

SOUTH AFRICAN LAW COMMISSION

WORKING PAPER 4

PROJECT 41

INVESTIGATION INTO THE POSSIBILITY OF MAKING
PROVISION FOR A DIVORCED WOMAN TO SHARE
IN THE PENSION BENEFITS OF HER FORMER
HUSBAND

October 1984

The South African Law Commission was established by the South African Law Commission Act, 1973 (Act 19 of 1973).

The members of the Commission are:

The Honourable Mr Justice G Viljoen (Chairman)
The Honourable Mr Justice H J O van Heerden (Vice-Chairman)
Prof J T Delport
Mr J E Knoll
Mr P A J Kotzé
Dr P J J Olivier SC
Mr G G Smit

The Secretary is Mr D A Kruger. The Commission's offices are on the 8th Floor, N G Kerk Sinodale Sentrum, 228 Visagie Street, Pretoria. Correspondence should be addressed to:

The Secretary
South African Law Commission
Private Bag X668
0001 PRETORIA

Telephone: (012) 26-1121/5.

PREFACE

This working paper has been prepared by the research staff of the Commission to serve as a basis for the Commission's deliberations. The views, conclusions and recommendations contained herein should not at this stage be regarded as those of the Commission. The working paper is being published in full to furnish persons and bodies wishing to comment or to make suggestions for the development, improvement, modernisation or reform of this particular branch of the law with sufficient background information to enable them to place substantiated submissions before the Commission.

Any person or body wishing to make oral representations to the Commission should submit a brief résumé of his or its proposed representations, together with a request to be heard by the Commission, to the Commission in writing.

It would be appreciated if written comments, representations or requests, could reach the Commission not later than 31 January 1985. Please refer to the previous page for the address to which correspondence should be directed.

The researcher responsible for the project who may be contacted for further information is:

Mr P Ellis

Tel (012) 26-1121 x 40

HIERDIE STUK IS OOK IN AFRIKAANS BESKIKBAAR

INDEX

CHAPTER	CONTENTS	PAGE
	PREFACE TO THE WORKING PAPER	
1.	ORIGIN OF THE PROJECT	1
2.	SURVEY OF THE SOUTH AFRICAN LAW RELATING TO PENSIONS	4
	1. Introduction	4
	2. Classification of funds	5
	3. Certain general principles applicable to the South African pension law	12
	4. Conclusion	16
3.	SURVEY OF THE LEGAL POSITION IN SOUTH AFRICA WITH REGARD TO FINANCIAL ARRANGEMENT ON DIVORCE	
	1. Introduction	17
	2. The general principle with regard to financial arrange- ments on divorce	17
	3. The rights of the woman according to the matrimonial property regime	18
	4. Forfeiture of benefits	21
	5. Redivision of assets on divorce	23
	6. The duty to pay maintenance	24
	7. Conclusion	29
4.	COMPARATIVE LEGAL SURVEY	
	1. Introduction	30
	2. The Romano-Germanic systems	30

	CONTENTS	PAGE
	2.1 The Netherlands	30
	2.2 West Germany	36
	2.3 Switzerland	39
	2.4 Austria	40
	3. The Anglo-American systems	41
	3.1 England	41
	3.2 The United States of America	43
	3.3 New Zealand	48
	3.4 Australia	50
	3.5 Canada	52
	4. The hybrid system of Scotland	53
5.	GENERAL CONCLUSION AND PRELIMINARY RECOMMENDATION	
	1. General Conclusions	56
	2. Preliminary Recommendations	61
	3. Closing observation	64
	QUESTIONNAIRE	65
	BIBLIOGRAPHY	66

CHAPTER 1

ORIGIN OF THE PROJECT

1. The South African Law Commission has already considered two projects related to this project, namely -
 - (a) Review of the Law of Divorce and
 - (b) Review of the Matrimonial Property Law.
2. The outcome of the former project was the Divorce Act, 70 of 1979. The project relating to matrimonial property law has resulted in the Matrimonial Property Act, 88 of 1984.
3. These two projects, especially the one relating to the matrimonial property law have given rise to the question whether provision should be made for a divorced wife to share in her former husband's pension benefits. In view of numerous foreseeable problems the Commission at first decided to leave the current legal position unaltered. However, the investigation was reopened at the request of the Minister and treated as a separate project. This question forms the subject of this working paper.
4. The question has also already been investigated by the Inter-departmental Committee of Inquiry into Certain Specific Pension Matters.¹ This inquiry found the following:²

A person's accrued frozen pension interest is often his most valuable possession - worth more than even his house - and this will become increasingly so the longer compulsory preservation applies. In the opinion of the Commit-

1 The Committee consisted of senior officers of the Department of Finance and of the then Department of Social Welfare and Pensions. This Committee's report was published in March 1980 (RP 75/1980).

2 Par 3.62 of the Report.

tee such an important asset should also be taken into account in the division of assets in a divorce, provided however that -

- (a) the husband's remaining accrued frozen interest after division shall not be smaller than the smaller of -
 - (i) one-half of his original accrued interest;
 - (ii) the applicable protected amount as determined by the formula in paragraph 3.60 above for a male unmarried insolvent;
- (b) any portion of the husband's accrued interest which subject to (a) is granted to the wife at the discretion of the Court, shall remain frozen (in favour of the wife) in one or other Approved Pension Provision Instrument...

A vested pension must likewise be capable of attachment after divorce, and it should therefore also be possible for an ex-wife to act as contemplated in paragraph 3.61 at (b) in the case of the wife.

5. These proposals have been embodied in the Draft Preservation of Pension Interests Bill,³ clause 13 of which reads as follows:

Payment of a preserved pension interest upon divorce

(1) Notwithstanding any provision to the contrary in the rules of a fund, a member shall retain in the case of an order of divorce, in terms of which a part of his preserved pension interest is attached, a total pension interest which is at least equal to the value of the protected interest which applies on the date of the order to a woman or to an unmarried man, as the case may be.

(2) Upon submission to a pension instrument or to a provident fund of an order of divorce which directs the division of a member's preserved pension interest between the member and the other spouse, such pension instrument or provident fund shall, subject to the provisions of subsection (1), reduce such member's preserved pension interest by the amount awarded by the Court to the member's spouse.

³ Published by General Notice 653 of 1981 in Government Gazette 7740 of 28 August 1981.

(3) That portion of the pension interest acquired by a spouse in terms of subsection (2) shall remain preserved at the pension instrument or provident fund concerned and the provisions of this Act shall apply mutatis mutandis to such pension interest.

(4) The person on behalf of whom a pension interest contemplated in subsection (3) is preserved, shall be deemed, for the purposes of this Act, to be a member of the pension instrument or provident fund which preserves the pension interest, and the normal retirement age applicable to members of such pension instrument or provident fund shall apply to such member.

6. However, this Bill has not yet been passed. The stumbling block is obviously the principle of compulsory preservation of pension interests. Until this principle is accepted there is no possibility of giving effect to clause 13. A member of the Interdepartmental Committee, Mr I M van Rooyen, was consulted and it emerged that there was no prospect of this Bill coming into operation in the near future.

CHAPTER 2

SURVEY OF THE SOUTH AFRICAN LAW RELATING TO PENSIONS

1. INTRODUCTION

1.1 Changed economic and social conditions give rise to modernization of structures. In the days of the subsistence economy the individual breadwinner provided for his family until he was no longer able to do so. Then it became his children's duty to support him. With the shift in emphasis from a subsistence economy to a market economy, it became increasingly difficult for an individual to support his own family and his elderly parents as well. A retired person therefore became increasingly dependent on himself for financial survival. Individuals therefore began to make provision for old age at an early stage in the form of savings and pension schemes.

1.2 As a result of competition in the labour market employers have created more and more imaginative pension schemes and more and more benefits have become available on retirement. The emphasis has thus shifted from mere provision for old age to a kind of deferred remuneration in the form of (sometimes huge) lump-sum gratuities. Such pension benefits have sometimes even been said to be a member's most important asset on his death.¹

1.3 In developed countries it is today taken for granted that the individual or the community must make provision inter alia by means of insurance. In South Africa this insurance is provided by means of personal insurance as well as by Pension, Provident, Retirement Annuity and Benefit Funds to which members and, in the majority of cases, also their employers make contributions and which are supported by the State through tax concessions. In

1 RP 75/1980, par 3.62.

those cases where adequate provision has not been made in this manner, the State intervenes by paying certain social pensions, e g old age and disability pensions, from the central coffers.²

2. CLASSIFICATION OF FUNDS

2.1 General

South African legislation makes provision for a wide variety of funds offering pension and related benefits. Thus the Income Tax Act, 58 of 1962, (hereinafter referred to as the Income Tax Act) distinguishes between pension, provident, retirement annuity and benefit funds, while the Pension Funds Act, 24 of 1956, does not distinguish between pension, provident and retirement annuity funds, and does not apply to benefit funds. Furthermore, many variations are found under each of these categories. It is therefore impossible and undesirable to go into all these differences within the framework of this working paper. For convenience in this chapter reference is made to "funds" as embracing all these above-mentioned schemes, except as otherwise indicated.

2.2 Classification of funds in terms of the Income Tax Act

2.2.1 Pension Funds

Section 1 of the Income Tax Act defines a pension fund as:

a superannuation, pension, provident, widows' or orphans' fund or pension scheme established by law or any such fund established for the benefit of the employees of any local authority, and any fund (other than a retirement annuity fund) not so established which is approved by the Commissioner in respect of the year of assessment in question: Provided that the Commissioner may approve a fund subject to such limitations or conditions as he may determine, and shall not approve a fund in respect of any year of assessment unless he is in respect of that year of assessment satisfied -

2 Op cit par 2.3

- (a) that the fund is a permanent fund bona fide established for the purpose of providing annuities for employees on retirement from employment or for widows, children dependants or nominees of deceased employees, or mainly for the said purpose and also for the purpose of providing benefits other than annuities for the persons aforesaid; and -
- (b) that the rules of the fund provide -
 - (i) that all annual contributions of a recurrent nature to the fund shall be in accordance with specified scales;
 - (ii) that membership of the fund throughout the period of employment shall be a condition of the employment by the employer of all persons of the class or classes specified therein who enter his employment on or after the date upon which the fund comes into operation;
 - (iii) that persons who immediately prior to the said date were employed by the employer and who on the said date fall within the said class or classes may, on application made within a period of not more than 12 months as from the said date, be permitted to become members of the fund on such conditions as may be specified in the rules;
 - (iv) that not more than one-third of the total value of the annuity or annuities to which any employee becomes entitled, may be commuted for a single payment, except where the annual amount of such annuity or annuities does not exceed R250;
 - (v) for the administration of the fund in such a manner as to preclude the employer, except in the case of a local authority, from controlling the management or assets of the fund and from deriving any monetary advantage from moneys paid into, or out of the fund, except that where the employer is a partnership, a member of the partnership may be permitted to derive such monetary advantage if he was previously an employee and, on becoming a partner, was permitted to retain his membership of the fund as though he had not ceased to be an employee, his contributions being based upon his pensionable emoluments during the 12 months which ended on the day on which he ceased to be an employee and his benefits from the fund being calculated accordingly; and
 - (vi) that the Commissioner shall be notified of all amendments of the rules; and

(c) that the rules of the fund have been complied with.

2.2.2 Provident funds

Section 1 of the Income Tax Act defines a provident fund as follows:

"provident fund" means any fund (other than a pension fund, benefit fund or retirement annuity fund) which is approved by the Commissioner in respect of the year of assessment in question: Provided that the Commissioner may approve a fund subject to such limitations or conditions as he may determine, and shall not approve a fund in respect of any year of assessment unless he is in respect of that year of assessment satisfied -

- (a) that the fund is a permanent fund bona fide established solely for the purpose of providing benefits for employees on retirement from employment or solely for the purpose of providing benefits for widows, children, dependants or nominees of deceased employees or deceased former employees or solely for a combination of such purposes; and
- (b) that the rules of the fund contain provisions similar in all respects to those required to be contained in the rules of a pension fund in terms of subparagraphs (i), (ii), (iii), (v) and (vi) of paragraph (b) of the definition of "pension fund"; and
- (c) that the rules of the fund have been complied with.

At first glance the definitions of a provident fund and a pension fund may seem to be practically identical. The Inderdepartmental Committee³ puts it thus:

The intention is apparently that Provident Funds are to be equated with Pension Funds, since for the purpose of approval in terms of the Income Tax Act, 1962, the only difference between the two is the fact that Provident Funds may make provision for lump-sum benefits, but not Pension Funds (except as regards the permitted one-third commutation). The actual tax treatment, however, shows up certain important differences.

