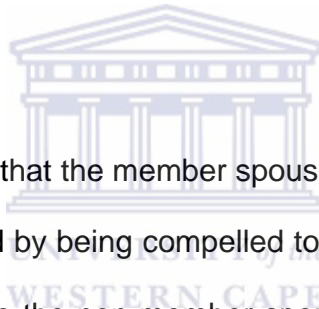
4.2.1.4 *Balancing of rights of spouses*

From the above paragraphs, it is clear that the clean break principle substantially promotes various constitutional rights of the non-member spouse. These rights need to be balanced against the 'right' of the member spouse to investment return on the non-member spouse's portion of the pension interest. The member spouse is unable to earn investment return on the non-member spouse's portion of the pension interest as a result of the immediate deduction of the amount due to the non-member spouse from the member's pension interest. It is submitted that the member spouse does not, in fact, have a 'right' to the investment return the non-member spouse's portion of the pension interest may have earned. Considering that investment returns are not guaranteed and the volatile nature of some investments, the member spouse could not be guaranteed a positive return on his pension interest. He therefore merely has a *spes*⁶⁰¹ that his pension interest would earn positive growth. He cannot thus be said to 'lose' investment return on

⁶⁰¹ A *spes* is an expectation, or hope. See Gonin and Hiemstra (2005) *Trilingual Legal Dictionary* 291.

the portion of the pension interest awarded to the non-member spouse, as such return may never have materialised.

In addition, had the parties remained married, the member spouse would only have the right to an equal share of the pension benefit at retirement, and not the pension benefit in its entirety, as the pension benefit would form part of their joint income.. Whether the parties are married in community of property or out of community of property with accrual, the non-member spouse is entitled to share equally in the amount received by the member spouse upon retirement.⁶⁰²



It is therefore submitted that the member spouse's right to his pension interest is not adversely affected by being compelled to immediately release a portion of his pension interest to the non-member spouse.⁶⁰³ It is submitted that the non-member spouse's right to dignity outweighs the 'right' of the member spouse to his pension benefit.

⁶⁰² Cronje and Heaton (2004) *South African Family Law* 71 and 98.

⁶⁰³ However, this should be distinguished from the potential adverse tax implications for the member spouse. See paragraph 4.2.2.2 below.

4.2.2 Taxation of retirement benefits allocated as per the clean break principle

The taxation of the portion of the pension interest awarded to the non-member spouse in South Africa, as well as the taxation of portion of the pension benefit awarded to the non-member spouse in terms of a pension sharing order in the UK, have been discussed in Chapters 2 and 3 above. In the following paragraphs the problematic aspects of taxation of retirement benefits paid to the non-member spouse at divorce will be identified, and possible solutions will be evaluated.

4.2.2.1 Potential prejudice to the non-member spouse

In South Africa, where the non-member spouse has made her election as to the form of payment of her portion of the pension interest after 1 March 2009 or where the divorce was granted after that date, she becomes liable for any tax payable on that amount.⁶⁰⁴ Tax is immediately payable if she elects to receive her portion in cash.⁶⁰⁵ Should she opt to have the portion transferred to a retirement savings vehicle in her own name, she will be liable for the tax

⁶⁰⁴ Marx and Hanekom (2009) *The Manual on South African Retirement Funds and other Employee Benefits* 711; See paragraphs 2.6.3.2 and 2.6.4 above.

⁶⁰⁵ Revenue Laws Amendment Act 35 of 2007; Marx and Hanekom (2009) *The Manual on South African Retirement Funds and other Employee Benefits* 711; Cameron and Du Preez (2009) 'Big tax penalty if you take your retirement benefits early' <http://www.persfin.co.za/index.php?fsectionId=&fArticleId=4888681> (accessed on 8/12/2009).

owing on the benefit resulting from that retirement savings vehicle.⁶⁰⁶ In other words, she pays the tax when the benefit accrues to her.

In the UK, the taxation of the non-member's portion of the pension benefits where pension sharing has taken place is similar to the position in South Africa where the non-member spouse makes her election after 1 March 2009. The amount awarded to the non-member spouse is taxed as the personal income of the non-member spouse where she takes payment of the amount.⁶⁰⁷ Where the amount is transferred to a new pension scheme in the non-member spouse's name, the non-member will be liable for the tax payable on the benefit when it accrues.⁶⁰⁸

It is submitted that immediate payment of tax on the non-member spouse's portion when received as a cash payment may prejudice the non-member spouse. It is possible that the non-member spouse would be entirely reliant on the portion of the pension interest awarded to her for financial support after retirement, and the subtraction of a potentially substantial amount for tax would erode her financial provisions for retirement. This may prevent the non-member from being able to contribute adequately to a retirement savings vehicle, which could lead to the non-member spouse being compelled to rely

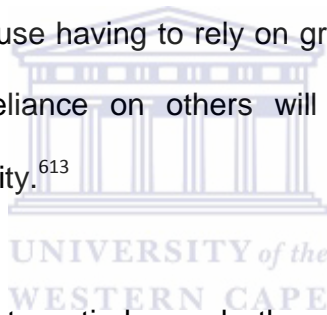
⁶⁰⁶ *Ibid.*

⁶⁰⁷ Divorce & Pensions <http://www.pruadviser.co.uk/content/acrobat.P523.PDF> (accessed on 17/09/2010).

⁶⁰⁸ *Ibid.*

on the older person's grant offered by the state to qualifying individuals for some income during her retirement.⁶⁰⁹ It is submitted that the erosion of the non-member spouse's portion of the pension interest by the payment of tax amounts to an infringement of her right to property.⁶¹⁰

In addition, a forced reliance on the older person's grant may infringe on the non-member spouse's right to dignity.⁶¹¹ The amount payable monthly from the state-administered grant for older persons⁶¹² may be insufficient to meet the financial needs of the non-member spouse after retirement, and may lead to the non-member spouse having to rely on gratuities from family or friends. Substantial financial reliance on others will negatively impact the non-member's sense of dignity.⁶¹³



While it is not possible to entirely evade the payment of tax on the portion awarded to the non-member spouse, it is proposed that, where the amount is paid to the non-member spouse in cash, the taxation of such amount be

⁶⁰⁹ The older person's grant and the qualifying criteria are set out in the Social Assistance Act 13 of 2004 and the Regulations relating to the application for and payment of social assistance and the requirements or conditions in respect of eligibility for social assistance, GN R898 in *Government Gazette* 31356 of 22 August 2008. See also SASSA <http://www.sassa.gov.za/ABOUT-SOCIAL-GRANTS/TYPES-OF-GRANTS-644.aspx> (accessed on 12/11/2010).

⁶¹⁰ See paragraph 4.2.1.3(i) above.

⁶¹¹ See paragraph 4.2.1.3(iii) above.

⁶¹² The current maximum amount of the older person's grant is R1080 per month. See South Africa Government Services http://www.services.gov.za/services/content/Home/ServicesForPeople/Retirementandold age/Oldagepension1/en_ZA (accessed on 12/11/2010).

⁶¹³ *Khosa and others v Minister of Social Development and others, Mahlaule and another v Minister of Social dDevelopment* 2004 (6) SA 505 (CC) para 76; See paragraph 4.2.1.3(iii) above.

minimal in an attempt to promote the financial stability of non-member spouse's after divorce. It is also possible that the non-member spouse can delay the payment of tax on her portion of the pension interest by transferring the amount to another retirement fund, which may prevent financial hardship through the immediate payment of tax.

4.2.2.2 Potential prejudice to the member spouse

In certain instances, the member spouse may be liable for the payment of the tax amount due on the portion awarded to the non-member spouse. These instances arise where the divorce was granted before 13 September 2007, as well as where the divorce was granted in the period from 14 September 2007 to 28 February 2009, where the non-member spouse made her election as to the form of payment before 1 March 2009.⁶¹⁴

In the abovementioned instances, it appears as if the member spouse is disadvantaged in two ways. Firstly, the member is liable for the tax amount payable on the portion of the pension interest awarded to the non-member spouse, which may be a sizeable figure. Secondly, the division of the pension interest between the divorced spouses decreases the pension

⁶¹⁴ Marx and Hanekom (2009) *The Manual on South African Retirement Funds and other Employee Benefits* 712; Du Plessis (2009) 'Tax changes relevant to the Retirement Fund Industry' <http://www.jmca.co.za/south-africa/newsletter-february-2009/tax-changes-relevant-to-the-retirement-fund-indu.php> (accessed on 19/05/2010; See paragraphs 2.6.3 and 2.6.3.1 above.

interest of the member spouse.⁶¹⁵ This leads to a smaller amount being available for investment, which may in turn lead to a lower return on investment. In other words, the member spouse's pension interest is decreased and he loses the opportunity to earn growth on the portion awarded to the non-member spouse.⁶¹⁶

It is suggested that the payment of tax by the member spouse in these circumstances is not unduly burdensome on the member spouse, despite the impression that the payment of tax appears punitive.

