

SOUTH AFRICAN LAW COMMISSION

PROJECT 41

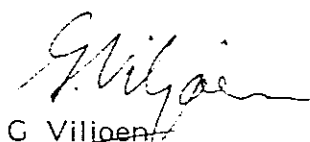
INVESTIGATION INTO THE POSSIBILITY OF
MAKING PROVISION FOR A DIVORCED WOMAN
TO SHARE IN THE PENSION BENEFITS OF
HER FORMER HUSBAND

REPORT

October 1986

To Mr H J Coetsee, MP, Minister of Justice.

I have the honour to submit to you in terms of section 7(1) of the South African Law Commission Act, 1973 (Act 19 of 1973), for consideration the Commission's report on the investigation into the possibility of making provision for a divorced woman to share in the pension benefits of her former husband.



G. Viljoen
CHAIRMAN
8 August 1987

INTRODUCTION

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)
The Honourable Mr Justice P J J Olivier
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HIERDIE VERSLAG IS OOK IN AFRIKAANS BESKIKBAAR

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Working Paper:
Pension Benefits

South African Law Commission Investigation into the possibility of making provision for a divorced woman to share in the pension benefits of her former husband Working Paper 4 Pretoria 1984

1. ORIGIN OF THE INVESTIGATION

1.1 The South African Law Commission has already undertaken two investigations that have a bearing on a person's pension interest before it is realised, namely -

(a) Revision of the Law of Divorce; and

(b) Revision of the Matrimonial Property Law.

The outcome of the former project was the Divorce Act, 70 of 1979. The latter investigation resulted in the Matrimonial Property Act, 88 of 1984.

1.2 During the investigation into the law of divorce the Commission had to consider the question whether a divorced woman should have any claim to her husband's pension interest. Although the Commission considered such a claim to be justifiable in many instances, it foresaw insurmountable problems regarding the quantification of the pension interest. The Commission was nevertheless of the opinion that a pension interest could be taken into account as a factor when maintenance is determined. Consequently no specific provision was made for it.

1.3 During the Parliamentary debate on the proposed divorce measures the question was raised whether express provision should not be made for a divorced woman to have a claim to the pension interest of her former husband. You referred the question to the Commission which decided to place the matter on its programme as a separate investigation.

1.4 The question whether a woman should have a claim to her husband's pension interest was also raised in the course of the investigation by the Interdepartmental Committee of Inquiry into Certain Specific Pension Matters.¹ The Committee found the following:²

1 Report: Pension Matters; 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
(Footnote continued)

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 Committee such an important asset should also be taken into account in the division of assets in a divorce ...

1.5 The Committee embodied the following clause in a draft bill:³

Payment of a preserved pension interest upon divorce

13.(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) 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.

1.6 This bill was not passed however, probably because consensus could not be reached on the proposed compulsory preservation of pension interests.

(Footnote continued)
1980 (RP 75/1980).

2 Par 3.62 of the Report.

3 Draft Preservation of Pension Interests Bill, published by General Notice 653 of 1981 in Government Gazette 7740 of 28 August 1981.

1.7 The Commission consequently went ahead and published a working paper containing tentative recommendations⁴ regarding the possibility of making provision for a divorced woman to share in the pension benefits of her former husband.

1.8 On 28 March 1985 a Joint Parliamentary Committee was appointed to inquire into the pension systems of the Republic. Since there was no indication as to the extent to which the matters under discussion would be covered by the Committee, the Commission decided to hold over its investigation until the Committee had completed its inquiry. During discussions with Mr J W H Meiring, MP, Chairman of the said Joint Parliamentary Committee, however, he indicated that the Committee would not cover the area of the Commission's investigation.

1.9 In the working paper that was published for comment⁵ the Commission limited itself strictly to the frame of reference indicated by the title of the investigation and only went into the position of a divorced woman. The fact of the matter is, however, that a growing number of women today enter the labour market, are members of some pension fund in their own right, and build up pension benefits that may even exceed the husband's. It would therefore only make good sense to consider not only the husband's accrued pension benefits, but also the wife's, in an investigation such as the present one, and the Commission has adopted this approach.

4 See Chapter 5, par 5.2.

5 Working Paper: Pension Benefits.

2. SURVEY OF THE SOUTH AFRICAN LAW RELATING TO PENSIONS

INTRODUCTION

2.1 Changed economic and social conditions give rise to modernisation 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. It then 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.