3 Op cit 39.

2.2.3 Retirement annuity funds

Section 1 of the Income Tax Act defines retirement annuity fund as follows:

"retirement annuity fund" means any fund (other than a pension fund, provident fund or benefit fund) which is approved by the Commissioner in respect of the year of assessment in question: Provided that the Commissioner may approve a fund subject to such limitations or conditions as he may determine, and shall not approve any fund in respect of any year of assessment unless he is in respect of that year of assessment satisfied -

- (a) that the fund is a permanent fund bona fide established for the sole purpose of providing life annuities for the members of the fund or annuities for the widows, children, dependants or nominees of deceased members; and
- (b) that the rules of the fund provide -
 - (i) for contributions by the members, including contributions made by way of transfer of members' interests in approved pension funds, provident funds or other retirement annuity funds;
 - (ii) that not more than one-third of the total value of any annuities to which any person becomes entitled, may be commuted for a single payment, except where the annual amount of such annuities does not exceed R250;
 - (iii) that no portion of any annuity payable to the widow, child, dependant or nominee of a deceased member may be commuted later than six months from the date of the death of such member;
 - (iv) adequate security to safeguard the interests of persons who may become entitled to annuities;
 - (v) that no member shall become entitled to the payment of any annuity after he reaches the age of seventy years or, except in the case of a member who becomes permanently incapable through infirmity of mind or body of carrying on his occupation, before he reaches the age of fifty-five years;
 - (vi) that where a member dies before he becomes entitled to the payment of an annuity, the benefits shall not exceed a refund to his estate or to his widow, children, dependants or nominees

of the sum of the amounts (with or without reasonable interest thereon) contributed by him as annuity or annuities to his widow, children, dependants or nominees;

- (vii) that where a member dies after he has become entitled to an annuity no further benefit shall be payable other than an annuity or annuities to his widow, children, dependants or nominees;
 - (viii) ...
 - (ix) ...
 - (x) that a member who discontinues his contributions prematurely shall be entitled either to an annuity (payable from the date on which he would have become entitled to the payment of an annuity if he had continued his contributions) determined in relation to his actual contributions or to be reinstated as a full member under conditions prescribed in the rules of the fund;
 - (xi) that upon the winding up of the fund a member's interest therein must either be used to purchase a policy of insurance which the Commissioner is satisfied provides benefits similar to those provided by such fund or be paid for the member's benefit into another approved retirement annuity fund;
 - (xii) that save as is contemplated in sub-paragraph (ii), no member's rights to benefits shall be capable of surrender, commutation or assignment or of being pledged as security for any loan;
 - (xiii) that the Commissioner shall be notified of all amendments of the rules; and
- (c) that the rules of the fund have been complied with.

2.2.4 Benefit funds

Section 1 of the Income Tax Act defines a benefit fund as:

- (a) any friendly society registered under the Friendly Societies Act, 1956 (Act No. 25 of 1956), or any fund which is not so registered solely because of the provisions of section 2(2)(a) of that Act; or
- (b) any medical scheme registered under the provisions of the Medical Schemes Act, 1967 (Act No. 72 of 1967); or

- (c) any fund (other than a pension fund, provident fund or retirement annuity fund) which, in respect of the year of assessment in question, the Commissioner is satisfied is a permanent fund bona fide established for the purpose of providing sickness, accident or unemployment benefits for its members, or mainly for such a purpose and also for the purpose of providing benefits for the widows, children, dependants or nominees of deceased members.

For the purposes of this working paper benefit funds are not of any great importance, because these funds are primarily intended to safeguard the member or his dependants against immediate financial hardship in the event of contingencies such as illness accidents or unemployment. In the nature of things they do not affect the divorced wife's position so materially as to warrant further discussion.

2.3 Classification of funds in terms of the Pension Funds Act, 24 of 1956

2.3.1 Official funds

These are funds which have been established by special Acts for employees of the State and certain parastatal institutions. The relevant acts are administered by the Department of Health and Welfare, except the act relating to funds established for employees of the South African Transport Services. Official funds' moneys are invested in Government securities and securities of other bodies and institutions in the public sector.⁴

2.3.2 Self-administered funds

These are funds, including retirement annuity funds, which themselves invest their moneys with bodies and institutions in the public and the private sectors of the economy and to which all the provisions of the Pension Funds Act, 24 of 1956, apply.⁵

4 Op cit 4.

5 Ibid

2.3.3 Underwritten funds

These are funds, including retirement annuity funds, which hold no assets other than policies of insurance and which for that reason can be exempted from some of the provisions of the Pension Funds Act, 24 of 1956.⁶

2.3.4 State-controlled funds

These are funds over which control of the same order as that laid down by the Pension Funds Act, 24 of 1956, is exercised in terms of another law or ordinance, and which can therefore be exempted from the provisions of that Act. This type of fund is usually established by local authorities for their employees.⁷

2.3.5 Industrial funds

These are funds established by agreements in terms of section 48 of the Labour Relations Act, 28 of 1956. These funds are controlled in terms of the relevant agreement.⁸

2.3.6 Foreign funds

These are funds whose head-offices are outside the Republic. Such funds are exempt from the provisions of the Pension Funds Act, 24 of 1956, except that they have to furnish security for the payment of benefits which may become payable to South African citizens residing in the Republic.⁹

2.4 Other possible classifications

Apart from the above-mentioned classifications funds may be classified in various other ways, for example according to the type

6 Ibid.
7 Ibid.
8 Ibid.
9 Ibid.

of defreezing contingency that may give rise to the payment of benefits or in the light of the Fund's financial experience ("fixed contribution schemes" or "money purchase schemes").¹⁰

2.5 Conclusion

2.5.1 The classification of funds presents a confusing picture. In practice, however, little difficulty is experienced. None of the above-mentioned classifications is all-embracing: the classification of funds in terms of the Income Tax Act is aimed at tax control, while the classification in terms of the Pension Funds Act is aimed at structural control. It is therefore evident that none of these classifications can serve as a general basis for this working paper.

2.5.2 It is sufficient to state that, in this working paper, the question is examined whether a divorced woman should share in the lump-sum payment or periodical payments of benefits from a fund to which her former husband had contributed financially during the marriage, alone or jointly with his employer or another institution. The terms of reference of the Commission do not include insurance policies. The question may be asked, however, whether the investigation should not be extended to include insurance policies since similar financial benefits may be obtained through them.

3. CERTAIN GENERAL PRINCIPLES APPLICABLE TO THE SOUTH AFRICAN PENSION LAW

3.1 Introduction

Every pension scheme has three basic components: the member, the fund and the beneficiary. The history of every scheme may be divided into two main phases: the contribution phase and the pay-

10 Op cit 8.

ment phase. The former takes place as long as the member and/or his employer contributes to the fund, and the latter takes place when a defreezing contingency¹¹ occurs.

3.2 The three components of a pension scheme

3.2.1 The member

In principle there is no restriction to prevent anyone from becoming a member of a pension scheme. In practice however, pension schemes are connected with employment and it is employees who become members of the pension schemes provided by their employers. Nowadays more and more women go out to work, and they usually also participate in their employer's pension schemes. The fact remains, however, that many women give up their employment at some stage to become home-makers,¹² and from that moment lose membership of their pension scheme. During the marriage, the husband usually provides for contingencies by his membership of a pension scheme. It may therefore be said that more husbands than wives are at present members of pension schemes. Benefits are not, however, restricted to members, and the picture may therefore at first glance seem gloomier than it actually is.¹³

3.2.2 The fund

In 1978 there were already 10 664 different funds. Over a period of 19 years there was an increase of 6,25 % per annum.¹⁴ Section 1 of the Pension Funds Act, 24 of 1956, defines pension fund as a pension fund organization, which in turn is defined as follows:

11 This term is used by the Interdepartmental Committee to signify the event which makes the benefits of the scheme available.

12 This is the Anglo-American term.

13 RP-75/1980, 5.

14 Ibid.

- (a) any association of persons established with the object of providing annuities or lump-sum payments for members or former members of such association upon their reaching their retirement dates, or for the dependants of such members or former members upon the death of such members or former members; or
- (b) any business carried on under a scheme or arrangement established with the object of providing annuities or lump-sum payments for persons who belong or belonged to the class of persons for whose benefit that scheme or arrangement has been established, when they reach their retirement dates or for dependants of such persons upon the death of those persons,

and includes any such association or business which in addition to carrying on business in connection with any of the objects specified in paragraph (a) or (b) also carries on business in connection with any of the objects for which a friendly society may be established, as specified in section 2 of the Friendly Societies Act, 1956, or which is or may become liable for the payment of any benefits provided for in its rules, whether or not it continues to admit, or to collect contributions from or on behalf of, members.

Every fund must apply to the Registrar of Pension Funds for registration.¹⁵ Upon registration the fund becomes a body corporate and administers its finances in terms of its rules and the relevant statutory provisions under the control of the Registrar.¹⁶

3.2.3 The beneficiary

When the defreezing contingency occurs, payments are made to the beneficiary in accordance with the rules¹⁷ of the fund. The following persons may be beneficiaries:

- (a) The member: Pension funds are usually aimed at placing the member in more or less the same financial position on retirement, disablement, etc as before. He is therefore the primary beneficiary.

15 Sec 4(1) of the Act.

16 Sec 15 of the Act.

17 The term "rules" includes the act, charter, deed of settlement memorandum of association, or other document by which the fund is constituted. (Sec 1 of the Pension Funds Act, 24 of 1956).

- (b) Dependants of the member: Section 1 of the Pension Funds Act, 24 of 1956, defines a dependant as follows:

"dependant", in relation to a member -

- (a) means a person considered by the person managing the business of the fund concerned as being in fact dependent on the member for maintenance, regardless of whether or not the member is legally liable for the maintenance of such person;
- (b) and includes a person who is in fact not dependent on the member for maintenance, if such person is -
 - (i) the spouse of the member, including a party to a customary union according to Black law and custom or to a union recognized as a marriage under the tenets of any Asiatic religion; or
 - (ii) a child or descendant of a child of the member or the spouse of such child or descendant,

who in accordance with the rules of the fund may become entitled to a benefit.

It is important to note that a member's divorced wife is excluded from being a dependant in terms of this definition, unless she is considered by the manager of the fund as being in fact dependant on the member for maintenance.

- (c) Nominees: Certain funds also provide that a member may nominate a person to whom certain benefits will accrue at his death. Nomination is in the sole discretion of the member and may be revoked by him.

3.3 The phases in the functioning of the fund

3.3.1 The contribution phase

Contributions to a pension fund normally come from the member and his employer. Where no employer-employee relationship exists, the member is usually the sole contributor to the fund, which tries to increase its funds through investment or otherwise. The contribution phase usually continues until the occurrence of a defreezing contingency.

3.3.2 The defreezing contingency

Defreezing contingencies are defined in the rules of a fund. It is usually the contingency for which the member wishes to provide when he joins a fund, as for instance retirement or death. On the other hand, the rules of funds usually also provide for the refunding of a member's contributions on resignation or dismissal. Present legislation does not provide for compulsory preservation of pension interests. Therefore, when a person resigns or is dismissed, his accrued pension benefits are paid out to him, unless he voluntarily transfers these benefits to another fund, or unless the fund is taken over by another. It is important to note that divorce is not regarded as a defreezing contingency under the present laws.

3.3.3 The payment phase

Under the current system the quantum of payments to the beneficiary is calculated only when the defreezing contingency takes place. Although the quantum of payment may be anticipated beforehand, it is not calculable before the occurrence of the defreezing contingency. Payment of benefits are made in the form of a lump-sum or periodical payments. Payment ceases at the death of the beneficiary.

4. CONCLUSION

It is evident that, unless a divorced woman is herself a member of a pension scheme, she practically does not share in the current pension system.¹⁸ The question is whether this situation is equitable and should be continued.

¹⁸ Social pensions are not included in this discussion.

CHAPTER 3

SURVEY OF THE LEGAL POSITION IN SOUTH AFRICA WITH REGARD TO FINANCIAL ARRANGEMENTS ON DIVORCE

1. INTRODUCTION

The inequities which may apparently arise from the fact that a divorced woman has no place in current pension law are legion. The pension law cannot however be considered in isolation. In this chapter the question whether these apparent inequities are not in any case remedied by the law relating to financial arrangement on divorce is examined.

2. THE GENERAL PRINCIPLE WITH REGARD TO FINANCIAL ARRANGEMENTS ON DIVORCE

2.1 In the majority of cases (95 %) the financial and matrimonial property consequences of divorce are stipulated in an agreement.¹ This agreement may be made an order of court,² but may not be varied by the court unilaterally, unless fraud, error or duress existed at the time of agreement.³ Only those parts of the settlement pertaining to maintenance may be varied by the court. The contents of such settlements are naturally determined by the parties' respective rights and duties under the positive law: the positive law is, as it were, a lever used by the parties in bargaining as to the contents of the agreement.