For divorces occurring after 1 March 2009, despite the fact that the member is no longer liable for the tax payable on the portion of the pension interest awarded to the non-member spouse,⁶¹⁷ the member spouse's pension is still diminished and the same potential consequences relating to investment return apply.

In the UK, the amount awarded to the non-member spouse in terms of a pension sharing order⁶¹⁸ is taxed in the hands of the non-member spouse.

⁶¹⁵ See paragraph 4.2.1.3 above.

⁶¹⁶ See, however, 4.2.1.4 for a discussion on the 'right' of the member spouse to investment return.

⁶¹⁷ Du Plessis (2009) 'Tax changes relevant to the Retirement Fund Industry' <http://www.jmca.co.za/south-africa/newsletter-february-2009/tax-changes-relevant-to-the-retirement-fund-indu.php> (accessed on 19/05/2010); Du Plessis (2009) 'Your retirement fund and divorce' <http://www.jmca.co.za/south-africa/newsletter-february-2009> (accessed on 14/07/2009).

⁶¹⁸ See paragraph 3.6 above.

The liability of the non-member spouse for the tax amount due on the pension credit she receives has been clear from the inception of the clean break principle.⁶¹⁹

4.2.2.3 Summary of proposals relating to the taxation of the pension interest awarded to the non-member spouse

The preceding paragraphs have alluded to the fact that liability for the payment of the tax amount due on the portion of the pension interest to the non-member spouse should rest with the member spouse. However, the legislature has clearly intended that the non-member spouse be liable for the tax due on her portion of the pension interest where the divorce has occurred after 1 March 2009.⁶²⁰ The UK has adopted a similar approach to the taxation of pension sharing orders.⁶²¹ It is submitted that the legislature created this tax liability for the non-member spouse in order to ensure that neither party suffered undue financial hardship at divorce.

It should be noted that tax is only immediately payable on the non-member's portion of the pension interest if she elects to receive the benefit in cash.

⁶¹⁹ See paragraph 3.7.2 above.

⁶²⁰ Du Plessis (2009) 'Your retirement fund and divorce' <http://www.jmca.co.za/south-africa/newsletter-february-2009> (accessed on 14/07/2009); Revenue Laws Amendment Act 35 of 2007.

⁶²¹ Divorce & Pensions <http://www.pruadviser.co.uk/content/acrobat.P523.PDF> (accessed on 17/09/2010); See paragraph 3.7.2 above.

Should she elect to transfer the amount due to her to another retirement savings vehicle, tax will only be payable on the pension benefit due to her from the new retirement fund. It is submitted that the delay in payment of tax when the non-member spouse transfers the amount due to her to a new retirement fund serves as an incentive for the non-member spouse to preserve the amount she receives at divorce for use after retirement.

4.3 MAINTENANCE

In South Africa, the Divorce Act makes provision for the awarding of a maintenance order in terms of which one party is obliged to maintain the other financially after divorce.⁶²² Maintenance payments are generally made monthly and are made in an attempt to ensure that both spouses maintain a similar standard of living after the divorce to the standard of living enjoyed during the marriage.⁶²³

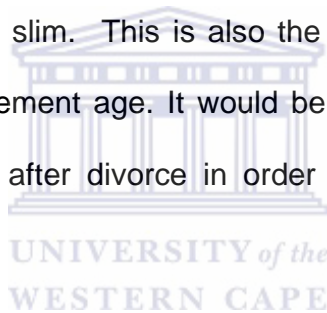
In the UK, maintenance orders are also granted upon divorce.⁶²⁴ However, the divorcing parties are given the option of foregoing immediate maintenance payments and instead having the maintenance amount (or part

⁶²² Section 7(2) of the Divorce Act 70 of 1979.

⁶²³ See *Grasso v Grasso* 1987 1 SA 48 (C). It may not be possible to ensure that the standard of living during the marriage is maintained after divorce. See *Pommerel v Pommerel* 1990 1 SA 998 (E) 1002.

⁶²⁴ Brookman Solicitors http://www.brookman.co.uk/areas_of_law/spousal_main.php (accessed on 27/10/2010).

thereof) paid as contributions to a retirement savings vehicle in the name of the spouse entitled to receive maintenance.⁶²⁵ It is submitted that a similar arrangement, implemented in South Africa, would contribute to the financial stability of the non-member spouse upon reaching retirement age, as she may have little or no retirement savings of her own at the time of divorce. However, it is essential to recognise that such an arrangement would only be practical where the non-member spouse has an additional means of income after divorce.⁶²⁶ In situations where the non-member spouse has been out of the job market for a considerable amount of time, the chances of her finding gainful employment are slim. This is also the case where the non-member spouse is close to retirement age. It would be unreasonable to remove her only source of income after divorce in order to pay contributions towards retirement savings.



It is thus suggested that the court which is empowered to grant a maintenance order in terms of the Divorce Act⁶²⁷ be given the discretion to order that maintenance payments be 'converted' into contributions towards a retirement savings fund in the name of the non-member spouse. The court would have to consider all the circumstances of each particular case in order

⁶²⁵ Divorce and Pensions http://www.invidion.co.uk/pensions_and_divorce.php (accessed on 14/07/2010).

⁶²⁶ It must be noted that the party claiming spousal maintenance cannot be compelled to seek paid employment after the divorce. See *Grasso v Grasso* 1987 1 SA 48 (C). See also paragraph 3.9 above.

⁶²⁷ Divorce Act 70 of 1979.

to determine whether such an application would be feasible. It is suggested that the court may have regard to the following factors when determining whether such an order would be practicable: the potential income of the maintenance creditor after divorce; the amount of retirement savings accumulating to the maintenance creditor at the time of divorce and, where the maintenance creditor is unemployed, the reasonable prospects of the maintenance creditor obtaining paid employment after divorce.⁶²⁸ The court should also consider the wishes of the parties when exercising its discretion in this regard.

4.4 FUNDS ESTABLISHED IN TERMS OF LEGISLATION OTHER THAN THE PENSION FUNDS ACT



The South African legislature introduced the clean break principle in 2007 by enacting the Pension Funds Amendment Act.⁶²⁹ This act amended the Pension Funds Act already in existence.⁶³⁰ While the introduction of the clean break principle has greatly improved the position of many non-member spouses, the fact that the clean break principle was introduced by an

⁶²⁸ The suggested factors for consideration by the court are similar to the factors the court must consider when making a maintenance order in terms of section 7(2) of the Divorce Act 70 of 1979.

⁶²⁹ Act 11 of 2007; See paragraph 2.5.2 for a discussion of the clean break principle in South Africa.

⁶³⁰ Act 24 of 1956.

amendment to the Pension Funds Act creates a large problem for certain non-member spouses.

The Pension Funds Act applies to all pension funds established in terms of that act.⁶³¹ It is important to realise that not all pension funds are established in terms of the Pension Funds Act.⁶³² In such instances (that is, where the member spouse belongs to a pension fund not established in terms of the Pension Funds Act) the non-member spouse may not be able to benefit from the clean break principle, as the particular fund will not be bound by the provisions of the Pension Funds Act.

4.4.1 Result of excluding certain funds from the provisions of the Pension Funds Act



In South Africa, numerous pension funds have been established in terms of legislation other than the Pension Funds Act. These funds include the Transnet Funds⁶³³ which have approximately 160 000 members,⁶³⁴ which were established in terms of the Transnet Pension Fund Act of 1990⁶³⁵ and

⁶³¹ Section 2 Pension Funds Act 24 of 1956.

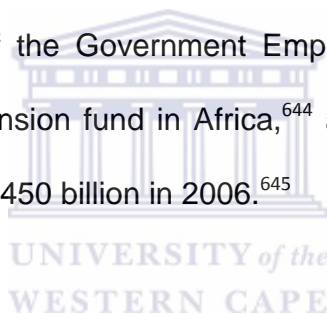
⁶³² See paragraph 4.4.1 below.

⁶³³ The 'Transnet funds' consist of the Transnet Retirement Fund for active members, as well as the Transnet Second Defined Benefit Fund for members already in retirement at the time of introduction of the Transnet Retirement Fund in 2000.

⁶³⁴ Registrar of Pension Funds (2006) *Forty – eighth annual report* 10.