2.2 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 sizeable lump-sum gratuities and annuities. Such pension benefits have sometimes even been said to be a member's most important asset on his death.¹

2.3 In developed countries it is today taken for granted that the individual or the community must make provision for old age, *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 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

1 Report: Pension Matters par 3.62.

2 Report: Pension Matters par 2.3.

CLASSIFICATION OF FUNDS

2.4 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, 1962), distinguishes between pension, provident, retirement annuity, and benefit funds,³ 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.

2.5 With reference to the Pension Funds Act, 24 of 1956, funds can be subdivided into official funds, self-administered funds, underwritten funds, State-controlled funds, industrial funds and foreign funds.⁴

2.6 Apart from the above-mentioned classifications funds may be classified in various other ways, for example according to the type of defreezing contingency that may give rise to the payment of benefits or in the light of the Fund's financial experience e g "fixed contribution schemes" or "money purchase schemes".⁵

2.7 None of these classifications is all-embracing: the classification in terms of the Income Tax Act, 1962, is aimed at tax control; while the classification of funds in terms of the Pension Funds Act, 1956, is aimed at structural control.

2.8 For purposes of this report reference will henceforth be made to "funds" when the following types of provision for old age are meant: pension funds (e g the Government Service Pension Fund), provident funds and retirement annuity funds.

3 As separately defined in section 1 of the Act.

4 Report: Pension Matters par 2.5.

5 Ibid par 3.2.

2.9 As mentioned above, the Pension Funds Act, 1956, does not distinguish between pension, provident and retirement annuity funds. These funds fall under the definition of "pension fund organization" in the said Act.

2.10 For the sake of completeness it should be mentioned that the basic requirements of pension funds (in the narrow sense of the word) and those of provident funds correspond except for the fact that in the case of pension funds not more than one third of the total value of an annuity or annuities to which a member becomes entitled may be replaced by a lump sum. Retirement annuity funds and pension funds correspond in this respect.

2.11 The fact of the matter is that these funds correspond in various ways and can be used for the possible division of pension benefits.

2.12 It was decided not to include insurance policies in the investigation at this stage for the reasons set out later in this report.⁶

CERTAIN GENERAL PRINCIPLES APPLICABLE TO SOUTH AFRICAN PENSION LAW

Introduction

2.13 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 payment phase. The former continues as long as the member and/or his employer contributes to the fund, and the latter commences when a defreezing contingency⁷ occurs.

The three components of a pension scheme

6 See Chapter 6 paragraphs 6.21 - 6.26 below.

7 Report: Pension Matters par 3.9. This term is used by the Interdepartmental Committee to signify the event which makes the benefits of the scheme available.

The member

2.14 In principle there is nothing to prevent anyone from becoming a member of a pension scheme. In practice however, pension schemes are connected with employment and it is mostly 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 scheme. The fact remains, however, that many women give up their employment at some stage to become home-makers,⁸ 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 happens in practice, therefore, that more husbands than wives are members of pension schemes. Benefits are not, however, restricted to members.⁹

The fund

2.15 In 1978 there were already 10 664 different funds. Over a period of 19 years there was an increase of 6,5 % per annum.¹⁰ Section 1 of the Pension Funds Act, 1956, defines fund and pension fund as a pension fund organization, which in turn is defined as follows:

- (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,

8 This is the Anglo-American term.

9 Report: Pension Matters par 2.9.

10 Ibid par 2.8.

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.

2.16 Every fund must apply to the Registrar of Pension Funds for registration.¹¹ 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.¹²

The beneficiary

2.17 When the defreezing contingency occurs, payments are made to the beneficiary in accordance with the rules¹³ of the fund. The following persons may be beneficiaries:

(a) The member:

Pension funds are usually aimed at providing financial care for the member on retirement, disability, etc. The member is therefore the primary beneficiary.

(b) Dependants of the member

Section 1 of the Pension Funds Act, 1956, defines a "dependant" as follows:

"dependant", in relation to a member -

11 Sec 4(1) of the Act.

12 Sec 15 of the Act.

13 The term "rules" in the Act 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, 1956)

- (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.

In terms of this definition a former spouse may be a dependant in certain circumstances. This does not, however, necessarily mean that such spouse is entitled to any benefit in terms of the rules of the fund.

(c) Nominees

Certain funds also provide that a member may nominate a person to whom certain benefits will accrue at the member's death. Nomination is in the sole discretion of the member and may be revoked by him.