2.2 If the parties are not able to come to an agreement, the court is not empowered to order an equitable division of assets.⁴ Hahlo states:⁵

-
- 1 Olivier Die Suid-Afrikaanse persone- en familiereg (2e uitgawe) Durban Butterworths 1980 at 303; S A Law Commission Report pertaining to the matrimonial property law Pretoria Government Printer RP 26/1982 at 85.
 - 2 Sec 7(1) of the Divorce Act, 70 of 1979.
 - 3 Hahlo The South African law of husband and wife Cape Town Juta 1975 at 432.
 - 4 Sinclair "Financial provision on divorce: need, compensation or entitlement?" 1981 SALJ 469, 480. Sec 20 of the Matrimonial Property Act, 88 of 1984 does not change the position.
 - 5 Op cit 433.

Where no agreement relating to the property rights of the spouses had been entered into the effect of the divorce depends, first, on the regime by which the marriage was governed, secondly, on whether or not an order of forfeiture of benefits has been made.

To this may be added the power of the court to order payment of maintenance.⁶

3. THE WIFE'S RIGHTS UNDER THE MATRIMONIAL PROPERTY REGIME

3.1 Marriage in community of property

3.1.1 At the time of a marriage in community of property the spouses separate estates are merged into a joint estate. All the assets that belonged to the parties separately before the marriage and all the assets that they acquire or that accrue to them during the marriage become part of the joint estate. Only gifts and bequests made to a spouse on condition that they shall not form part of the joint estate, and certain forms of damages are excluded therefrom. The husband and wife are joint owners⁷ of the joint estate, each holding an undivided half share. Each spouse has the power to dispose of his or her half share by will.⁸ All the debts incurred by the spouses whether before or during the marriage are charges on the joint estate, the pension contributions made by the husband or wife therefore also being charges on the joint estate.

3.1.2 The joint estate terminates on divorce. The decree of divorce is per se an order for the division of the joint estate. Each party is entitled to half the nett value of the joint estate as at the date of divorce. The husband is responsible by law for the liquidation process, unless a liquidator is appointed.

6 Sec 7(2) of the Divorce Act, 70 of 1979.

7 Contra however: Ex parte Woolf 1944 OPD 266, 271 and Oberholzer 1947 3 SA 294 (O), and the criticism of Olivier op cit 233 et seq.

8 S A Law Commission Report on matrimonial property law above 4.

3.1.3 The question now poses itself whether the wife's interest in the husband's pension benefits forms an asset in the joint estate. This question has never been answered by the courts, because it has been generally accepted that the wife is entitled to pension benefits only if she has the status of "wife of the member" upon payment of the benefits. If she is divorced, it is assumed that she does not have this status, and is therefore not entitled to the benefits. Before divorce, so the reasoning goes, she only has a spes to share in the eventual pension benefits of her husband. This spes falls away on divorce.

3.1.4 A similar question arose in CIR v Nolan's Estate.⁹ For the respondent it was argued that "(a)s the marriage was in community of property, the rights under the contract between the employer and the insurance society for the benefit of the employee, which accrued upon retirement of the deceased, were owned by the deceased and his wife in undivided shares". To this argument Hoexter ACJ replied as follows:¹⁰

In my opinion the annuity enjoyed jointly by the deceased and his wife during his lifetime and enjoyed after his death by his widow, came into existence on his retirement. In terms of clause 26 of the second schedule there is only one annuity; it commences on the retirement of the employee and it does not terminate at his death; his death merely marks the point of time at which the annuity previously paid to him, now becomes payable to his designated dependant.

In casu the defreezing contingency was the husband's retirement. Marito vivo the wife acquired only a half share in the cash benefit when it was paid out. At the husband's death payments were made direct to her. It is clear, therefore, that the courts do not recognise the wife's interest in the husband's pension benefits before the defreezing contingency as a right.

9 1962 1 SA 785 (A).

10 At 791C.

3.1.5 Conclusion

Although pension scheme contributions are a charge on the joint estate, the interest built up with these contributions forms no part of the joint estate before it is paid out. If the parties are divorced before the benefits are paid out, the wife's interest in these benefits terminates on divorce.

3.2 Marriage out of community of property

3.2.1 Marriage out of community of property, contracted under the standard antenuptial contract, has the effect that the separate estates of each spouse continue to exist after marriage. Debts incurred by a spouse are charges on his or her own estate and assets which he or she acquires or which accrue to him or her fall into his or her separate estate. Each spouse may dispose by will of his or her separate estate. Donations between spouses, are permitted, except in so far as it would contravene the provisions of the Insolvency Act, 24 of 1936.¹¹

3.2.2 On divorce each party takes his or her separate estate, together with any gifts stipulated in the antenuptial contract, provided they are due.¹²

3.2.3 Conclusion

Contributions made by a member to a pension scheme are a charge on his or her own estate in the case of a marriage out of community of property. It follows therefore that the other spouse has no claim to the pension benefits accrued before they are paid out.

3.3 Marriage under the accrual regime

3.3.1 The accrual regime is a matrimonial property regime recommended by the Commission in its report on matrimonial property

11 Sec 22 of the Matrimonial Property Act, 88 of 1984.

12 Hahlo op cit 439.

law.¹³ This recommendation is contained in section 2 of the Matrimonial Property Act, 88 of 1984.

3.3.2 Under the accrual regime there are still two separate estates stante matrimonio. Each spouse may control and dispose of his or her separate estate. At the dissolution of the marriage, whether by death or divorce, the accrual, i.e. the nett increase of each estate during the marriage, is calculated. In terms of section 3(1) of this Act, the accrual is divided as follows:

At the dissolution of a marriage subject to the accrual system, by divorce or by the death of one or both of the spouses, the spouse whose estate shows no accrual or a smaller accrual than the estate of the other spouse, or his estate if he is deceased, acquires a claim against the other spouse or his estate for an amount equal to half of the difference between the accrual of the respective estates of the spouses.

3.3.3 The term accrual is defined as follows:¹⁴

The accrual of the estate of a spouse is the amount by which the net value of his estate at the dissolution of his marriage exceeds the net value of his estate at the commencement of that marriage. (15)

3.3.4 Conclusion

In the light of the foregoing definition it is clear that a husband's pension benefits are taken into account in the determination of the accrual only in so far as they have already been paid out to him. His contributions stante matrimonio are a charge on his separate estate and of course affect the eventual accrual of his estate.

4. FORFEITURE OF BENEFITS

4.1 Section 9 of the Divorce Act, 1979,¹⁶ provides as follows:

13 RP 26/1982 at 79.

14 Sec 4(1)(a) of the Matrimonial Property Act, 88 of 1984.

15 Cf further sections 4(1)(b) and 4(2).

16 Act 70 of 1979.

(1) When a decree of divorce is granted on the ground of the irretrievable break-down of a marriage the court may make an order that the patrimonial benefits of the marriage be forfeited by one party in favour of the other, either wholly or in part, if the court, having regard to the duration of the marriage, the circumstances which gave rise to the break-down thereof and any substantial misconduct on the part of either of the parties, is satisfied that, if the order for forfeiture is not made, the one party will in relation to the other be unduly benefited.

(2) In the case of a decree of divorce granted on the ground of the mental illness or continuous unconsciousness of the defendant, no order for the forfeiture of any patrimonial benefits of the marriage shall be made against the defendant.

4.2 Hahlo and Sinclair¹⁷ describe the scope of the court's powers in terms of the provision quoted as follows:

It will be seen that as regards forfeiture orders, the courts under section 9 (1) possess discretionary powers which they previously did not have. It is within their discretion to decide whether there should be a forfeiture order; whether it should be made in favour of the plaintiff or of the defendant; and whether it should embrace all or part only of the patrimonial benefits which the spouse against whom the order is made has derived from the marriage. But the powers of our courts still fall far short of the wide discretionary powers as to a redistribution of capital and property which the courts of Holland during the seventeenth and eighteenth centuries enjoyed, and which the English courts under the Matrimonial Causes Act 1973 have. While they can make a forfeiture order in respect of all or part of the patrimonial benefits which a spouse has derived from the marriage, they cannot go beyond patrimonial benefits.

4.3 In the strictest sense this means that, in the case of a marriage out of community of property, promises contained in the antenuptial contract are cancelled and that the defendant has to return what he has received and forfeits his claim in respect of unfulfilled promises. In the case of a marriage in community of property the defendant does not lose all claims to the joint estate but only to those things brought in by the other party. The joint estate is therefore divided between the spouses according to what each has brought in, but only if the spouse in whose favour

17 Hahlo and Sinclair Reform of the South African law of divorce Cape Town Juta 1980 at 51.

the forfeiture operates had brought in most.¹⁸ In terms of section 9(1) the courts have a discretion to temper the forfeiture with reference to the duration of the marriage, the circumstances which gave rise to the break-down, and any substantial misconduct on the part of either of the parties.

4.4 Conclusion

The doctrine of forfeiture of benefits, in the case of a marriage in community of property, works on the basis of what each spouse contributed to the marriage. It therefore operates in favour of the spouse who contributed most and to the detriment of the spouse who contributed least. In the case under consideration, the wife will more often be the one who had contributed least, and section 9(1) therefore does not affect her interest in the husband's pension benefits.

If the wife is the pensioner, however, section 9(1) of the Act may protect her contribution in the form of pension against the husband provided that her nett contribution stante matrimonio exceeded her husband's in the case of a marriage in community of property. If they were married out of community of property her pension contribution will be protected per se. Should she take the unlikely step of promising her pension contribution to the husband in an antenuptial contract, section 9(1) affords her the usual protection.

It appears, therefore, that section 9(1) of the Divorce Act, 1979, does not offer the wife much protection.

5. REDIVISION OF ASSETS ON DIVORCE

5.1 Section 7(1) of the Divorce Act provides:

A court granting a decree of divorce may in accordance with a written agreement between the parties make an order with regard to the division of the assets of the parties ...

¹⁸ Joubert "Verbeuring van voordele van huwelik na egskeiding" 1982 De Jure 217, 219.

5.2 If the parties cannot come to an agreement, the court may not as is the case in several overseas countries,¹⁹ order an equitable division of assets,^{19A} and the liquidation process according to the matrimonial property regime stante matrimonio takes place. In this liquidation process the husband's pension benefits are disregarded.

5.3 It is possible that the parties to a divorce action may reach an agreement whereby the husband's pension benefits on retirement in the future may be included. Such an agreement may then be made an order of court. However, it is unusual for the parties to enter into such an agreement. The reasons are, probably, first that the husband cannot, under present law, be forced into such an agreement, secondly, that the value of future pension benefits is difficult to assess, and thirdly, that the atmosphere at the time of a divorce is usually not conducive to such arrangements.

5.4 Conclusion

The possibility of a settlement granting the wife a claim to her former husband's pension benefits in the future would afford the wife only limited protection because it would depend on the husband's goodwill.

6. THE DUTY TO PAY MAINTENANCE

6.1 Section 7(1) of the Divorce Act provides further:

A court granting a decree of divorce may in accordance with a written agreement between the parties make an order with regard to the division of the assets of the parties or the payment of maintenance by the one party to the other.

6.2 If the parties cannot reach agreement as to the payment of maintenance, section 7(2) of the said Act empowers the court to make a maintenance order:

¹⁹ See Chapter 4 above.

^{19A} Cf sections 8(1) and 20(1) of the Matrimonial Property Act, 1984. It remains to be seen whether the courts will consider pension interests here.

In the absence of an order made in terms of subsection (1) with regard to the payment of maintenance by the one party to the other, the court may, having regard to 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, and any other factor which in the opinion of the court should be taken into account, make an order which the court finds just in respect of the payment of maintenance by the one party to the other for any period until the death or remarriage of the party in whose favour the order is given, whichever event may first occur.

6.3 Although in theory the court may, in both these instances, order either lump-sum or periodical payments, in practice only the latter is found.²⁰ Sinclair²¹ says the following with regard to lump-sum payments:

Although it might be contended that an order "in respect of" or "with regard to" maintenance, to use the word employed in section 7(2) does not exclude one for a capital sum, little hope, it is submitted, can be held out for a judicial interpretation of section 7(2) as a provision enabling the court, in making an order it finds "just", to include the transfer of a lump-sum from one spouse to the other.

Although Sinclair expresses doubts on this matter, it may still be regarded as res nova in our law, there being neither authority for nor against such a proposition. It is however suggested that the court that orders the transfer of a lump-sum benefit in accordance with an agreement, may do the same, in the absence of an agreement provided the order relates to maintenance.