⁶³⁵ Transnet Pension Fund Act 62 of 1990.

the Transnet Pension Amendment Act of 2000.⁶³⁶ The Post Office Pension Fund⁶³⁷ was also not established in terms of the Pension Funds Act, although its membership is small⁶³⁸ and, therefore, the rules of the fund will have a limited scope of application. Other funds which are not subject to the provisions of the Pension Funds Act are the Telkom Pension Fund,⁶³⁹ the Temporary Employees Pension Fund,⁶⁴⁰ the Associated Institutions Pension and Provident Funds⁶⁴¹ as well as any funds established by bargaining councils in terms of collective agreements.⁶⁴² The Government Employees Pension Fund (GEPF) is not governed by the Pension Funds Act as it was established in terms of the Government Employees Law of 1996.⁶⁴³ The GEPF is the largest pension fund in Africa,⁶⁴⁴ and had 1.1 million members and assets exceeding R450 billion in 2006.⁶⁴⁵



Since funds established in terms of legislation other than the Pension Funds Act are not governed by the Pension Funds Act, but are supervised in terms of specific legislation, spouses of members of these funds would not be

⁶³⁶ Transnet Pension Amendment Act 41 of 2000.

⁶³⁷ The Post Office Pension Fund was established by the Post Office Act 44 of 1958.

⁶³⁸ The Post Office Pension Fund had only 261 members in 2006; Registrar of Pension Funds (2006) *Forty – eighth annual report* 10.

⁶³⁹ Established in terms of the Post Office Act 44 of 1958.

⁶⁴⁰ Registrar of Pension Funds (2006) *Forty – eighth annual report* 3.

⁶⁴¹ *Ibid.*

⁶⁴² Registrar of Pension Funds (2006) *Forty – eighth annual report* 10; Marx and Hanekom (2009) *The Manual on South African Retirement Funds and other Employee Benefits* 748.

⁶⁴³ Government Employees Pension Law, Proclamation 21 of 1996.

⁶⁴⁴ Government Employees Pension Fund <http://www.gepf.gov.za/Pages/Home.aspx> (accessed on 08/11/2010).

⁶⁴⁵ Marx and Hanekom (2009) *The Manual on South African Retirement Funds and other Employee Benefits* 742.

entitled to enforce the clean break principle at divorce, which was established by an amendment to the Pension Funds Act.

Non-member spouses in such instances would be entitled to receive their portion of the pension interest only as provided for in the Divorce Act, as this act is binding on all pension funds irrespective of the governing legislation.⁶⁴⁶ If the rules of the relevant fund were to provide for a different approach, the non-member spouse would be bound by the rules of the fund.⁶⁴⁷ For example, the rules of the Transnet funds provide for the application of section 7 of the Divorce Act upon the accrual of the benefit to the member,⁶⁴⁸ hence the non-member is compelled to wait until the retirement of the member to receive her portion of the pension interest. The GEPF rules do not address the payment of amounts to non-member spouses in terms of divorce orders, while the Government Employees Pension Law makes provision for the application of section 7 of the Divorce Act.⁶⁴⁹

Non-member spouses affected by these provisions would therefore be unable to receive their portion of the pension interest before the benefit accrued to

⁶⁴⁶ Section 1 Divorce Act 70 of 1979.

⁶⁴⁷ See Rule 6.2 of the Transport Fund General Rules which provides that the rules of the fund are binding on each participating employer as well as its members and dependants of members. A dependant of a member of the fund includes a spouse, in terms of rule 1.1.10. dependants, ; See also section 29(5) Government Employee Pension Law, Proclamation 21 of 1996.

⁶⁴⁸ See Special Rule 10.13 of the Transport Fund General Rules which provides that an award made to a member's former spouse in terms of section 7 of the Divorce Act 70 of 1979 be deducted from the member's benefit when membership of the fund terminates..

⁶⁴⁹ Section 21 of the Government Employee Pension Law, Proclamation 21 of 1996.

the member spouse. The date of accrual would be determined by the rules of the particular fund.⁶⁵⁰

In 2005, section 21 of the Government Employees Pension Law came under the scrutiny of the Supreme Court of Appeal.⁶⁵¹ In *Government Employees Pension Fund v Naidoo*, the first respondent (the non-member spouse) had been awarded a portion of the pension interest of the member spouse which was to be calculated at the time of divorce, but which would only become payable at the time of accrual of the benefit to the member spouse. *In casu* the member had resigned shortly before the divorce. The court concluded that the resignation of the member led to the accrual of the benefit to the member and the non-member spouse was accordingly entitled to enforce payment of her portion of the benefit.⁶⁵²

The non-member spouse would otherwise not have been entitled to enforce the divorce order before the normal time of accrual of the benefit to the member. This would also be the case where the member belongs to one of the Transnet funds, as the Transnet funds rule is similar to the provision applicable to the GEPF.⁶⁵³ The inability of the non-member spouse to enforce

⁶⁵⁰ Marx and Hanekom (2009) *The Manual on South African Retirement Funds and other Employee Benefits* 707.

⁶⁵¹ *Government Employees Pension Fund v Naidoo and Another* [2005] 11 BPLR 891 (SCA).

⁶⁵² *Government Employees Pension Fund v Naidoo and Another* [2005] 11 BPLR 891 (SCA) para 7.

⁶⁵³ See Special Rule 10.13 of the Transport Fund General Rules, as well as section 21 of the Government Employee Pension Law, Proclamation 21 of 1996.

payment of her portion of the member's pension interest prior to the retirement of the member is clearly prejudicial to the non-member spouse, and is in conflict with the clean break principle. The prejudice suffered by non-member spouses was the reason behind the introduction of the clean break principle into South African law.⁶⁵⁴ It is inequitable for certain non-member spouses to be deprived of their portion of the member's pension interest simply because the legislature has (possibly inadvertently) neglected to ensure that they, too, could benefit from the introduction of the clean break principle.

In the UK, no distinction is made between pension funds on the basis of the legislation governing the various funds. The clean break principle is, however, excluded in specific circumstances.⁶⁵⁵ It is submitted that the application of the clean break principle (i.e. pension sharing)⁶⁵⁶ is excluded from specific pension schemes in circumstances in which it would be unfair to reduce the pension benefit payable from that scheme. For example, pension sharing is excluded⁶⁵⁷ where the pension benefit is already subject to an earmarking order.⁶⁵⁸ It is thus implied that the pension benefit which would in theory be available for pension sharing is already a reduced benefit.

⁶⁵⁴ *Cockcroft v Mine Employees Pension Fund* [2007] 3 BPLR 296 (PFA) 299.

⁶⁵⁵ See paragraph 3.6.1 above.

⁶⁵⁶ See paragraph 3.6 for an explanation of the clean break principle as applied in the UK.

⁶⁵⁷ See Sections 25B – D of the Matrimonial Causes Act 1973 (c. 18).

⁶⁵⁸ See paragraph 3.5.2 for a discussion of earmarking orders in the UK.

The implementation of the clean break principle in the UK therefore does not provide a potential solution for the exclusion of certain pension funds from the clean break provisions in South Africa.

4.4.2 The constitutionality of section 37D, as amended

It has been suggested that the amendment to section 37D of the Pension Funds Act⁶⁵⁹ is unconstitutional.⁶⁶⁰ The basis for this suggestion is that spouses of members of pension funds not subject to the provisions of section 37D are discriminated against upon divorce, as they are not able to enforce immediate payment of the portion of the pension interest awarded to them, to the same extent as spouses protected by section 37D are able to.⁶⁶¹

In a High Court application in 2009,⁶⁶² the complainant was married to a member of the GEPF. The parties were then divorced, and the complainant was awarded a portion of the member's pension interest in the GEPF. The GEPF rules did not allow for the immediate payment of the awarded portion of the pension interest to the complainant. The complainant thus asserted that the Government Employees Pension Law⁶⁶³ and rules were unconstitutional,

⁶⁵⁹ Section 37D of the Pension Funds Act 24 of 1956 as amended by section 28 of the Pension Funds Amendment Act 11 of 2007.

⁶⁶⁰ Du Preez (2009) 'I want access to my share of benefits' <http://www.persfin.co.za/index.php?fArticleId=5188932> (accessed on 08/11/2010).

⁶⁶¹ *Ibid.*

⁶⁶² *Wiese v Government Employees Pension Fund* 2009 (WCC) (unreported).

⁶⁶³ Government Employees Pension Law Proclamation 21 of 1996.

as these provisions infringed on her right to equality. The argument put forward was that, since non-member spouses of members of the GEPF were not permitted to benefit from the clean break provisions in the same manner as non-member spouses of members of funds registered in terms of the Pension Funds Act, the Government Employees Pension Law and rules infringed on its member's spouse's right to equality.⁶⁶⁴

The complainant applied for relief in the form of the 'reading in'⁶⁶⁵ of a provision into the Government Employees Pension Law and rules similar to the clean break provisions in section 37D of the Pension Funds Act. By 'reading in' such a provision, the spouses of members of the GEPF would be able to enforce immediate payment of their portion of the pension interest.