The phases in the functioning of the fund

The contribution phase

2.18 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.

The defreezing contingency

2.19 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 pension contributions are usually paid out to him. It is important to note that divorce is not regarded as a defreezing contingency under the present laws.

The payment phase

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

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

INTRODUCTION

3.1 In this chapter the question is examined whether the apparent inequity of the fact that a spouse does not share in the pension interest of the other is not in any case remedied by the law relating to financial arrangements on divorce.

THE NATURE OF THE PENSION INTEREST¹

3.2 Put simply, the minimum amount to which a member of a pension fund is entitled is in the first instance limited to his contributions, possibly with interest. In suitable instances the employer's contributions may be added. Before the occurrence of the defreezing contingency, however, this interest is neither realisable nor precisely definable. Until the defreezing contingency (death, retirement, etc.) occurs, the benefits are frozen and the member may not reduce, transfer, cede, pledge or hypothecate them - section 37A of the Pension Funds Act, 1956.

3.3 Because of the frozen nature of a pension interest and the fact that its defreezing depends on numerous contingencies that may take place and that may increase or decrease the pension benefits, it is sometimes said that the pension interest in a fund is nothing more than a mere expectation and that it becomes an asset of the member or his estate only when the defreezing contingency occurs.

3.4 Alternatively, the pension funds create rights which become enforceable only when the defreezing contingency occurs and are thus conditional rights. In one sense these rights may be regarded as being suspensive conditional rights: Member A gets X amount when he resigns; Y amount when he turns 60; Z amount when he turns 65 etc. In another

1 Cf. Ellis in 1985 Obiter.

sense these rights may be regarded as being subject to resolute conditions: E g if the member is dismissed he forfeits all his benefits.

3.5 In addition, the pension fund normally also creates rights in respect of the member's dependants. A dependant's right usually depends on the conditions applicable to the member and also on the question whether the dependant is in fact a dependant and regarded as such. Should a wife lose her status as a dependant prior to the member's retirement because of divorce, any right she would have had against the fund falls away.

3.6 The question may be asked whether the frozen and conditional nature of the pension interest renders it a nuda spes. In our opinion it does not. As has been said, the rules of a pension fund create certain rights and obligations - a definite vinculum juris - between the fund and the member. The object of the fund is the payment of certain benefits when a certain future event occurs. When the condition is fulfilled, the member or other beneficiaries may enforce their interests against the pension fund. It thus appears that the relationship between the member and the pension fund may be regarded as a subjective right and, more specifically a personal right, and not a nuda spes.²

THE GENERAL PRINCIPLE WITH REGARD TO FINANCIAL ARRANGEMENTS ON DIVORCE

3.7 In the majority of cases (95 % and more) the financial and patrimonial consequences of divorce are settled in an agreement.³ This agreement may be made an order of court,⁴ and may only be varied by the court by mutual consent of the parties, unless the agreement was concluded as a result of fraud, error or duress.⁵ Only those parts of the settlement pertaining to maintenance may be varied by the court. The contents of

2 Ibid at 104.

3 Barnard et al 260; Report: Matrimonial Property Law 85.

4 Sec 7(1) of the Divorce Act, 70 of 1979.

5 Hahlo 386 and 386 n 173.

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 the process of bargaining with regard to the contents of the agreement.

3.8 If the parties are not able to come to an agreement the court is only empowered in certain circumstances to order an equitable division of the assets.⁶ Otherwise the proprietary consequences of the divorce are governed by the matrimonial property régime that existed at the time of divorce, and any order the court may make with regard to maintenance or the forfeiture of benefits.⁷

THE WIFE'S RIGHTS UNDER THE MATRIMONIAL PROPERTY RÉGIME

Marriage in community of property

3.9 On 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 delictual damages are excluded therefrom. The husband and wife are joint owners of the joint estate, each holding an undivided half share.⁸ Each spouse has the power to dispose of his or her half share by will.⁹ All the debts incurred by the spouses whether before or during the marriage are charges on the joint estate. The expenditure and therefore the pension contributions made by the husband or wife are likewise charges on the joint estate. When the pension benefits are realised they of course form part of the joint estate.