6.4 In quantifying the amount of maintenance payable, the court is guided by the factors referred to in section 7(2) of the Divorce Act. Joubert²² suggests the following scheme for the calculation of the amount by the courts:

20 Joubert "Onderhoud na egskeiding" 1980 De Jure 80.

21 Sinclair "Financial provision on divorce - need compensation or entitlement?" 1981 SALJ 469, 477.

22 1980 De Jure 80 et seq.

- (a) Die onderhoudsbehoefte: Die hof bepaal wat die aanspraakmaker se basiese behoeftes is. Ander nie-basiese behoeftes word in ag geneem in die lig van die partye se lewensstandaard. Daarna bepaal die hof in welke mate die aanspraakmaker self in staat is om so 'n behoefte te bevredig. Hierby word sy of haar verdienvermoë beoordeel, asook potensieële inkomste uit ander bronne en potensieële besparings. Privaatskulde van die aanspraakmaker word as 'n reël nie by die berekening van sy of haar behoefte ingesluit nie.
- (b) Die vermoë om onderhoud te betaal: Nadat die behoefte van die aanspraakmaker bepaal is, word vasgestel in watter mate die verpligte party in hierdie behoefte kan voorsien. Hier word sy verdienvermoë asook ander verwagte vermoëns bereken, soos getemper deur uitgawes wat hy geregtig sou wees om terug te hou ter voorsiening van sy eie behoeftes. Onder verwagte vermoëns word verstaan dié inkomste wat die verpligte party kan bekom deur die beter bestuur van sy finansiële sake, bv. deur geld wat rentevry gebêre word teen 'n billike rentekoers te belê. Onder hierdie verwagte vermoëns kan die toekomstige uitkerings uit 'n pensioenskema wel deeglik in aanmerking geneem word.
- (c) Ander faktore: Benewens die bogenoemde faktore kan die volgende faktore wat in artikel 7(2) opgenoem word, nou in aanmerking geneem word:
- (i) die ouderdom van elke party;
 - (ii) die duur van die huwelik;
 - (iii) die lewenspeil van die partye voor egskeiding;
 - (iv) hulle gedrag vir sover dit op die verbrokkeling van die huwelik betrekking het; en
 - (v) enige ander faktor wat na die oordeel van die hof in aanmerking geneem behoort te word.

Joubert²³ also suggests that the other factors be employed to decrease the quantum of maintenance calculated under (a) and (b) supra.

6.5 The courts have however also introduced a procedure not based on the above-mentioned considerations, i e the award of token maintenance. This procedure originated from the fact that section

23 Ibid.

10(1) of the Matrimonial Affairs Act, 1953,²⁴ was interpreted to the effect that maintenance may be awarded to a party only during divorce proceedings and not thereafter. This provision was replaced by section 7(1) of the Divorce Act, 1979, to the same effect. In Nel v Nel²⁵ Smuts J held:

Na my mening kan 'n hof 'n nominale bedrag onderhoud toeken wat tot gevolg sal hê dat 'n eiseres op 'n latere geleentheid aansoek sal kan doen om 'n vermeerderde bedrag onderhoud, indien daar rede is om te glo dat sy in die toekoms waarskynlik onderhoud gaan benodig en dit bewys is dat dit in die omstandighede reg en billik is dat die verweerder dan voorsiening behoort te maak vir onderhoud vir haar, al is die eiseres in staat om haarself te onderhou op die datum waarop ontbinding van die huwelik beveel word.

The granting of token maintenance thus leaves the door open for an increase in the amount of maintenance payable, should the wife's needs increase later.²⁶

6.6 With regard to variation of orders, section 8 of the Divorce Act, 1979, provides as follows:

(1) A maintenance order or an order with regard to the custody or guardianship of, or access to, a child, made in terms of this Act, may at any time be rescinded or varied or, in the case of a maintenance order or an order with regard to access to a child, be suspended by a court if the court finds that there is sufficient reason therefor.

(2) A court other than the court which made an order referred to in subsection (1) may rescind, vary or suspend such order if the parties are domiciled in the area of jurisdiction of such first-mentioned court and the respondent consents to the jurisdiction of that court.

In terms of this provision the court may vary an existing order after divorce. It is suggested that the same factors as in the case of the original maintenance award should apply to the variation. It is therefore clear that in the case of variation of an

24 Act 37 of 1953.

25 1977 2 SA 288 (O), 290 C.

26 Cf generally Schäfer "Token maintenance" 1980 THRHR 57 et seq.

order the wife will never receive more than she needs to satisfy her needs.

6.7 The question that now presents itself, is to what extent the husband's pension benefits are taken into account when the amount of maintenance is fixed:

If the defreezing contingency occurs prior to the divorce, the husband's pension benefits are normally regarded as part of his assets or income out of which he can pay maintenance.

If divorce takes place prior to the defreezing contingency, however, the wife's claim to the husband's pension benefits (under the heading maintenance) is determined by her needs.²⁷ At the initial determination of the maintenance duty, the husband's future income from pension benefits is taken into account on a limited scale: It would be of practical value only if the defreezing contingency were about to take place at the time of divorce. His pension benefits may certainly be taken into account if the divorced wife applies for an increase in maintenance when the defreezing contingency has occurred. A warning must be sounded however that the court would be reluctant to grant an increase in maintenance purely on the grounds of an increase in the husband's income. The wife would be entitled to an increase only if she could satisfy the court that her needs had increased, and then only to the amount of the increase in needs.

The wife's right to maintenance is further protected, as far as the pension benefits of her ex-husband are concerned, by section 7(1)(b) of the General Pensions Act, 1979,²⁸ which provides as follows:²⁹

27 Sinclair op cit 475.

28 Act 29 of 1979.

29 In terms of sec 7(3) "pensioner" means any person to whom any authority or benefit is payable, but does not include a person to whom any annuity benefit is payable as the widow or dependant of any person.

If the Minister or, if authorized thereto by the Minister, the Secretary is satisfied that ... any judgment or order for the payment of money given or made before or after the commencement of this Act by a court of law against a pensioner in any judicial proceedings for the dissolution of the marriage between such pensioner and his spouse, has not been satisfied in full, the Minister or the Secretary ... may ... at his discretion direct that so much of any annuity or benefit payable to such pensioner under any pension law as does not exceed the amount of the contributions of moneys which have not been paid or the amount of the judgment or order which has not been satisfied, shall be paid to such fund or such spouse as the case may be ...

6.8 The next question relates to the duration of the maintenance duty. Assuming that the maintenance duty is based on the court order, Joubert³⁰ states that the maintenance order is usually so worded that maintenance is payable until the death or remarriage of the claimant, whichever occurs first.

In the light of the common law the following may be read in: "or until the claimant dies."³¹ The parties may however include different provisions in the settlement which may lengthen or shorten the maintenance duty.

7. CONCLUSION

Whatever the theoretical concessions to the wife with regard to her ex-husband's pension benefits, they are limited by her maintenance needs: she never gets more than she needs. When (especially) the lump-sum gratuity of a pension scheme becomes available, it usually far exceeds the wife's needs and therefore she will not receive a large share.

Another factor which limits the wife's prospects, is the duration of the maintenance duty: If she remarries before her ex-husband's pension benefits are paid out, she forfeits any claim to these benefits which she had under the maintenance order.

30 1980 De Jure 80, 94.

31 Ibid.

CHAPTER 4

COMPARATIVE SURVEY

1. INTRODUCTION

In recent years matrimonial law and matrimonial property law have enjoyed the attention of law reformers the world over. One of the most pressing questions in this regard is the reallocation of matrimonial property on divorce. The reason for this is to be found in rapid changes in economic conditions, ideas and trends - the term "the new property" is in fact used.¹

A comparative study could therefore be very useful. The discussion that follows is based on a study of the most important Romano-Germanic systems and the Anglo-American legal systems.

2. THE ROMANO-GERMANIC SYSTEMS

2.1 The Netherlands

2.1.1 Introduction

The traditional Dutch attitude is that a pension scheme is built up in order to ensure that a member is financially provided for when he can no longer earn an income, whether as a result of old age or disablement or otherwise. Furthermore the pension provision is mainly built up by the payment of premiums. When a member becomes involved in divorce it is said that equity requires that pension benefits refer to the person from whose funds they were built up.² The Dutch law distinguishes between "pensioenrechten in verband met een werkkring", pension rights created by Statute, and cases which are dealt with under section 153 of the Burgerlijk Wetboek (BWB) in general.

1 Glendon "Modern marriage law and its underlying assumptions: the new marriage and the new property" 1980 Family Law Quarterly 441.

2 Van Mourik and Jongsma Het Nederlands Vermogensrecht bij Echtscheiding Zwolle Tjeenk Willink 1978 at 355 et seq.

2.1.2 "Pensioenrechten in verband met een werkkring"

On 27 November 1981 the Hoge Raad ruled that "pensioenrechten als de onderhavige in het algemeen voor het gedeelte dat op het tijdstip van de ontbinding van de gemeenschap door echtscheiding of scheiding van tafel en bed was opgebouwd bij de verdeling van de gemeenschap door middel van verrekening in aanmerking moeten worden genomen."³

This principle laid down by the Hoge Raad, created serious problems with regard to the calculation of the parties' interests. Arts and Clausning state the problem thus:⁴

Om een scheidende echtgenoot een goed overwogen advies inzake de pensioenverrekening te geven zal men enig inzicht in de pensioenmaterie moeten hebben. Dat zal bij de meesten ontbreken. In veel gevallen zal het verstandig zijn om te rade te gaan bij een actuaris en/of fiscalist.

No universal solution suggests itself. Middelbos⁵ is of the opinion that each case has to be judged on its own merits. This learned writer suggests that the calculation of the pension interest should be done in the first place by the body administering the pension. To make doubly sure that the calculation is correct, he suggests that "een onafhankelijke derde noemens berekeningen ... maken of hem te vragen een oordeel te geven over de gehanteerde verekeningssystematijk."⁶

2.1.3 Cases regulated specifically by legislation

At the time of divorce the wife's prospects with regard to pension benefits are regulated by her pension entitlement. When this entitlement is based on a specific Act, the provisions of that Act

3 1982 NJ 503; Arts & Clausning "Pensioenopbouw en pensioenverrekening" 1983 Advokatenblad 337.

4 Ibid.

5 "Pensioenverrekening bij echtscheiding" 1983 Advokatenblad 343.

6 At 347.

are decisive, and specific provision is usually made for the divorced wife. The following are some examples of such arrangements:

(a) The "Algemene Ouderdomswet" (AOW)

Everyone who has been insured under this Act, and who reaches the age of 65, is entitled to an old-age pension. Except in certain exceptional cases, a married woman has no right to such pension.⁷ If she is not married, i e also when she is divorced, she has a right to share in this fund, although the rates are lower for single persons than for married persons.⁸

(b) The "Algemene Weduwe- en Wezenwet" (AWW)

The object of this Act is to assist the widow and orphans of a member. Of interest is section 4(a) AWW which reads as follows:

Voor de toepassing van deze wet en van de tot haar uitvoering genomen besluiten wordt na het overlijden van een man mede als zijn weduwe aangemerkt de vrouw, met wie hij gehuwd is geweest, indien het huwelijk vóór zijn overlijden was ontbonden of nietig verklaard, mits de vrouw:

- (a) na de ontbinding of nietigverklaring van het huwelijk niet is hertrouwd en
- (b) overeenkomstig de bepalingen van deze wet recht op weduwepensioen zou hebben gehad, indien de man op de dag van die ontbinding of nietigverklaring van het huwelijk zou zijn overleden.

(c) The "Algemene Burgerlijk Pensioenwet" (ABP)

This Act regulates the pension rights of civil servants. In terms of section G4 ABP "bijzonder weduwenpensioen" is granted to the woman to whom the deceased, former or pensioned civil servant was married provided that:

7 Van Mourik and Jongsma op cit 374.

8 Ibid.

- (a) de vrouw recht op weduwenpensioen zou hebben gehad indien de man op de dag van het vonnis waarbij de echtscheiding is uitgesproken, zou zijn overleden
- (b) de onder (a) bedoelde dag ligt op of na het tijdstip van inwerkingtreding van de Wet herziening echtscheidingsrecht en de echtscheiding of de ontbinding van het huwelijk niet is uitgesproken met toepassing van het voor genoemde tijdstip geldende recht en
- (c) de vrouw niet als gevolg van hertrouwen met haar vroegere echtgenoot ter zake van dat overlijden recht op weduwenpensioen verkrijgt.