While such an arrangement seems a practical solution to the exclusion of certain non-member spouses from benefiting from the clean break principle, such 'reading in' would only benefit non-member spouse married to members of the GEPF. Non-member spouses married to members of the Transnet funds, the Post Office Pension Fund, the Temporary Employees Pension Fund, bargaining council funds as well as the Associated Institutions Pension and Provident Funds would not benefit from such a 'reading in'. In other

⁶⁶⁴ The right to equality is entrenched in section 9 of the Constitution of the Republic of South Africa of 1996.

⁶⁶⁵ 'Reading in' a provision into legislation involves the inclusion of certain terms in legislation which excludes those terms, resulting in the unconstitutionality of the legislation, or relevant section thereof. See *National Coalition for Gay and Lesbian Equality and others v Minister of Home Affairs and others* 2000 (1) BCLR 39 (CC) para 62.

words, the court would have to be approached by a group of excluded non-member spouses⁶⁶⁶ to rule that such a 'reading in' applies to all pension funds not established in terms of the Pension Funds Act.

An alternative constitutional argument could be raised. It could be argued that the amendment to section 37D of the Pension Funds Act is unconstitutional in its entirety, as the amendment prevents numerous non-member spouses from making use of the clean break provisions and thereby infringes on those non-members' rights to dignity, access to social security and property.⁶⁶⁷ Should such an argument be accepted by the court, the court would have the power to declare the section invalid.⁶⁶⁸ The legislature would then be afforded the opportunity to remedy the invalidity of the section. The court declaring the section invalid may order that the section will apply, irrespective of its invalidity, until such time as the legislature remedies the invalidity.⁶⁶⁹

If the court were to declare section 37D, as amended, invalid, essentially the clean break principle would (temporarily) be removed from South African law. All non-member spouses would then be unable to enforce the immediate

⁶⁶⁶ This is permitted by section 38 of the Bill of Rights, which provides that various persons may approach a competent court for appropriate relief when it is alleged that a right in the Bill of Rights has been infringed. The list of persons permitted to approach a court for an alleged infringement of a right enshrined in the Bill of Rights includes 'anyone acting as a member of, or in the interest of, a group or class of persons'.

⁶⁶⁷ See paragraph 4.2.1.3 above for an explanation on the manner in which the clean break principle facilitates these rights.

⁶⁶⁸ Section 172 of the Constitution of the Republic of South Africa 1996.

⁶⁶⁹ *Fraser v Children's Court, Pretoria North and others* 1997 (2) BCLR 153 (CC) para 50.

payment of their portion of the pension interest until such time as the legislature re-introduced the clean break principle in accordance with the order of the court. This situation would clearly be untenable.⁶⁷⁰ The preferable route would be for the court to suspend the invalidity of the section until the legislature introduced new laws allowing all member spouses to make use of the clean break principle.

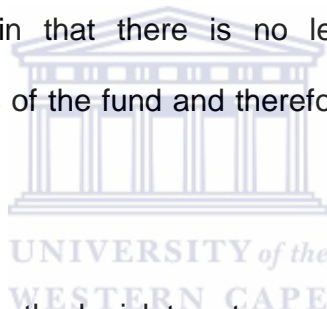
Despite the fact that section 37D, as amended, indeed seems to be unconstitutional, it is respectfully submitted that declaring the section completely invalid is not the appropriate approach to remedy the problems created by the amendment. Such an approach could involve substantial costs and the matter could take some time before it was heard by the court. It is clear, however, that the exclusion of non-member spouses (married to members of funds not subject to the provisions of the Pension Funds Act) needs addressing.⁶⁷¹

⁶⁷⁰ *Ibid.*

⁶⁷¹ See paragraph 4.4.1 above.

4.4.3 Measures to include the provisions of the clean break principle in the administration of pension funds not established in terms of the Pension Funds Act

In order to afford spouses of members of pension funds not registered in terms of the Pension Funds Act the benefits of the clean break principle, it is submitted that two options are available. Firstly, the relevant funds could amend their rules in order to provide for the immediate payment of a portion of the pension interest to the non-member spouse at divorce.⁶⁷² This is, however, problematic in that there is no legislative basis for such an amendment to the rules of the fund and therefore such an amendment could not be forced.



The second option is for the legislature to amend the Divorce Act to include the clean break principle. It is submitted that this is the preferable approach. An amendment of the Divorce Act to include the clean break principle would ensure that all non-member spouses married to members of any pension fund would benefit from the clean break provisions, as the Divorce Act applies to all pension funds irrespective of whether they have been registered in terms of the Pension Funds Act.⁶⁷³

⁶⁷² Du Preez (2009) 'I want access to my share of benefits' <http://www.persfin.co.za/index.php?fArticleId=5188932> (accessed on 08/11/2010).

⁶⁷³ Section 1 Divorce Act 70 of 1979.

4.5 RELIGIOUS AND CUSTOMARY MARRIAGES

One of the requirements for the immediate enforceability of a divorce order awarding a non-member spouse a portion of the member spouse's pension interest, is that such award must have been made in terms of a divorce order granted by a court.⁶⁷⁴

The effect of this requirement is that couples whose unions are not dissolved by a court cannot benefit from the clean break principle. Included in this group are marriages entered into purely in terms of religion. In order for a religious divorce to be valid, no court order is required.⁶⁷⁵ Spouses married in terms of these principles are therefore not compelled to approach a court for a decree of divorce. The division of property between the spouses in religious and customary marriages is dealt with as per the particular religion or culture.⁶⁷⁶

In the UK, the situation is also problematic. Religious marriages in the UK may only be dissolved by a court if the marriage was initially recognised as valid in terms of civil law.⁶⁷⁷ If the marriage was not recognised, it is not considered valid from a civil law perspective and the parties to such a

⁶⁷⁴ See paragraph 2.8 above.

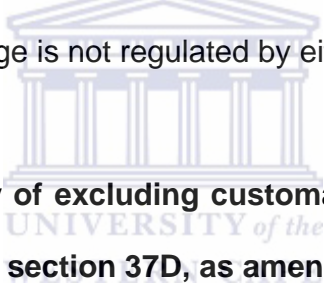
⁶⁷⁵ Cronje and Heaton (2004) *South African Family Law* 194 and 219.

⁶⁷⁶ See paragraph 2.10 above.

⁶⁷⁷ See paragraph 3.8.1 above.

marriage can therefore not approach the court for divorce order. When such marriages are dissolved, the distribution of property between the spouses is done in accordance with the principles of the particular religion.

The UK position on this matter is thus similar to the position in South Africa, in that in neither jurisdiction can spouses approach the court for a divorce order if they are married purely in terms of religion (and in South Africa, customary law). Effectively, this means that such spouses cannot benefit from the introduction of the clean break principle, as the division of property upon dissolution of the marriage is not regulated by either legislation or the court.



4.5.1 Constitutionality of excluding customary and religious marriages from the application of section 37D, as amended

It is submitted that the exclusion of non-member spouses in customary and religious marriages from the application of the clean break principle amounts to unfair discrimination in terms of section 9 of the Constitution,⁶⁷⁸ which provides that everyone is equal before the law, and deserves equal protection of the law.

⁶⁷⁸ The Constitution of the Republic of South Africa 1996.

The test for unfair discrimination was established in the case of *Harksen v Lane*.⁶⁷⁹ The Constitutional Court identified the 'stages of enquiry' which need to be followed in order to determine whether behaviour or legislation amounts to unfair discrimination in contravention of section 9 of the Constitution.⁶⁸⁰

The 'stages of enquiry' as per the *Harksen* case are:

- a) Whether the provision differentiates between categories of people; and
- b) Whether that differentiation amounts to unfair discrimination.

The second stage of enquiry (b) comprises two sub-stages:

- i) Whether the differentiation amounts to discrimination; and
- ii) whether such discrimination is unfair.

- c) Possible justification for the unfair discrimination identified in the preceding stages.⁶⁸¹

The exclusion of non-member spouses to religious and customary marriages from the application of section 37D of the Pension Funds Act will now be

⁶⁷⁹ *Harksen v Lane* 1997 (11) BCLR 1489 (CC).

⁶⁸⁰ *Harksen v Lane* 1997 (11) BCLR 1489 (CC) para 53.

⁶⁸¹ *Harksen v Lane* 1997 (11) BCLR 1489 (CC) para 53. See also Motala and Ramaphosa (2002) *Constitutional Law: Analysis and cases* 265.

evaluated to determine whether it constitutes unfair discrimination as per the test established in *Harksen v Lane*.

4.5.1.1 Does the clean break principle differentiate between categories of people?

‘Differentiation’ is the classification of people into different categories.⁶⁸² If the differentiation is linked to a rational purpose, it is not in conflict with the Constitution.⁶⁸³ If, however, that differentiation is not linked to a rational purpose, it may amount to unfair discrimination.

The clean break principle as introduced by section 37D does not itself differentiate between categories of people. However, the requirements for enforceability of the clean break principle make it clear that only those couples whose marriage can be dissolved by a court are entitled to make use of the clean break principle.⁶⁸⁴ As mentioned above, couples married purely in terms of religious or customary law are not required to approach a court for the dissolution of the marriage.⁶⁸⁵

⁶⁸² Motala and Ramaphosa (2002) *Constitutional Law: Analysis and cases* 262.

⁶⁸³ De Waal and Currie (2005) *Bill of Rights Handbook* 239.

⁶⁸⁴ These requirements are found in section 37D(4)(a) of the Pension Funds Act 24 of 1956 read with section 7(8) of the Divorce Act 70 of 1979.

⁶⁸⁵ See paragraph 2.10 above, as well as paragraph 4.5 above.

It is, therefore, submitted that the clean break principle indeed differentiates between couples married in terms of civil law only, or in terms of both civil and religious or customary law, and those couples married purely in terms of religious or customary law. It is also submitted that there is no clear, rational purpose for this differentiation.

4.5.1.2 Does the differentiation amount to unfair discrimination?

This stage consists of two sub-stages which will now be discussed with reference to the differentiation as identified above.⁶⁸⁶

i) *Does the differentiation amount to discrimination?*

Differentiation amounts to discrimination where the differentiation is based on either listed grounds, or grounds which injure human dignity.⁶⁸⁷ In this instance, the differentiation is based on grounds listed in section 9 of the Constitution, namely religion or culture.⁶⁸⁸ There is a constitutional presumption that differentiation based on listed grounds is usually immaterial

⁶⁸⁶ *Harksen v Lane* 1997 (11) BCLR 1489 (CC) para 53; Motala and Ramaphosa (2002) *Constitutional Law: Analysis and cases* 265.

⁶⁸⁷ *Prinsloo v Van Der Linde* 1997 (3) SA 1012 (CC) para 51.

⁶⁸⁸ Section 9(3) of the Constitution of the Republic of South Africa provides the current listed grounds, which include: race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, *religion*, conscience, belief, *culture*, language and birth (my emphasis).

and therefore unconstitutional.⁶⁸⁹ Since the differentiation in this instance is indeed based on listed grounds, it amounts to discrimination.

ii) *Is this discrimination unfair?*

If discrimination is based on a listed ground, it is presumed to be unfair.⁶⁹⁰ Since the discrimination in this instance is based on either religion or culture (which are listed grounds as per section 9), the discrimination is thus presumed to be unfair.

4.5.1.3 *Is there a justification for the unfair discrimination as identified?*

The unfair discrimination against couples married in terms of religious or customary law may be justified in terms of section 36 of the Constitution ('the limitations clause'). The limitations clause provides that

The rights in the Bill of Rights may be limited only in terms of a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all the relevant factors...

The requirements for a permitted limitation of a fundamental right are thus as follows:

- i) the limitation must be in terms of a law of general application; and

⁶⁸⁹ Motala and Ramaphosa (2002) *Constitutional Law: Analysis and cases* 266.

⁶⁹⁰ Section 9(5) of the Constitution; De Waal and Currie (2005) *Bill of Rights Handbook* 245.

- ii) the limitation must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

These requirements will now be scrutinised with reference to the unfair discrimination as identified above.

i) Limitation in terms of a law of general application

A law of general application is one which applies to a majority of the inhabitants of the Republic and which is well-known to those individuals.⁶⁹¹

This requirement has clearly been met, as the requirements for enforceability of a divorce order against the member's pension fund are laid out in the Pension Funds Act,⁶⁹² read with the Divorce Act.⁶⁹³ Both pieces of legislation apply generally throughout the Republic and both are well-known.

ii) Reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom

This requirement is somewhat problematic, in that there is no set test which determines whether the infringement of a right is reasonable and justifiable in an open and democratic society based on the abovementioned constitutional

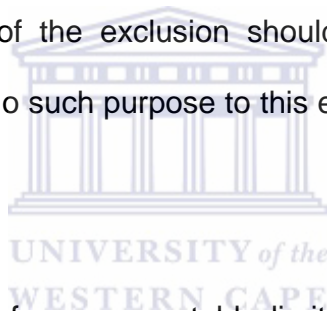
⁶⁹¹ *S v Makwanyane* 1995 (6) BCLR 665 (CC) para 156; De Waal, Currie and Erasmus (1999) *Bill of Rights Handbook* 144.

⁶⁹² Act 24 of 1956.

⁶⁹³ Act 70 of 1979.

principles.⁶⁹⁴ The facts of each particular case should be examined to establish whether this requirement has been met.⁶⁹⁵

It is submitted that the enforceability of a non-member spouse's claim against the member's pension fund being dependant on the granting of a divorce order by a court is not reasonable and justifiable as required by section 36. This requirement effectively excludes non-member spouses living in accordance with their particular religious or cultural beliefs from benefiting from the clean break principle. Since this exclusion is based on listed grounds, the purpose of the exclusion should be a convincing one. It is submitted that there is no such purpose to this exclusion and this requirement is therefore not met.



Since the requirements for an acceptable limitation of rights have not been met, it is submitted that there is no basis for such limitation. The exclusion thus amounts to unfair discrimination based on religion or culture.

⁶⁹⁴ *S v Manamela* 2000 (3) BCLR 491 (CC) para 76.

⁶⁹⁵ *S v Makwanyane* 1995 (6) BCLR 665 (CC) para 104.

4.5.2 Suggested remedies for the unfair discrimination against non-member spouses on the basis of particular religious or cultural beliefs

The remedies for unconstitutional legislative provisions are numerous.⁶⁹⁶ However, it is submitted that the most appropriate remedy in this instance is not to declare the relevant provisions invalid with immediate effect,⁶⁹⁷ or to sever⁶⁹⁸ the relevant sections from the respective pieces of legislation. This would lead to uncertainty relating to the requirements for enforcing divorce orders against pension funds in order for the non-member spouse to receive payment of her portion of the member's pension interest. Reading in⁶⁹⁹ or reading down⁷⁰⁰ of the particular section would also not be useful in this instance. Reading down would be inappropriate, as the inconsistency with the Constitution arises from an exclusion of certain parties, and reading down involves an exclusion of terms from legislation. It is submitted that the reading in would also be inappropriate, as the inclusion of religious or customary marriages in the scope of application of the clean break principle

⁶⁹⁶ The remedies for unconstitutional legislative provisions include reading down of such provisions (i.e. limiting the interpretation of the relevant provision); reading in (i.e. including previously excluded terms); removing / severing the relevant provision from the legislation in question, or declaring the provision invalid. The injured party may make application to the court for the granting of a mandamus or institute an action for damages (*Fose v Minister of Safety and Security* 1997(3) SA 786 (CC)). The latter remedies are, however, only applicable to individual cases of infringement of constitutional rights. The remedies are listed in section 172 of the Constitution of the Republic of South Africa 1996.

⁶⁹⁷ Section 172(1)(a) of the Constitution of the Republic of South Africa 1996.

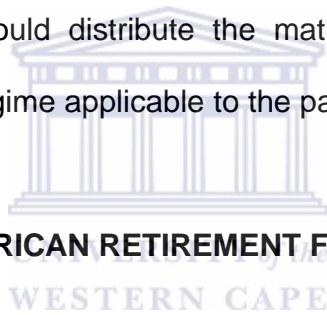
⁶⁹⁸ *Coetzee v Government of the Republic of South Africa* 1995 (10) BCLR 1382 (CC) para 19.

⁶⁹⁹ Motala and Ramaphosa (2002) *Constitutional Law: Analysis and cases* 86.

⁷⁰⁰ Motala and Ramaphosa (2002) *Constitutional Law: Analysis and cases* 85.

requires the introduction of numerous provisions, and reading in is only suitable where a minor amendment to legislation is sufficient.⁷⁰¹

It is submitted that spouses in religious or cultural marriages should be permitted to approach a court for a declaratory order confirming the non-member spouse's entitlement to a portion of the member spouse's pension interest. This declaratory order should reflect the division of the matrimonial property as agreed between the spouses at the time of the divorce in terms of the relevant religion or culture. Where there is no such settlement agreement in place, the court should distribute the matrimonial property as per the matrimonial property regime applicable to the parties.⁷⁰²



4.6 THE SOUTH AFRICAN RETIREMENT FUND REFORM PROCESS

The South African retirement fund reform process was set in motion by the Taylor Committee Report in 2002.⁷⁰³ However, prior to the release of this report, the need for an overhaul of the retirement industry in South Africa was recognised by various organizations. For example, as long ago as 1992 the Mouton Committee released a report relating to necessary improvements

⁷⁰¹ *National Coalition for Gay and Lesbian Equality and others v Minister of Home Affairs and others* 2000 (1) BCLR 39 (CC) para 75.