The amount of the "bijzonder weduwenpensioen" is the same as the usual "weduwenpensioen", but subject to the proviso that only the years of service during which the man had been married to her are taken into account.⁹

(d) The "Pensioen en Spaarfondsenwet" (PSW)

Industrial and business pension funds fall under this Act. The former is "een in een bedrijfstak werkend fonds, waarin hetzij alleen ten bate van personen, die als werknemer, hetzij mede ten bate van personen, die in andere hoedanigheden in de bedrijfstak werkzaam zijn, gelden worden bijeengebracht."¹⁰ By ondernemingspensioenfonds is meant "een aan een onderneming verbonden fonds, waarin ten bate van personen die aan die onderneming verbonden zijn, gelden worden bijeengebracht."¹¹

On divorce, the wife's position is regulated as follows:

- (i) The woman whose marriage to a member is dissolved acquires the premium-free right to a widow's pension which the man had acquired on her behalf at the time of dissolution of the marriage other than by death or on the attainment of retirement age.

9 Op cit 379.

10 Op cit 381 n 63.

11 Op cit 381 n 64.

- (ii) The woman whose marriage to a former member is dissolved acquires the premium-free right to a widow's pension that the former member had acquired on her behalf at the end of his membership.¹²

What the member or former member would have acquired on behalf of his wife depends on the provisions of the pension scheme concerned.

(e) Professional pension funds

Persons in a certain profession usually belong to a professional society. The Minister of Social Affairs may order compulsory participation of a professional group in a pension scheme. That professional group then falls under the "wet van 1 September 1972". Certain professional pension funds are however regulated by separate legislation, e.g. the schemes for pharmacists, notaries, etc.

The relevant legislation lays down certain stipulations regarding the rules of the fund, but makes no provision for the wife on divorce. Some individual funds do, however, regulate this matter voluntarily in their rules.¹³

2.1.4 Cases not specifically regulated by legislation

All the cases to which the above-mentioned laws do not apply fall under section 153 BWB:¹⁴

1. Indien als gevolg van de gevorderde echtscheiding een bestaand vooruitzicht op uitkeringen aan de andere echtgenoot na vooroverlijden van de echtgenoot die de vordering heeft ingesteld zou teloorgaan of in ernstige mate zou verminderen, en de andere echtgenoot deswege tegen die vordering verweer voert, kan deze niet worden toegewezen voordat daaromtrent een voorziening is getroffen die, gelet op de

12 Op cit 383.

13 Op cit 385-6.

14 Bakels Burgerlijk Wetboek (7th Reprint) Deventer Kluwer 1971 at 50.

omstandigheden van het geval, ten opzichte van beide echtgenoten billijk is te achten. De rechter kan daartoe een termijn stellen.

2. Het eerste lid is niet van toepassing: Indien redelijkerwijs te verwachten is dat de andere echtgenoot zelf voor dat geval voldoende voorzieningen kan treffen; Indien de duurzame ontwrichting van het huwelijk in overwegende mate te wijten is aan de andere echtgenoot.

Whether there is sufficient reason to refuse the application for divorce and to insist on the making of such provision is left to the judgment of the judge. It is also left to the judge to decide whether the arrangement made is just or not.

As to the former, Van Mourik¹⁵ contents that a judge would not easily decide that a serious decrease in pension prospects would result from divorce, and would therefore exercise this discretion on a very limited scale. As to the latter, Van Mourik¹⁶ suggests that each case has to be judged on its own merits and that no accurate inferences can be made from court judgments.

2.1.5 Conclusion

- (a) The law of the Netherlands recognises the wife's right on divorce to share in her husband's pension benefits.
- (b) The BWB does not lay down any hard and fast rule whereby the wife's pension interest is quantified. The Code only provides a way out in section 153 for cases not otherwise provided for, the matter then being resolved by agreement between the parties.
- (c) As a result of the decision of the Hoge Raad on 27 November 1981 a debate is currently being conducted on the quantification of the wife's interest. The general idea is that the quantification will depend in each case on the facts and should be done by an actuary or similarly qualified person.

15 Op cit 368.

16 Op cit 369.

- (d) Wherever the wife acquires a right to a share in the husband's pension benefits, it never exceeds the amount which was built up on her behalf stante matrimonio.

2.2 West Germany

2.2.1 Introduction

On 1 July 1977 section 1587 of the Bürgerliches Gesetzbuch (BGB) came into operation, providing for an equalisation of pension expectations on divorce (Versorgungsausgleich). The provisions contained in section 1587 are supplementary to the equalisation of accrual under the Zugewinnngemeinschaft and provide for the party who has the smaller expectation of pension benefits on divorce.

2.2.2 Section 1587 BGB (Grundsatz)

This introductory section provides:¹⁷

- (1) Zwischen den geschiedenen Ehegatten findet ein Versorgungsausgleich statt, soweit für sie oder einen von ihnen in der Ehezeit Anwartschaften oder Aussichten auf eine Versorgung wegen Alters oder Berufs - oder Erwerbsunfähigkeit der in S 1587 a Abs. 2 genannten Art. begründet oder aufrechterhalten worden sind. Ausser Betracht bleiben Anwartschaften oder Aussichten, die weder mit Hilfe des Vermögens noch durch Arbeit der Ehegatten begründet oder aufrechterhalten worden sind.
- (2) ...
- (3) Für Anwartschaften oder Aussichten, über die der Versorgungsausgleich statt findet, gelten ausschliesslich die nachstehenden Vorschriften; die güterrechtlichen Vorschriften finden keine Anwendung.

Subsection (3) of the Grundsatz contains the interesting provision that the matrimonial property law is expressly excluded, and that only the further provisions of section 1587 BGB apply to the equalisation of pension benefits. In this way the legislative

17 Palandt Bürgerliches Gesetzbuch (41. Neubearbeiter Auflage) München CH Beck 1982 at 1442.

overcomes the problem of possible confusion or conflict between the Versorgungsausgleich and the Zugewinnngemeinschaft.

2.2.3 The methods of equalisation of pension benefits

The German legislature realised that no two divorce cases are identical, and that it is therefore not desirable to lay down a hard and fast rule. Therefore section 1587 contains a variety of different rules attempting to cover every case that might arise and to solve each equitably. Three methods in particular are employed for this purpose:

(a) Transfer of pension rights from one spouse to the other

Section 1587(n)(i) BGB provides:¹⁸

Übertragung und Begründung von Rentenanwartschaften durch das Familiengericht. Hat ein Ehegatte in der Ehezeit Rentenanwartschaften in einer gesetzlichen Rentenversicherung im Sinne des S 1587a Abs. 2 Nr. 2 erworben und übersteigen diese die Anwartschaften im Sinne des S 1587a Abs. 2 Nr. 1. 2, die der andere Ehegatte in der Ehezeit erworben hat, so überträgt das Familiengericht auf diesen Rentenanwartschaften in Höhs der Hälfte des Wertunterschiedes. Das Nähere bestimmt sich nach den Vorschriften über die gesetzlichen Rentenversicherungen.

(b) Provision by the obliged spouse of sufficient pension benefits for the spouse entitled

Section 1587(b)(i) provides:¹⁹

"Soweit der Ausgleich nicht nach Absatz 1 oder 2 vorzunehmen ist, hat der ausgleichspflichtige Ehegatte für den Berechtigten als Beiträge zur Begründung von Anwartschaften auf eine bestimmte Rente in einer gesetzlichen Rentenversicherung den Betrag zu zahlen, der erforderlich ist, um den Wertunterschied auszugleichen; dies gilt nur, solange der Berechtigte die Voraussetzungen für ein Altersruhegeld aus einer gesetzlichen Rentenversicherung noch

18 Op cit 1468. Subsect (b)(ii) contains a similar provision.
19 Ibid.

nicht erfüllt. Das Nähere bestimmt sich nach den Vorschriften über die gesetzlichen Rentenversicherungen. Nach Absatz 1 zu übertragende oder nach Absatz 2 zu begründende Rentenanwartschaften sind in den Ausgleich einzubeziehen; im Wege der Verrechnung ist nur ein einmaliger Ausgleich vorzunehmen.

(c) Claim of the spouse entitled to the eventual payment of pension benefits

Section 1587(g)(i) BGB provides:²⁰

Anspruch auf Rentenzahlung. Der Ehegatte, dessen auszugleichende Versorgung die des anderen übersteigt, hat dem anderen Ehegatten als Ausgleich eine Geldrente (Ausgleichsrente) in Höhe der Hälfte des jeweils übersteigenden Betrags zu entrichten.-Die Rente kann erst dann verlangt werden, wenn beide Ehegatten eine Versorgung erlangt haben oder wenn der ausgleichspflichtige Ehegatte eine Versorgung erlangt hat und der andere Ehegatte wegen Krankheit oder anderer Gebrechen oder Schwäche seiner körperlichen oder geistigen Kräfte auf nicht abschbare Zeit eine ihm nach Ausbildung und Fahigkerren zumutbare Erwerbstätigkeit nicht ausüben kann oder das fünfundsechzigste Lebensjahr vollendet hat.

2.2.4 Conclusion

(a) Gray²¹ explains the principle underlying the above-mentioned arrangements as follows:

The efforts of husband and wife are equally important contributions to the maintenance of the family, irrespective of whether they comprise the performance of a salaried job or the management of the household, with the result that the property acquired by one of the spouses during the marriage is justifiably regarded as the product of a living partnership effort by both spouses, and that both should be entitled to an equal share in it on the dissolution of the partnership. Pension rights, as the economic basis of the closing years of life, are no less the product of that equal partnership effort by both spouses. It is therefore a dictate

20 Op cit 1481.

21 Reallocation of property on divorce Oxford Professional Books Ltd 1977 at 160.

of justice that such rights too should be shared equally between the spouses in the event of divorce.

- (b) The BGB does not lay down any hard and fast rule, but lays down a series of rules, which have to be applied in succession with a view to achieving maximum equality of the pension expectations of the spouses.
- (c) The BGB also adheres to the principle that only those pension interests accumulated during the "Ehezeit" are eligible for equalisation.

2.3 Switzerland

2.3.1 The Swiss Zivilgesetzbuch (ZGB) makes no provision for the question under discussion. Tuor and Schnyder²² explain the general position as follows:

Mit der Scheidung enden auch der güterrechtlichen Verhältnisse der Ehegatten. Bestand ein Eheverträge, so fällt er dahin. Erbsprüche bestehen unter Geschiedenen nicht, weder gesetzliche noch solche aus Verfügungen von Todes wegen, die ein Gescheidener vor der Scheidung zugunsten des andern errichtet hatte. Gleiches gilt grundsätzlich von der versicherungsrechtlichen Begünstigung.

It is evident that the wife's expectations stante matrimonio of sharing in her husband's future pension benefits also cease to exist on divorce.

2.3.2 To regulate the legal position pertaining to property on divorce, the parties may enter into an agreement. In the absence of such an agreement the court makes an order. This order is however only aimed at the administration of the estate and can go no further than maintenance. The court may order payment of a lump-sum or periodical payments. Periodical payments cease at the remarriage of the party entitled.²³

22 Das Schweizerische Zivilgesetzbuch (9. Auflage) Zürich Schul-
tess Polygraphischer Verlag 1975 at 156.

23 Op cit 159.

2.3.3 Reform of the matrimonial property law is currently in progress. In 1976 the "Expertenkommission für die Revision des Familienrechts, Gesetzentwurf für eine Änderung des Zivilgesetzbuches, Wirkungen der Ehe im Allemeinen und Ehegüterrecht, Begleichbericht" started formulating proposals. It is not known what the outcome of this exercise was. Presumably the question under consideration will also be answered by the Expertenkommission.

2.3.4 Conclusion

The Swiss law shows many similarities to the South African law on this subject. It is expected that law reform in Switzerland will follow the modern trend and will provide for the wife in some way.

2.4 Austria

2.4.1 The Austrian Allgemeines Bürgerliches Gesetzbuch (ABGB) makes no specific provision for the case in question. On divorce a simple division of "eheliche Gebrauchsvermögen" (matrimonial property) and "eheliche Ersparnissen" (matrimonial savings) takes place. Section 81 ABGB provides the following:²⁴

1. Wird die Ehe geschieden, aufgehoben oder für nichtig erklärt, so sind das eheliche Gebrauchsvermögen und die ehelichen Ersparnisse unter die Ehegatten aufzuteilen. Bei der Aufteilung sind die Schulden, die mit dem ehelichen Gebrauchsvermögen und den ehelichen Ersparnissen in einem inneren Zusammenhang stehen, in Anschlag zu bringen.
2. Eheliches Gebrauchsvermögen sind die beweglichen oder unbeweglichen körperlichen Sachen, die während aufrechter ehelicher Lebensgemeinschaft dem Gebrauch beider Ehegatten gedient haben; hierzu gehören auch der Hausrat und die Ehwohnung.
3. Eheliche Ersparnisse sind Wertanlagen, gleich welcher Art, die die Ehegatten während aufrechter ehelicher Lebensgemeinschaft angesammelt haben und die ihrer Art nach üblicherweise für eine Verwertung bestimmt sind.