⁷⁰² Provided that the parties can adduce adequate evidence of the matrimonial property regime applicable to the marriage.

⁷⁰³ Taylor Committee Report (2002) *Transforming the past – Protecting the future*.

needed in the South African retirement industry.⁷⁰⁴ Project 112 undertaken by the South African Law Commission (SALC) in 1999 is particularly relevant for purposes of this thesis, as it relates specifically to the division of retirement savings upon divorce.⁷⁰⁵

In 2004 the National Treasury published its first Discussion Paper relating to the need for reform of the South African retirement industry.⁷⁰⁶ The National Treasury acknowledged that numerous parametric amendments to retirement related legislation had created additional problems and therefore needed to be addressed.⁷⁰⁷ One of the areas that the National Treasury considered problematic was the distribution of retirement savings upon divorce.⁷⁰⁸

As per the 2007 Discussion Paper⁷⁰⁹ released by the National Treasury,

A primary reform objective is to provide basic income protection for all South Africans through a combination of social assistance and contributory savings and insurance arrangements.⁷¹⁰

The reform of the retirement industry is therefore aimed at ensuring that all South Africans have a measure of financial support upon reaching retirement

⁷⁰⁴ Mouton Committee (1992) *Report of the Committee of Investigation into a Retirement Provision System for South Africa*.

⁷⁰⁵ South African Law Commission (1999) *Report on sharing of pension benefits – Project 112*. See also paragraph 2.4 above.

⁷⁰⁶ National Treasury (2004) *Retirement Fund Reform: A Discussion Paper*.

⁷⁰⁷ National Treasury (2004) *Retirement Fund Reform: A Discussion Paper* 5. The National Treasury refers to ad hoc amendments. It is submitted that ad hoc amendments may also be termed parametric amendments.

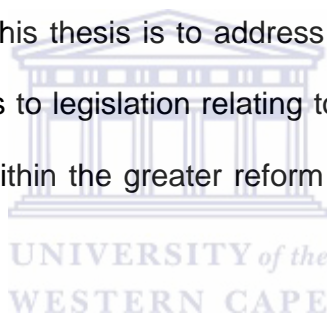
⁷⁰⁸ National Treasury (2004) *Retirement Fund Reform: A Discussion Paper* 45.

⁷⁰⁹ National Treasury (2007) *Social Security and Retirement Reform*.

⁷¹⁰ National Treasury (2007) *Social Security and Retirement Reform* 7.

age. It is submitted that this objective includes those members of society who have been unable to contribute satisfactorily to retirement savings for various reasons. For this reason, a national retirement fund is proposed to which all South Africans will be compelled to contribute despite the fact that their income may be low or irregular.⁷¹¹

Considering that the entire retirement industry is undergoing an extensive reform, the opportunity to address specific problem areas in the field has arisen in addition to the opportunity to overhaul the retirement system in its entirety. The focus of this thesis is to address the difficulties created by the parametric amendments to legislation relating to the distribution of retirement savings upon divorce within the greater reform process as envisaged by the National Treasury.



4.7 CONCLUSION

From the preceding paragraphs, it is clear that the legislation relating to the division of retirement benefits at divorce applicable in the UK is, in some instances, useful in offering a potential solution to problems identified in this field in South Africa. In other instances, (for example, the exclusion of couples married in terms of religious or customary law from the application of

⁷¹¹ National Treasury (2004) *Retirement Fund Reform: A Discussion Paper 20*.

the clean break principle), the UK provisions provide little or no assistance in resolving problems unique to South Africa.

While it is useful to examine the UK position in certain troublesome areas, it is still necessary to consider solutions to the identified problem areas which will fit into the South African legal landscape. It is clear that certain issues need to be resolved in a manner which is in accordance the constitutional values of the country, which are human dignity, equality and freedom.⁷¹²



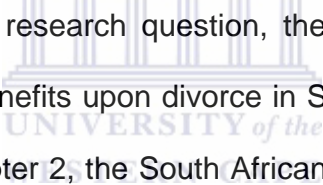
⁷¹² Section 7 of the Bill of Rights.

CHAPTER 5

CONCLUSION

5.1 RESEARCH QUESTION

The research question underlying this thesis is whether the parametric amendments to the legislation relating to the division of retirement benefits at divorce have been adequate, or whether there is a need for a systemic overhaul of the legislation.



In order to answer the research question, the legislation applicable to the division of retirement benefits upon divorce in South Africa as well as the UK was examined. In Chapter 2, the South African legislation in this regard was scrutinised. Numerous problems were identified which arose as a result of parametric amendments to the legislation dealing with the division of retirement benefits at divorce and the consequences of such division. The principle pieces of legislation are the Divorce Act⁷¹³ (amended by the Divorce Amendment Act⁷¹⁴); the Pension Funds Act⁷¹⁵ (amended by the Pension Funds Amendment Act⁷¹⁶ and the Financial Services Laws General

⁷¹³ Act 70 of 1979.

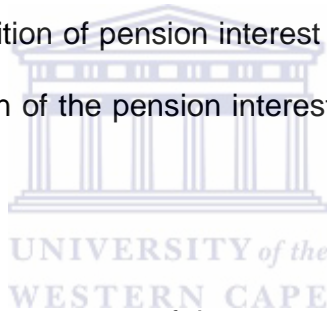
⁷¹⁴ Act 7 of 1989.

⁷¹⁵ Act 24 of 1956.

⁷¹⁶ Act 11 of 2007.

Amendment Act⁷¹⁷) and the Income Tax Act⁷¹⁸ (amended by the Revenue Laws Amendment Act⁷¹⁹ and the Taxation Laws Amendment Act⁷²⁰).

The amendment to the Divorce Act in 1989 introduced the term 'pension interest'. Prior to 1989, the term 'pension interest' was not defined and divorcing parties could therefore not include retirement benefits in the division of matrimonial property at divorce.⁷²¹ The result of the introduction of the concept of 'pension interest' was the creation of the possibility that retirement benefits could be distributed between the parties at divorce.⁷²² The introduction of the definition of pension interest had no effect on the timing of the payout of the portion of the pension interest awarded to the non-member spouse.⁷²³



In 2007, the timing of the payment of the non-member spouse's portion of the pension interest was addressed in the form of an amendment to the Pension Funds Act.⁷²⁴ The Pension Funds Amendment Act introduced the 'clean break' principle into South African law, which provided that the non-member spouse would be entitled to claim immediate payment of her portion of the

⁷¹⁷ Act 22 of 2008.

⁷¹⁸ Act 58 of 1962.

⁷¹⁹ Act 60 of 2008.

⁷²⁰ Act 3 of 2008.

⁷²¹ *Kirchner v Kirchner* [2009] 2 BPLR 135 (W).

⁷²² See paragraph 2.3 above.

⁷²³ See paragraph 2.3.4 above.

⁷²⁴ The Pension Funds Act 24 of 1956 was amended in 2007 by the Pension Funds Amendment Act 11 of 2007.

pension interest.⁷²⁵ The amendment introduced by the Pension Funds Amendment Act led to much uncertainty in respect of the retrospective application thereof. The retrospective application⁷²⁶ of the clean break principle was the subject of numerous judgments and PFA determinations⁷²⁷ until it was addressed by the legislature in another amendment to the Pension Funds Act in 2008. The Financial Services General Laws Amendment Act confirmed the retrospective application of the clean break principle, although some related issues remain unclear.⁷²⁸

Another result of the abovementioned parametric amendments to the Pension Funds Act is that certain divorcing couples are not able to benefit from the clean break principle.⁷²⁹ The parties who are excluded from the application of the clean break principle are those who are married in terms of religious or customary law⁷³⁰ as well as couples in which the member spouse belongs to a retirement fund which has not been established in terms of the Pension Funds Act.⁷³¹ The constitutionality of these exclusions was discussed in Chapter 4.

⁷²⁵ Section 28(b) of the Pension Funds Amendment Act 11 of 2007 introduced the clean break principle into South African law. See paragraph 2.5.2 above.

⁷²⁶ See paragraph 2.5.3 above.

⁷²⁷ *Beukes v Pepkor Retirement Fund* [2007] 3 BPLR 288(PFA); *Cockcroft v Mine Employees Pension Fund* [2007] 3 BPLR 296 (PFA); *Swart v Mittal Steel SA Selector Pension and Provident Fund* [2007] 3 BPLR 378 (PFA); *Lessing v Evergreen Pension Fund and Another* [2007] 3 BPLR 334 (PFA); *Kirchner v Kirchner* 2009 2 BPLR 135 (W).

⁷²⁸ See paragraphs 2.5.4, 4.2.1.1 and 4.2.1.2 above.

⁷²⁹ See paragraphs 4.5 and 4.5 above.

⁷³⁰ See paragraph 4.5 above.

⁷³¹ See paragraph 4.4 above.

The tax legislation applicable to the non-member spouse's portion of the pension interest has also undergone some radical changes. Initially, the member spouse was liable for all tax due on the non-member spouse's portion of the pension interest in terms of the Income Tax Act.⁷³² The member was inevitably liable for the tax due on the non-member's portion until 13 September 2007.⁷³³ Various amendments to the Income Tax Act after this date caused a gradual shift in the liability for the tax amount due on the non-member's portion of the pension interest.⁷³⁴ As of 1 March 2009, the liability for the tax due on the non-member's portion of the pension interest rests solely with the non-member spouse.⁷³⁵

In the period between the abovementioned dates, the tax liability depends on the date of the divorce as well as the date on which the non-member spouse makes her election as to the form of the payment of her portion of the pension interest.⁷³⁶ This interim period led to some uncertainty as to which party was liable for the tax on the non-member spouse's portion of the pension interest.⁷³⁷ The implications of the abovementioned shift in liability were considered in Chapter 4 and the period between the amendments to the Income Tax Act was discussed in Chapter 2.

⁷³² See paragraph 2.6.2 above.

⁷³³ *Ibid.*

⁷³⁴ Revenue Laws Amendment Act 35 Of 2007; Revenue Laws Amendment Act 60 of 2008; Taxation Laws Amendment Act 3 of 2008.

⁷³⁵ See paragraph 2.6.4 above.

⁷³⁶ See paragraph 2.6.3 above.

⁷³⁷ See paragraph 2.6 above.

The legislation relating to the division of retirement benefits upon divorce applicable in the UK was discussed in Chapter 3. The relevant legislation in the UK has also undergone parametric amendments, in some instances with problematic consequences.⁷³⁸ In Chapter 4, the legislation applicable in the UK in selected areas was compared to the legislation applicable in South Africa in order to determine whether the UK provisions provide solutions to problems identified in the South African context. In certain instances, sections of legislation applicable in South Africa have no counterpart in the UK and the UK legislation cannot assist in resolving the problems created by such legislation in South Africa.⁷³⁹ An example of this is the requirements for the enforceability of a divorce order giving effect to the clean break principle in the Pension Funds Act, which leads to the exclusion of certain parties from the scope of application of the clean break principle.⁷⁴⁰ In the UK, the clean break principle is applicable to all married parties.⁷⁴¹ In addition, it is important to bear in mind that constitutional supremacy is the cornerstone of South African law and all legislation must satisfy the objectives of the Bill of Rights.⁷⁴² The UK does not have a constitution as the supreme law, and

⁷³⁸ The Matrimonial Causes Act 1973 (c. 18) was amended by the Pensions Act 1995 (c. 26). Subsequent amendments were made by the Welfare Reform and Pensions Act 1999 (c. 30), the Pensions Act 2004 (c. 35) and the Pensions Act 2007 (c. 22).

⁷³⁹ See paragraph 4.5.1 above.

⁷⁴⁰ *Ibid.*

⁷⁴¹ See paragraph 3.6 above.

⁷⁴² Constitution of the Republic of South Africa, 1996.

therefore there is no overarching requirement of constitutionality applicable to legislation in the UK.⁷⁴³

5.2 IDENTIFIED PROBLEMS IN THE SOUTH AFRICAN CONTEXT

As stated previously, various problems relating to the division of retirement benefits resulting from parametric amendments to the relevant legislation have been identified.⁷⁴⁴ These problems can be grouped into specific categories which indicate the nature of the problem created by the particular parametric amendment. The categories are legal certainty, constitutionality and difficulty relating to implementation.



5.2.1 Legal certainty

The result of the series of parametric amendments to the legislation governing the distribution of retirement benefits at divorce is that there is a lack of legal certainty on some issues. The parametric amendment which has led to the most obvious lack of legal certainty is the introduction of the clean break principle as introduced into the Pension Funds Act in 2007. In

⁷⁴³ It is recognised that the UK is a member of the European Union, and that the European Union has various human rights instruments in place. However, the European Union has not formed part of this study as the focus is the effect of parametric amendments to legislation which is best illustrated by reference to the UK on its own.

⁷⁴⁴ See paragraph 5.1 above.

particular, the retrospective application of the clean break principle has been a concern to fund administrators and presiding officers alike.

Initially, section 37D as amended was not thought to apply retrospectively. The PFA in *Cockroft v Mine Employees Pension Fund* then found that section 37D was in fact intended by the legislature to apply retrospectively.⁷⁴⁵ However, numerous conflicting PFA determinations were made, in which the PFA found that section 37D did not apply retrospectively.⁷⁴⁶ The reasoning behind that finding was somewhat flawed, in that the PFA effectively allowed the section to apply retrospectively despite finding that that was not the intention of the legislature.



The actual retrospective application of section 37D, as amended, was rendered somewhat academic in 2008, with the passing of the Financial Services Laws General Amendment Act,⁷⁴⁷ which clearly provides that section 37D applies to divorce orders granted prior to 13 September 2007.

While the fact that section 37D applies retrospectively has now been confirmed, certain issues relating to the retrospectivity remain unresolved. For example, it is not clear whether divorce orders granted prior to 1989 may be enforced immediately as per section 37D. The definition of pension

⁷⁴⁵ *Cockroft v Mine Employees Pension Fund* [2007] 2 BPLR 378 (PFA) 301.

⁷⁴⁶ See paragraphs 2.5.3.2 and 2.5.3.4 above.

⁷⁴⁷ Act 22 of 2008.

interest was introduced in 1989,⁷⁴⁸ which made it possible for retirement fund savings to be distributed at divorce. However, prior to 1989, no such division could take place as pension interests did not form part of the matrimonial assets which could be divided at divorce.⁷⁴⁹ The extent of the retrospective application of section 37D is therefore still uncertain.

5.2.1.1 Recommendations

It is submitted that the extent of the retrospective application of the clean break principle needs to be addressed. The uncertainty relating to the retrospective application of section 37D has stemmed from a series of parametric amendments to the Pension Funds Act. It is therefore submitted that an additional parametric amendment to establish the parameters of the retrospectivity of section 37D would be inappropriate and may lead to further confusion. In addition, the Pension Funds Act (and any amendments thereto) would apply only to retirement funds subject to the provisions of the Act. It is recommended that any further legislation relating to the retrospectivity of section 37D be separate from the Pension Funds Act, bearing in mind that new legislation is necessary to include various parties in the scope of application of the clean break principle.⁷⁵⁰

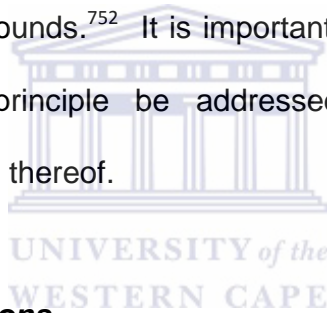
⁷⁴⁸ See paragraph 2.3 above.

⁷⁴⁹ *Ibid.*

⁷⁵⁰ See paragraph 5.2.2.1 below.

5.2.2 Constitutionality

The constitutionality of excluding certain persons from the scope of application of the clean break principle has been discussed extensively in Chapter 4.⁷⁵¹ In essence, it is submitted that the exclusion of parties married in terms of religious or customary law and not in terms of civil law and couples in which the member spouse belongs to a retirement fund not established in terms of the Pension Funds Act is unconstitutional. The exclusion is unconstitutional in that it discriminates unfairly against the abovementioned parties on prohibited grounds.⁷⁵² It is important that the scope of application of the clean break principle be addressed in order to remedy the unconstitutional aspects thereof.



5.2.2.1 Recommendations

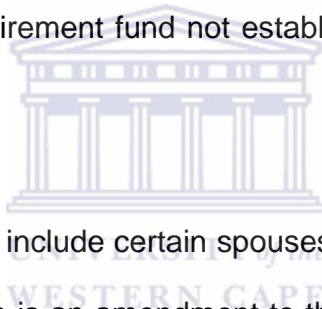
It is clear that there is a need to include religious marriages, customary marriages and marriages in which the member spouse is a member of a retirement fund not established in terms of the Pension Funds Act in the scope of application of the clean break principle. It has also been established that the reason for the exclusion of these non-member spouses is that the Pension Funds Act applies only to members of retirement funds established

⁷⁵¹ See paragraphs 4.4 and 4.5 above.