24 Schwind Kommentar zum österreichischen Eherecht (2. Auflage) Wien Manzsche Verlags- und Universitätsbuchhandlung 1980 at 305.

2.4.2 The question that now has to be answered is whether the pension benefits accumulated by the husband during the marriage fall within the definition of "eheliche Ersparnisse". Schwind²⁵ is of the opinion that "Versicherungssparens" fall within the definition, but does not mention pension benefits. It is unlikely however that pension benefits will ever be included under this definition in the light of the opinion that a true value can in fact be attached to the investment on divorce. Schwind²⁶ mentions the following investments among others that are "üblicherweise zur Verwertung bestimmt": income realised from the sale of land, income from the letting of property, etc.

2.4.3 Conclusion

In the light of the above-mentioned arguments, it would seem that the Austrian law does not recognise any claim of a wife to the pension benefits of her former husband.

3. THE ANGLO-AMERICAN SYSTEMS

3.1 England

3.1.1 It may be stated at the outset that the English courts are vested with a discretion to order an equitable reallocation of economic benefits on divorce. Gray sees the matter as follows:²⁷

The court is ... directed to carry out a discretionary readjustment of the spouses' economic relations on divorce in the light of their future circumstances and needs. The court is vested with extremely wide and flexible powers of financial provision and property adjustment. These powers are to be so exercised as to put the parties, so far as it is practicable and having regard to their con-

25 Op cit 310.

26 Op cit 309.

27 Op cit 114. The Matrimonial Causes Act, 1973, also provides that so-called "grave financial hardship" may be raised as a defence against a divorce action on the grounds of absence of five years. This matter is however not discussed here.

duct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other.

3.1.2 Section 25(1) of the Matrimonial Causes Act, 1973, lists the factors the court must consider when deciding upon an equitable division of property. Of importance to the question under discussion is section 25(1)(g), whereby the court is directed to apply its mind to "the value to either of the parties to the marriage of any benefit (for example a pension) which, by reason of the dissolution ... of the marriage, that party will lose the chance of acquiring."²⁸

3.1.3 The question is how far this provision improves the wife's position on divorce as regards her husband's pension benefits. The Occupational Pensions Board stated in 1976 that a wife "does not have a right to receive any part of her husband's personal pension during his lifetime and, therefore, there is no right to be lost on divorce."²⁹ Gray³⁰ submits however that the term "acquiring" used by the legislature in framing section 25(1)(g) of the said Act can signify either "de jure entitlement" or "de facto enjoyment". He then refers to Trippas v Trippas³¹ where Lord Denning left the door open to bring the husband's pension expectations within the ambit of section 25(1)(g) as part of the wife's "divorce package". Gray³² then concludes that "(t)here seems therefore to be some support for the inclusion of rights to a retirement pension within the assets which English courts can reallocate on divorce."

3.1.4 That this view prevailed eventually is evident from the following statement by Harper:³³

28 Op cit 157. My underlining.

29 Ibid.

30 Ibid.

31 1973 Fam 134 at 141.

32 Op cit 158.

33 Divorce and your money (2nd Edition) London Unwin 1981 at 151.

Finally, remember: That if the wife was to have received a pension on the husband's death, there will need to be compensation of some kind.

3.1.5 As to social pensions in terms of the Social Security Act, 1975, Cretney³⁴ observes the following with regard to the wife's position:

- (i) If she is over 60 when divorced, she is entitled to the same rate of retirement pension that she would have had if her husband had died at the time of divorce, i.e. the single person's pension...
- (ii) Otherwise she is entitled to a retirement pension based on the husband's contributions during the marriage...

3.1.6 Finally it must be pointed out that the position in England with regard to pension law in general differs somewhat from that in South Africa in that the principle of preservation of benefits on a change of employer is built into English pension law.³⁵

3.1.7 Conclusion

- (a) English law accepts the principle that the wife loses her claim to the husband's pension benefits on divorce, but accepts also that she must be compensated in some way for this loss;
- (b) What form the compensation is to take is in the discretion of the court adjudicating upon the divorce action.

3.2 The United States of America

3.2.1 Rules in the United States with regard to the reorganisation of property on divorce have in recent years been undergoing a development phase.³⁶ The "National Conference of Commissioners

34 Principles of family law (3rd Edition) London Sweet & Maxwell 1979 at 397.

35 Gray op cit 158; Cf also Cretney op cit 391 et seq for a discussion of the English pension system.

36 Freed "Equitable distribution in the common law states: a bird's eye view" in Ream (Ed) Economics of divorce American Bar Association 1978 at 21 et seq.

on Uniform State Laws" is currently engaged in a comprehensive investigation of the matrimonial property law, inter alia with reference to the question whether a divorced woman should share in the pension benefits of her former husband.

3.2.2 There is at present a kaleidoscopic variety of arrangements in the different states of the USA with regard to the reorganisation of property on divorce, and these will not be discussed. Suffice it to say that in 34 of the so-called "Common Law States" it is accepted principle that the courts have the power to order an equitable division distribution of assets on divorce.

Although this basic premise is accepted in all these states, there are fundamental differences among them on how this division is to be done. The most important point of difference is, however, the question of which assets should be placed in the pool for distribution. In some states, pension expectations are in this pool, in others not. Thus Freed³⁷ states:

The present or potential right to pension and retirement benefits may be the only asset of value in a marriage. Spousal rights to a share in such benefits upon marital dissolution have received growing attention in community property states and in some common law property states as well. The merits of such spousal rights are fairly clear in the community property states. In addition, it is probable that many common law property law states providing for equitable distribution will regard retirement and pension benefits as "marital property." Spousal rights to share in the benefits may, however, be contingent on whether the pension rights have "vested" at the time of the divorce.

3.2.3 The majority of authors³⁸ take California as an example. The initial assumption is³⁹ that "the pension payment serves as a remuneration for services rendered by the employed; if those services were discharged during the marriage, that remuneration must

37 Op cit 25.

38 Fain "The effect of property distribution on alimony awards in a common law property jurisdiction (California)" in Economics of divorce supra at 35 et seq.

39 Gray op cit 160.

compose a community asset".

Initially the courts held that "non-vested pension rights" were not "property" but "mere expectations".⁴⁰ This decision was however overruled by the Californian Court in In re Marriage of Brown⁴¹, in which case it was decided that all pension rights are distributable on divorce as "property".

3.2.4 The next question is how to go about quantifying the wife's interest. Gray⁴² states the position as follows:

It is, however, an integral feature of the principle of matrimonial partnership that the spouses should share only those retirement benefits which are attributable to employment during the course of the marriage.

The courts, however, are not unanimous in this regard. In In re Marriage of Freiberg⁴³ the Californian Court took the full number of years of the husband's service (including those after divorce) into account, while the Texas Court in In re Marriage of Rister⁴⁴ took the view that only the years of service during the marriage should be taken into account. Gray⁴⁵ reconciles these two attitudes as follows:

The conflict existing between the Rister and Freiberg formulae is probably best resolved by holding the former to be appropriate to the calculation of shared rights where a final capital sum determination is required at the point of divorce, and the latter to be appropriate where a pension is to be apportioned later in instalments.

3.2.5 Next it must be determined how effect should be given to these principles in practice. Gray⁴⁶ suggests the following:

40 French v French (1941) 112 P. 2d 235; Gray op cit 165.

41 (1976) Cal Rptr 633; Gray op cit 166.

42 Op cit 165.

43 (1976) Cal Rptr 792, 797; Gray op cit 166.

44 (1974) 512. SW 2d 74; Gray op cit 166.

45 Op cit 167.

46 Ibid.

Another major problem which arises in relation to the distribution of pension benefits between husband and wife concerns the manner in which apportionment can best be given effect. Where a retirement benefit has matured, the preferable mode of division is an allocation of the entire benefit to the nominal pension-holder balanced by the award to the other spouse of a corresponding value in the other partnership assets. Where the benefit has not yet matured, its present value can be actuarially assessed with reference to the possibility that death or termination of employment may destroy the entitlement before it matures. Thus determined, the value of the benefit at the time of divorce may be included in the division of assets. Where the attribution of a capital value is impossible as the basis of distribution, either because the uncertainties effecting vesting or maturation are excessively great or for some other reason, the court "can instead award each spouse an appropriate portion of each pension payment as it is paid ... This method of dividing the community interest in the pension renders it unnecessary for the court to compute the present value of the pension rights, and divides equally the risk that the pension will fail to vest. It is no valid objection to the latter mode of apportionment that the court will be required to supervise the payments of pension benefits. As the Californian Supreme Court ruled in Brown, 308 "the claim of mere administrative burden surely cannot serve as support for an inequitable substantive rule which distinguishes between vested and non-vested rights".

3.2.6 Fain⁴⁷ describes how specific cases are dealt with in practice:

The California appellate decisions... emphasize that courts will continue to consider all the spouses' resources in dividing the marital property and determining the amount and duration of support to award. Aside from the family residence, most couples do not have large community estates. Benefits arising from their employment are one of the most significant resources that either husband or wife have. The discussion below describes some of these benefits and suggests whether or not they should be included in the community estate. This type of property has become increasingly important in planning the future security of dependent spouses and children for the vast majority of divorcing couples.

1. Employee profit sharing and/or pension plans provided by business employers. The employment profit and pension plans are defined by ERISA (Employment Retirement Insurance

47 Op cit 58 et seq. The full text is reproduced here for the sake of accuracy.

Security Act of 1974) and include the so-called "Keogh Plans." For the employee, these plans may be non-vested, vested in part, or vested in their entirety. Generally, the employer alone funds such plans; the employee makes no contribution. The recent California Supreme Court case of In re Marriage of Brown, 15 Val. 3d 838, 126 Cal. Rptr. 633 (1976), reversed a line of cases that held that non-vested pension rights are not property but a mere expectancy, and thus not a community asset subject to division upon dissolution of the marriage. The Supreme Court now makes it clear that whenever employee benefits exist in favour of a spouse, even when not yet vested, such benefits must be considered in the division of community property. In other words, employee benefits, whether vested or not, are property that must be divided upon dissolution of the marriage.

2. Military Retirement Pay. Typically, entitlement to military retirement pay requires a certain number of years of military service; upon completion of the requisite years, whether the person is actually retired or not, he is eligible. Military retirement pay is generally considered a community asset, subject to an apportionment based on the period of time the military retiree has been married to the current spouse.

3. Civil Service or Government Retirement Pay or Pension. Generally speaking, the employee contributes a percentage of his salary to these retirement plans. His pension payments then consist of his contributions and the employer's contributions. Eligibility for a pension requires a substantial number of years of service to the employer. See In re Marriage of Ward 50 Cal. App. 3d 150, 123 Cal. Rptr. 234 (1975); In re Marriage of Mercier, 48 Cal.App.3d 775, 121 Cal.Rptr. 886 (1975).

4. Executive Deferred Compensation Plan. A deferred compensation plan is not a true pension or retirement plan. It is a contractual arrangement between an executive and his corporate employer whereby part of the executive's earned salary is paid after his retirement. Its purpose, of course, is to reduce the executive's income tax.

5. Military Disability Pay. California law holds that disability retirement pay for service is not community property, at least if no longevity requirement rights have vested. See In re Marriage of Jones, 13 Cal.3d 457, 119 Cal.Rptr. 108 (1975); In re Marriage of Loehr, 13 Cal.3d 465, 119 Cal.Rptr. 113 (1975). Such disability payments received during marriage are community property, but those received after dissolution are a spouse's separate property. Disability pay is not a form of deferred compensation for past services, but payment to compensate the veteran for disability.

6. Workers' Compensation Disability Award. In re Marriage of Robinson, 56 Cal.App. 3d 682, 126 Cal.Rptr. 779 (1976), held that disability payments to a totally disabled spouse becomes the separate property of such spouse after dissolution of the marriage.

3.2.7 Conclusion

- (a) Unlike the English law, American jurists are of the opinion that the wife has a right on divorce to the pension benefits of her husband, and that this right has to be divided on divorce.
- (b) The wife's right on divorce is actuarially quantified and she receives her financial share which is determined by the court. If that is impossible, she receives her share of the benefit when it is eventually paid out.
- (c) Although the courts are not unanimous in this regard, the balance of opinion seems to support the principle that only the period of service stante matrimonio should be taken into account in quantifying the benefits.

3.3 New Zealand

3.3.1 The New Zealand matrimonial property law is governed by the Matrimonial Property Act, 1976. This Act maintains the principle that the matrimonial property regime out of community of property operates ex lege, but provides for the accrual regime in the event of termination of the marriage, on the ground of the principle of "equal contribution of husband and wife to the marriage partnership."⁴⁸

3.3.2 Section 8(i) of the Matrimonial Property Act, 1976, provides:⁴⁹

Matrimonial property shall consist of -
Any pension benefit, or right to which either the husband or the wife is entitled or may become entitled under any superannuation scheme if the entitlement is derived, wholly

48 Fischer The Matrimonial Property Act 1976 Wellington Butterworths 1977 at 1.

49 Op cit 155.

or in part, from contributions made to the scheme after the marriage or from employment or office held since the marriage...

It is interesting to note that section 8(g) of the Act also includes insurance policies in the definition of "matrimonial property":⁵⁰

Any policy of assurance taken out by one spouse on his or her own life or the life of the other spouse, whether for his or her benefit or the benefit of the other spouse (not being a policy that was fully paid up at the time of the marriage and not being a policy to the proceeds of which a third person is beneficially entitled), whether the proceeds are payable on the death of the assured or on the occurrence of a specified event or otherwise.

3.3.3 On divorce an equal division of "matrimonial property" takes place.⁵¹ Because a simple halving is not always possible, section 25(1) contains the following provision:

On an application ... the Court may ... make:

- (a) Such order as it considers just determining the respective shares of each spouse in the matrimonial property or any part thereof, or dividing the matrimonial property or any part thereof between the husband and the wife.
- (b) Any other order that it is empowered to make by any provision of this Act.

The court, therefore, receives a virtually unfettered discretion to order a rearrangement of property on divorce. Fischer⁵² says the following about the way in which section 25(1) is applied in practice:

In most cases it will prove more convenient to leave the rights and obligations associated with hire purchase, insurance and superannuation undisturbed, making compensating adjustments in the distribution of the other matrimonial property. Where, for example, the husband has accumulated valuable superannuation rights, it will generally be sim-

50 Ibid.

51 Sec 15(1) of the relevant Act.

52 Op cit 127.

plest to give the wife other matrimonial property to an equivalent value (section 33(3)(c)) or require payment of an appropriate sum by the husband (section 33(3)(i)) or require the husband to purchase an insurance policy of equivalent value.

3.3.4 In addition to these powers, the court may make an agreement between the parties on a redivision of pension rights an order of court, and the manager of the pension instrument is then obliged to administer the scheme in accordance with the court order.⁵³

3.3.5 Conclusion

- (a) New Zealand law regards pension expectations as a form of "matrimonial property" which can be divided equitably on divorce.
- (b) Because such pension expectations are difficult to divide in practice, in case where the parties cannot reach an agreement, the spouse who is detrimentally affected is compensated financially for the loss of his or her pension benefits.

3.4 Australia

3.4.1 Baily⁵⁴ explains the underlying principle of financial justments on divorce in Australia as follows:

The Australian model is typical of the traditional Anglo-Saxon approach of leaving the property rights of married couples virtually unaffected by the ceremony and status of marriage. While a marriage is continuing, the "ordinary" rules of the law of property and equitable principles of trust apply as do between "strangers". Once, however, the marriage breaks down and divorce proceedings are instituted, the court is given extensive powers under section 79 of the Family Law Act to distribute and allocate assets and the distribution made will by no means be determined by the

53 Sec 31(1) of the relevant Act.

54 "Principles of property distribution on divorce: compensation, need or community?" 1980 Australian Law Journal 190.

parties' pre-existing property rights when they came into court. Thus the Australian system is basically one of separation of property during marriage with extensive legislative power for adjustment of assets on divorce.

3.4.2 Section 79 of the Family Law Act, 1976, provides that the court may order an equitable distribution of assets on divorce.⁵⁵ In Finnis v Finnis⁵⁶ the court was specifically called upon to decide whether pension benefits were part of matrimonial assets. The court was not prepared to regard pension benefits as assets subject to division before these benefits are paid out, and therefore postponed the matter sine die in order to make the appropriate order when the benefits were paid out. It is important to note that the court did not make a compensatory order in this case.

3.4.3 Section 75 of the Act provides that, when the court has to decide the question of maintenance, the court should take into account, when determining the quantum of maintenance, the "eligibility of either party for a pension, allowance or benefit under any law of the Commonwealth or of a State or Territory or under any superannuation fund or scheme, or the rate of any such pension, allowance or benefit being paid to either party."⁵⁷

3.4.4 Conclusion

- (a) Australian Law does not regard the expectation of pension benefits as a right subject to division on divorce.
- (b) The court does however recognise the wife's interest in such pension benefits, but prefers to quantify her share when the benefit is eventually paid out.
- (c) The expectation of pension benefits is taken into account in the calculation of the amount of maintenance payable to the party entitled to maintenance.

55 Rose (Ed) Nygh and Turner's family law service Sydney Butterworths 1976 at 2185.

56 (1978) Fam LN No 15; Rose op cit 2190.

57 Rose op cit 2159.

3.5 Canada

3.5.1 The Canadian matrimonial property law did not provide for a divorced woman to share in the pension benefits of her former husband. In 1977 the Canada Pension Plan was amended and certain procedures were introduced whereby a part of the husband's pension benefits may be transferred to the wife under administrative law.

3.5.2 Section 53.2(1) of the amended Canada Pension Plan reads as follows:⁵⁸

An application in writing to the Minister may be made by or on behalf of either former spouse to a marriage or his estate or such person as may be prescribed by regulation within 36 months of the date of a decree absolute of divorce or of a judgment of nullity of the marriage, granted or rendered on or after January 1, 1978, for a division of the unadjusted pensionable earnings of the former spouses.

3.5.3 Section 53.2(4) provides as follows with regard to the effect of such application:

On approval by the Minister of an application referred to in subsection (1), the unadjusted pensionable earnings for each former spouse for the period of cohabitation attributable to contributions made under this Act, determined in the same manner as the total pensionable earnings attributable to contributions made under this Act are determined in section 81, shall be added and then divided equally and the unadjusted pensionable earnings so divided shall be attributed to each former spouse.

3.5.4 It is of interest to note that the above-mentioned Amendment Act also provides that the parties must have cohabited for at least 36 consecutive months before an application may be made for the division of the "unadjusted pensionable earnings."⁵⁹

58 Statutes of Canada 1976-7 Ch 36. Date of commencement 1 January 1978.

59 Sec 53.2(2)(a) of the Amendment Act (1977).

3.5.5 Conclusion

- (a) Canadian Law does provide for a divorced woman to share in the pension benefits of her former husband.
- (b) The solution falls under administrative law and not matrimonial property law.

4. THE HYBRID SYSTEM OF SCOTLAND

4.1 Before 1964 the principle that the guilty spouse is not entitled to any financial benefit on divorce was adhered to in Scotland. The guilty spouse was deemed to have died on divorce. The innocent wife (the husband was not treated in the same way) had the jus relictæ, which entitled her to a third of the husband's movable property (if he had children) or half (if he had no children). The only exception was when the divorce was granted on the grounds of incurable insanity.⁶⁰

4.2 In the early fifties, the Macintosh Committee and the Morton Commission recommended certain amendments to the existing law. These recommendations were implemented by the Succession (Scotland) Act, 1964, which abolished the jus relictæ and gave the court the discretion to order payment of a lump-sum or periodical payments on divorce. The purpose of this provision was to provide for the payment of maintenance. The 1964 Act however made no provision for the principle of financial reallocation.⁶¹ The effect of the 1964 Act was therefore essentially the same as is the case in South Africa today.

4.3 This matter has been investigated by the Scottish Law Commission since 1976. In a published working paper the Commission maintained that the court should be empowered to order an equit-

60 Scottish Law Commission Family law report on aliment and financial provision Edinburgh Her Majesty's Stationery Office 1981 at 68.

61 Op cit 69.

able redistribution.⁶² However this initial recommendation was eventually not accepted by the Commission. Instead of an unfettered discretion, the following principle was accepted:⁶³

The court should make an order for financial provision on divorce if, and only if (a) the order is justified by one or more of the following principles:

- (i) fair sharing of matrimonial property;
- (ii) fair sharing of contributions and disadvantages;
- (iii) fair sharing of the economic burden of child-care;
- (iv) fair provision for adjustment to independence; and
- (v) relief of grave financial hardship;

and (b) the order is reasonable having regard to the resources of the parties.

4.4 With regard to life insurance policies and pension schemes the Commission accepted the following principles:⁶⁴

- (a) Only the portions of the pension or insurance benefits accumulated stante matrimonio should be eligible for distribution;
- (b) Because pension or insurance schemes mostly do not start paying out until a date after divorce, the court may make one of two orders:
 - (i) if sufficient capital is available, the court may order that the entitled party be compensated from such capital for the loss of pension expectations;
 - (ii) If sufficient capital is not available, the court may order payment of a portion of the eventual benefit.

62 Scottish Law Commission Memorandum No 22: Aliment and financial provision 1976 at 206.

63 Family law report on aliment and financial provision 92.

64 Op cit 97-8.

- (c) With regard to the question whether the legislature should lay down a statutory formula for quantifying these benefits, the Commission recommended that it would not be proper for the legislature to lay down a hard and fast formula, saying that "(w)e would prefer to leave questions of valuation to be dealt with according to the circumstances of the case."⁶⁵

4.5 The Commission's recommendation was then formulated as follows:⁶⁶

Where either spouse has rights or interests under a life policy or occupational pension scheme or similar arrangement, the proportion of such rights or interests which relates to the period from the marriage until the date of financial separation should be treated as matrimonial property.

4.6 The recommendations of the Scottish Law Commission have not yet been embodied in legislation.⁶⁷

4.7 Conclusion

- (a) Scottish Law does not recognise the wife's right to share in the benefits of her husband's pension scheme on divorce.
- (b) The Scottish Law Commission recommends, however, that she should have such a right and that such right should be treated on the same basis as other matrimonial property eligible for division on divorce.
- (c) To determine the extent of the wife's right only the period during which the parties were married is relevant.

65 Ibid.

66 Ibid.

67 Scottish Law Commission Eighteenth annual report: 1982-1983 at 33.

CHAPTER 5

GENERAL CONCLUSIONS AND PRELIMINARY RECOMMENDATIONS

1. GENERAL CONCLUSIONS

1.1 In Chapter 3 it was pointed out that the wife's interest in her husband's pension interests after divorce does not extend beyond her maintenance needs until her death or remarriage. In view of the practical difficulties involved in quantifying pension interests the tendency to leave things as they stand is tempting. Van Mourik,¹ however, holds the following view:

Het zou ook kunnen dat bij menigeen de gedachte overheerste dat zolang de man leefde weinig behoefte bestond aan het ouderdomspensioen aangezien dat via de alimentatie toch wel voor een deel by de vrouw terecht zou komen. Dat berustte dan op een troebel inzicht in de alimentatiewetgeving en -praktijk. Alimentatie is immers afhankelijk van behoefte en draagcracht en andere ook niet-finansiële omstandigheden. En het recht op alimentatie vervalt door hertrouwen of samenleven met een ander als ware men gehuwd.

1.2 The question now is: to reform or not to reform? Factors in favour of reform are the following:

1.2.1 Public opinion: The limited comments received by the secretariat to date without exception support the idea of reform. The history of the project, outlined in Chapter 1, also seems to suggest that the Minister of Justice, in requesting the Commission to reconsider the matter, was prompted by public opinion to do so. Some private views informally obtained by the researcher without exception support reform.

1.2.2 Developments abroad: It is evident from Chapter 4 that in virtually every civilised legal system reforms have recently

1 Van Mourik "De Vermogensrechtelijke Echtscheidingsproblematiek na 27 November 1981" 1982 Advocatenblad 248.

taken place in order to grant a divorced woman some share in her former husband's pension interests. For example, this is already accepted principle in England, certain states of the USA, New Zealand, the Netherlands, Canada and West Germany. In the USA an investigation is currently in progress and it is to be expected that the world-wide trend will be followed. The Scottish Law Commission has already made recommendations in favour of reform, whilst an "Eksperntenkommission" is at present investigating the matter in Switzerland.

1.2.3 Justice and equity: In Chapter 3 the many inequities that apparently could arise from the present legal position were pointed out. Potential injustice and inequity is always an argument in favour of reform.

1.3 Reasons for maintaining the status quo are the following:

1.3.1 Reform may lead to a proliferation of litigation: After the introduction of any new rule, there is usually an increase in litigation.² Experience has shown that the majority of divorce actions are settled out of court. There is no real reason to fear that this trend would be stopped by reform.

1.3.2 Through reform the wife would acquire a right on divorce which she did not have while married: This argument points to a disregard of economic facts. It is a simple fact that the wife has an economic interest (albeit no "right" in the scientific sense) in the husband's pension scheme as long as the marriage lasts. Reform would merely give judicial recognition to this interest.