⁷⁵² See paragraphs 4.4.2 and 4.5.1.3 above.

in terms of the Act and, in the case of customary and religious marriages, only where the marriage is a registered civil marriage.⁷⁵³

To this extent, it is submitted that the clean break principle should be embodied in legislation which makes it clear that a non-member spouse in a religious or customary marriage is entitled to approach the court for a declaratory order confirming her entitlement to a portion of the member spouse's pension interest. The legislation should also provide for the application of the clean break principle to marriages in which the non-member spouse belongs to a retirement fund not established in terms of the Pension Funds Act.



One manner in which to include certain spouses in the scope of application of the clean break principle is an amendment to the Divorce Act permitting non-member spouses of members of retirement funds to benefit from the clean break principle. In the case of religious or customary non-member spouses, the proposed amendment to the Divorce Act should include a provision allowing the non-member spouse to approach the court for a declaratory order confirming her entitlement to a portion of the member's pension interest.⁷⁵⁴ However, this is not the preferable approach, for reasons mentioned in the following paragraphs.

⁷⁵³ See paragraphs 2.9 and 2.10 above.

⁷⁵⁴ See paragraph 4.5.2 above.

It is submitted that a single piece of carefully considered legislation could provide for the inclusion of these spouses in a manner that provides sufficient legal certainty and which is in accordance with the Constitution. This legislation should be separate from both the Divorce Act and the Pension Funds Act.

The introduction of new legislation, separate from the Pension Funds Act, is necessary as the unconstitutional exclusion of certain parties from the application of the clean break principle arose as a result of the clean break principle being introduced into the Pension Funds Act. As mentioned previously, the Pension Funds Act applies only to certain retirement funds and this leads to the exclusion of members of those funds not subject to the provisions of the Act.⁷⁵⁵ While an amendment to the Divorce Act initially appears feasible, it should be noted that not all divorces are governed by the Divorce Act (that is, where the marriage is purely religious). The ideal solution is therefore new legislation which is applicable to all retirement funds and all marriages.

⁷⁵⁵ Section 1 Pension Funds Act 24 of 1956. See paragraph 4.4 above.

5.2.3 Difficulty relating to the practical requirements for the enforceability of a divorce order against a retirement fund

The requirements for the enforceability of a divorce order awarding a non-member spouse a portion of the member spouse's pension interest are found in section 37A of the Pension Funds Act, read with section 7(8) of the Divorce Act. The implications of these requirements were discussed in Chapter 2.⁷⁵⁶

It is submitted that the requirements for the enforceability of a divorce order against a retirement fund may prevent or deter certain non-member spouses from approaching the relevant fund for payment of their portion of the pension interest. Divorce orders that do not fulfil the abovementioned requirements would need to be rectified in order to meet the requirements and therefore be enforceable.⁷⁵⁷ The non-member spouse is thus compelled to incur additional legal costs in applying for the rectification of the divorce order. The alternative is that the non-member spouse will have to wait until the benefit accrues to the member spouse and only then enforce her claim against the member's pension benefit. This flies in the face of the clean break principle and is clearly prejudicial to the non-member spouse.

⁷⁵⁶ See paragraph 2.8 above.

⁷⁵⁷ *Ibid.*

5.2.3.1 Recommendations

It has been established that the requirements for enforceability of a divorce order against the retirement fund of the member spouse may lead to the non-member spouse incurring additional costs to rectify her divorce order, or prevent her from claiming her portion of the pension interest of the member spouse until the pension benefit accrues to the member. It is proposed that the requirements for enforceability of a divorce order against the member's retirement fund be relaxed to the extent that a division of pension interest is implicit in a divorce order directing that the matrimonial assets of the spouses.

In addition, it is submitted that a relaxation of the requirements would prevent attempts by retirement funds to avoid payment of the non-member spouse's portion of the pension interest based on the wording of the divorce order. Unnecessary delays in the payment of the amount due to the non-member spouse would therefore be reduced. The proposed form of a relaxation of the requirements for enforceability of a divorce order against a retirement fund is a legislative amendment to both the Divorce Act and the Pension Funds Act, which contain said requirements. It is submitted that the amendment should take the form of a single piece of legislation which simultaneously amends the Divorce Act and the Pension Funds Act and thereby abolishes the requirements for enforceability of a divorce order against the member's retirement fund.

5.3 CONCLUSION

The aim of this thesis was to identify inadequacies in South African legislation relating to the distribution of retirement fund benefits at divorce created by numerous parametric statutory amendments.⁷⁵⁸ A further aim was to promote a systemic overhaul of the aforementioned legislation in order to remedy the various problematic aspects thereof.⁷⁵⁹

It has been shown that parametric amendments to legislation governing the distribution of retirement fund benefits at divorce have led to a lack of legal certainty⁷⁶⁰ and, in certain instances, the infringement of constitutional rights of individuals.⁷⁶¹ Since South Africa is experiencing an extensive retirement fund reform,⁷⁶² it is fitting that the concerns relating to the legislation governing the distribution of retirement fund benefits be addressed during the reform process.

The National Treasury recognised early in the recent retirement fund reform process that the primary South African retirement fund legislation (the Pension Funds Act) has been inundated with parametric amendments to retirement legislation, and that there is a need for a systemic overhaul of the

⁷⁵⁸ See paragraph 1.6 above.

⁷⁵⁹ *Ibid.*

⁷⁶⁰ See paragraph 5.2.1 above.

⁷⁶¹ See paragraph 5.2.2 above.

⁷⁶² See paragraph 1.4 and 4.6 above.

entire industry, which includes the division of pension interest upon divorce.

In the 2004 Discussion Paper, the National Treasury stated that

Over the course of the past 48 years there have been numerous amendments to the Act, updating it where considered necessary in an *ad hoc* fashion, introducing features such as member-elected trustees, the Pension Funds Adjudicator, minimum benefits and surplus apportionment. Therein however lies one of the reasons for a review of the current legislation: it needs careful review to ensure consistency and to resolve problems introduced by the piecemeal addition of a variety of measures. A review of the Act should aim at consolidating and integrating retirement funding arrangements, while also contributing to a more consistent and coherent structure and regulation of the broader social security system in South Africa.⁷⁶³

A systemic overhaul of the retirement funding legislation relating to the division of retirement fund benefits upon divorce has thus been acknowledged as an ideal remedy for the difficulties created by 'piecemeal' (i.e. parametric) amendments to the Pension Funds Act and other legislation concerning the division of retirement fund benefits at divorce. It is suggested that the aforementioned difficulties be addressed as a part of the extended retirement fund reform process and that the legislation establishing the proposed comprehensive social security system in South Africa include simplified and all-encompassing provisions for the division of retirement fund benefits at divorce.

⁷⁶³ National Treasury (2004) *Retirement Fund Reform: a discussion paper* 5.

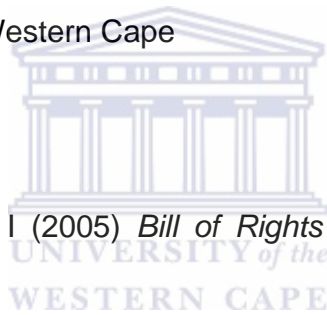
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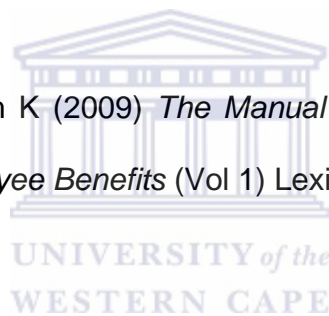
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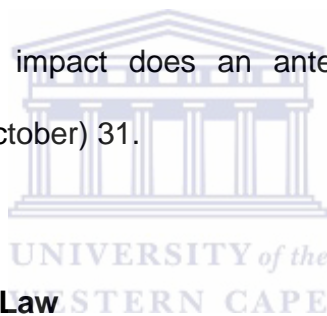
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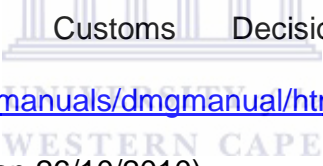
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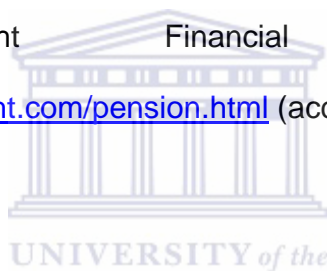
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