1.3.3 The wife's interest cannot be determined: In the past this project has foundered on this argument. It may, however be argued that, when the husband dies, the wife's right can be quan-

2 Cf e g the numerous reported cases following the introduction of sections 112 and 115 of the Criminal Procedure Act, 51 of 1977.

tified. Should she then be divorced from him the day before he dies, her right should likewise be quantifiable. The problem is in fact one of evidence, and could therefore be overcome. There are two possible methods of quantification:

- (a) The legislature could lay down a formula for quantification.
- (b) The legislature could leave the matter of quantification to the court.

It could be argued against the former possibility that too rigid a rule might lead to inequity. On the other hand it might be argued that such a solution would be conducive to legal certainty.

Against the latter it could be argued that it could lead to an increase in litigation. Furthermore the court would have to make use of the expert evidence of an actuary. However, such experts are extremely scarce and their services highly expensive. On the other hand it may be argued that a certain amount of flexibility could be introduced into the quantifying process in this way.

However, it would seem that a middle course could be found, i.e. that the legislature, after consultation with all concerned, could lay down a quantification formula. This problem is, therefore, not insurmountable.

1.3.4 It might further be argued that a foreign principle would be introduced into our law by reform. This argument is based on a comparison between the Anglo-American principle of an equitable division of matrimonial property on divorce, and the principle applying in our law on divorce of giving effect to the matrimonial property law stante matrimonio. Both systems take cognisance of the parties' maintenance needs. The argument then goes that taking cognisance of pension benefits on divorce is a principle peculiar to the Anglo-American system but foreign to the South African system.

This argument does not hold water for the following reasons:

- (a) The object of both systems is the same. Thus the South African Law Commission stated in 1978:³

In the Commission's opinion, the object to be pursued is to lay down realistic rules for the dissolution of marriages. By realistic rules is meant rules which are in keeping with present-day needs, which take due account of the interests of all those involved and of society, and which do not lose sight of society's conception of what is reasonable and just.

The only difference between the principle in English law and the principle in South African law lies on the way in which this object is achieved: In English law the principle depends on the discretion of the trial judge, while we make use of guidelines legislation. Just as the English trial judge takes cognisance of pension interests, so should our legislature do. No fundamental principle would therefore be violated nor would a foreign system be transplanted here by introducing pension benefits into the financial arrangements on divorce.

- (b) Furthermore, it should be borne in mind that cognisance of the parties pension interests on divorce is not peculiar to the Anglo-American systems, but, as shown above, has formed part of the Romano-Germanic systems as well since earliest times.⁴

1.4 The current problem developed from the fact that in their early days pension schemes were based on two principles:

3 Report on the law of divorce (1978) at 4.

4 See Chapter 4 above.

(a) The permanence of marriage.

(b) The custom that the husband is the breadwinner of the family unit.

Both these principles have been seriously eroded in modern times. With regard to (a) above irrefutable proof is to be found in the following divorce statistics:⁵

Year	Whites	Coloureds	Asians	Total	Annual Increase/ Decrease
1967	5 833	723	82	6 638	-
1968	6 241	736	88	7 065	+ 6,43 %
1969	7 262	747	160	8 169	+15,62 %
1970	7 748	753	143	8 644	+ 5,81 %
1971	8 240	886	163	9 289	+ 7,46 %
1972	8 432	900	187	9 519	+ 2,47 %
1973	8 890	1 212	135	10 237	+ 7,54 %
1974	9 907	1 307	226	11 440	+11,75 %
1975	10 730	1 260	165	12 255	+ 7,12 %
1976	10 850	1 187	292	12 329	+ 0,60 %
1977	9 864	1 165	364	11 393	- 7,59 %
1978	11 456	1 560	316	13 332	+17,01 %
1979	13 816	1 486	391	15 693	+17,70 %
1980	16 543	2 088	519	19 150	+22,02 %
1981	17 065	2 910	636	20 611	+ 7,62 %

With regard to (b) above the presence of women in the labour market is equally indisputable proof. A working woman is usually entitled to membership of a pension fund, but her membership does not continue beyond her period of employment. It is a generally known fact that these periods of employment are even shorter in the case of women than in the case of men, because many women leave their employment at some stage to become home-makers.

1.5 The purpose for which pension schemes are created has also changed with the years. The initial purpose was to enable the husband, as the breadwinner of his family, to discharge his finan-

⁵ S A Law Commission Konsepverslag: Evaluering van die Wet op Egskeiding April 1983 at 3.

cial responsibilities as they will be when he can no longer earn an income by working. His dependants at that stage reap the benefits.

In time employers created more attractive pension schemes which began to assume the character of savings plans. Instead of enabling the member only to discharge his financial obligations on retirement, etc, he is now placed in a better economic position, especially through the payment of a lump-sum gratuity. The character of pension schemes has therefore changed from the "welfare idea" to the "economic idea."⁶

1.6 In the light of the foregoing it may therefore be said that pension schemes are built up by the husband as the manager of the family unit, and that his contributions are made at the expense of this unit. It is therefore only fair that the interests accumulated during the existence of the family unit should be utilised to the benefit of this unit. As long as this unit lasts, the fact that the benefits thus accumulated are linked to the person of the husband creates no problems. When the marriage breaks down, however, it is not fair that the husband should retain the sole right to benefits so accumulated, or that a second or third wife should eventually reap these benefits in toto, purely on the strength of her status as wife of the member at the time when the benefits become available. Equity and justice dictate that some part of these benefits should accrue the wife on divorce.

2. PRELIMINARY RECOMMENDATIONS

2.1 Quantification

2.1.1 It has already been argued above that the quantification of pension benefits does not present an insurmountable problem.⁷

6 Cf the observations of Mr Martin Sweet, legal adviser to Guardian National, in Business Times Supplement 12 June 1983 at 6.

7 Cf p 55 above.

The formula according to which this should be done is still open to debate. It is however suggested that the following guidelines should be observed:

- (a) The duration of the marriage.
- (b) The parties' contributions to pension schemes.
- (c) The contributions of other parties, e g employers, to such schemes.
- (d) The defreezing contingency that results in the payment of the funds.

2.1.2 The last-mentioned guideline poses the most serious problem because of the uncertainty as to which contingency will occur first. No quantification is possible before some certainty is reached on this matter.

2.1.3 The Commission invites views on the guidelines to be applied and the relative weight to be attached to each guideline.

2.1.4 It is further suggested that the legislature should eventually lay down a formula, based on these guidelines, for the quantification of the parties' pension interests.

2.2 Division

2.2.1 The next question is how to divide the pension interests. There is no reason why the interests should be divided in any other way than in the case of other matrimonial property. The power of equitable distribution with which the Anglo-American courts are equipped is foreign to our law and should be avoided if inequities can be solved in some other way which is more characteristic of our law.

2.2.2 The following scheme is therefore suggested:

- (a) Marriage in community of property: It is suggested that the quantified pension interest be divided equally between the parties in a manner similar to the way in which matrimonial property is divided.
- (b) Marriage out of community of property: It is suggested that the quantified pension interest be divided according to the terms of the antenuptial contract. If the antenuptial contract does not provide for the division of pension interests, then cadit quaestio.
- (c) Marriage under the accrual regime: It is suggested that the quantified pension interest be divided in the same way as other matrimonial property.

2.3 Payment of pension moneys

2.3.1 When the pension interest has been quantified and divided in theory, the question as to payability arises. The fact that pension interests cannot be liquidated on divorce cannot be ignored.

2.3.2 If, however, the wife is entitled to a certain portion of the benefit in theory, she has a lever for bargaining for compensating benefits during the settlement negotiations. Such compensating benefits could be:

- (a) that the husband undertakes to cede a policy to the wife in order to provide her with a sum of money equal to her share in the pension interest plus interest;
- (b) the settling of a sum of money on the wife.

2.3.3 If the parties are not able to reach an agreement, however, the only alternative is for the wife's pension interest to be liquidated on her former husband's retirement, death, etc. The objection may be levelled against this that a "clean break" should

as far as possible be made between the parties on divorce. Making the "clean break" to the detriment of either party should however be guarded against. If the wife liquidates her interest only when the defreezing contingency occurs, she only receives what is due to her, and does not prejudice the husband in any way. If however, she were to receive nothing, the possibility of serious detriment to the wife exists, and the husband would receive benefits to which he is not really entitled.

3. CLOSING OBSERVATION

3.1 However, things are not so simple in practice. Pension funds are governed by many statutory rules and other regulations. These rules are at present still in consistent with the principles set forth above. If any measure of success is to be achieved with these principles, adjustments to these rules will be necessary. Thus Van Mourik observes:⁸

Zonder medewerking van het betrokken pensioenlichaam zal men niet de situatie kunnen creëren waarin de vrouw haar rechten rechtstreeks jegens dat lichaam kan geldend maken. Voor de verzameld pensioenfondsen is een fraaie taak weggelegd. Afhankelijkheid van een pensioenfonds is in verre te prefereren boven afhankelijkheid van een voormalige echtgenoot.

This "fraaie taak" will call for a concerted effort by the pension funds and the Commission.

3.2 The Commission would welcome views on any of the aspects touched upon above, as well as those raised in the attached questionnaire.

8 Ibid.

QUESTIONNAIRE

1. Are the theoretical inequities of the current legal position of the wife on divorce with regard to the husband's pension interests such as to warrant the intervention of the legislature?
2. If so, what would the correct theoretical basis for such intervention be?
3. What guidelines should be applied in quantifying the wife's "right" and what weight should be attached to each guideline?
4. How and when should the wife's "right" be liquidated?
5. Should any restriction be imposed on the duration of marriages eligible on divorce for a division of pension interests?
6. Should insurance policies not be dealt with on the same basis as pension benefits? If not, why not?
7. Would the proposed division be unfair to the husband? If so, to what extent should the man's rights be protected?
8. What economic implications would the proposed system have?

BIBLIOGRAPHY

1. Textbooks

- Bakels Burgerlijk wetboek (7de druk), Deventer Kluwer 1971.
- Bissett-Johnson & Holland Matrimonial property law in Canada, Ontario Burroughs & Co 1980.
- Cretney Principles of family law (3rd Edition), London Sweet & Maxwell 1979.
- Fischer The matrimonial property act 1976, Wellington Butterworths 1977.
- Gray Reallocation of property on divorce, Oxford Professional Books Ltd 1977.
- Hahlo The South African law of husband and wife, Cape Town Juta 1975.
- Hahlo & Sinclair Reform of the South African law of divorce, Cape Town Juta 1980.
- Harper Divorce and your money, London Unwin 1981.
- Olivier Die Suid-Afrikaanse persone- en familiereg (2de Uitgawe), Durban Butterworths 1980.
- Palandt Bürgerliches Gesetzbuch (41. Neubearbeiter Auflage), Munich CH Beck 1982.
- Ream (Ed) Economics of divorce American Bar Association 1978.
- Rose (Ed) Nygh & Turner's family law service, Sydney Butterworths 1976.
- Schwind Kommentar zum österreichischen Eherecht (2. Auflage), Wien Manzsche Verlags- und Universitätsbuchhandlung 1980.
- Tuor & Schnyder Das Schweizerische Zivilgesetzbuch (9. Auflage), Zurich Schultess Polygraphischer Verlag 1975.
- Van Mourik & Jongsma Het Nederlands vermogensrecht bij echtscheiding Zwolle Tjeenk Willink 1978.

2. Articles

- Arts & Clausing "Pensioenopbouw en pensioenverrekening" 1983 Advokatenblad 337.
- Baily "Principles of property distribution on divorce - compensation, need or community?" 1980 Australian Law Journal 190.

Glendon "Modern marriage law and its underlying assumptions: The new marriage and the new property" 1980 Family Law Quarterly 441.

Joubert "Onderhoud by egskeiding" 1980 De Jure 80.

Joubert "Verbeuring van voordele van huwelik na egskeiding" 1982 De Jure 217.

Middelbos "Pensioenverrekening bij echtscheiding" 1983 Advokatenblad 343.

Schäfer "Token maintenance" 1980 THRHR 57.

Sinclair "Financial provision on divorce - need, compensation or entitlement?" 1981 SALJ 469.

Van Mourik "De vermogensrechtelijke echtscheidingsproblematiek na 27 November 1981" 1982 Advokatenblad 248.

3. Reports

South African Law Commission

Report pertaining to the law of divorce and related matters (1978).

Report pertaining to the matrimonial property law with special reference to the matrimonial affairs Act, 1953, the status of the married woman, and the law of succession in so far as it affects the spouses (1982).

Draft report pertaining to the evaluation of the effect of the divorce Act, 1979 (1983).

Scottish Law Commission

Memorandum No 22: Aliment and financial provision (1976).

Family law report on aliment and financial provision (1981).

Eighteenth annual report: 1982-1983 (1983).

Other

First report of the interdepartmental committee of inquiry into certain specific pension matters (1980).