6 Sec 7(3) and 7(6) of the Divorce Act 70, of 1979; cf also Barnard et al 260-261.

7 Cf secs 7 and 9 of the Divorce Act, 70 of 1979.

8 Barnard et al 182.

9 Report: Matrimonial Property Law 4.

3.10 The joint estate terminates on divorce. The decree of divorce is per se an order for the division of the joint estate. Save for the forfeiture of benefits each party is entitled to half the net 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.

3.11 An attempt has been made above to show that a person's interest in specific pension benefits is more than a mere expectation and is in fact a conditional right. The question whether this interest indeed forms an asset in the joint estate has never been answered categorically by the courts. The question was however raised in an unreported decision, viz Maritz v Maritz.¹⁰

3.12 According to the facts of the case the plaintiff and the respondent were married in community of property. In 1982 the marriage was dissolved and in 1984 the defendant received an amount of R2 758,38 in pension moneys. Plaintiff subsequently instituted an action in the magistrate's court for half of the amount (with interest a temporae morae). In her claim she alleged that the amount formed part of the joint estate at the time of the divorce, although it had not been realised then. The magistrate however dismissed the claim and the plaintiff thereupon appealed to the Cape Provincial Division. The appeal was based on two grounds: first, that the magistrate had erred in finding that the respondent personally had a legal claim against the pension fund, and should have found that the claim was to the benefit of the joint estate and, secondly, that the magistrate had erred in finding that the plaintiff was not entitled to a half share of the claim.

3.13 With regard to the magistrate's handling of the merits of the claim, Mr Justice Van Heerden found that the documents before the court contained so little information about the contributions to the pension fund, the particulars of the pension and its payment, who acquired any legal claim, etc, that the magistrate could not come to a decision on the information.

10 (C) A410/85. See also Ellis in 1986 THRHR.

3.14 Regarding the question whether the amount formed part of the joint estate on divorce although not yet realised, the court did not express any view under the circumstances. With reference to Ex Parte De Wet¹¹ and Gillingham v Gillingham¹² the court, however, made the following observations :

Now, it would appear ... that after the dissolution of a marriage in community of property a party is not free to sue the other for a half share of any specific asset of that estate. The estate must be divided as a whole, i e the assets and liabilities should be divided in such a way that each gets half of the remainder after the liquidation of the estate and after the settlement of the liabilities.

In this case a receiver had not been appointed. Apparently the parties did not ask for this, but it appears from the alternative plea that an agreement had been reached by the parties. Whether or not this is so would depend on the facts, but the fact remains that, according to the authority I have referred to, the plaintiff is not empowered to sue the defendant now and claim half of one asset which she avers falls within the joint estate.

Ellis¹³ points out that while one accepts the wisdom of the principle that parties should not be allowed to squabble in court about each individual possession that formed part of the joint estate, the question remains however whether a conditional pension right is not capable of being divided as an asset in the joint estate.

3.15 On divorce a division of the joint estate takes place. If the parties agree on the manner of division there is no problem and effect is given to the agreement. If they cannot reach agreement it is up to the court to divide the estate and the court is empowered to appoint a person to give effect thereto.¹⁴

11 1952 4 SA 122 (O).

12 1904 TS 609. Our translation and underlining.

13 Ellis in 1986 THRHR at 237.

14 Gillingham v Gillingham 1904 TS 609 at 613.

3.16 Although pension scheme contributions are a charge on the joint estate, the current legal position, or at least the practical application thereof, appears to be that any right or interest the one spouse may have in the future pension benefits of the other on divorce is disregarded on division of the joint estate. Benefits which accrued to the member of the pension fund prior to divorce, however, automatically form part of the joint estate.

Marriage out of community of property

3.17 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 of his or her separate estate by will. Donations between spouses are permitted, except in so far as the provisions of the Insolvency Act, 24 of 1936,¹⁵ would be contravened.

3.18 On divorce each party takes his or her separate estate, together with any gifts stipulated in the antenuptial contract, provided they are due.¹⁶

3.19 In the case of marriages entered into prior to 1 November 1984 in terms of an antenuptial contract by which community of property, community of profit and loss, and accrual sharing are excluded, the court may, in the absence of an agreement regarding the division of the assets, in terms of section 7(3) of the Divorce Act, 70 of 1979, order that such assets of a spouse as the court may deem just be transferred to the other spouse. Since a pension interest is not at present taken into account as an asset on division, a spouse has no claim to such a pension interest or even a realised pension benefit of the other spouse.

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

16 Hahlo 383.

Marriages under the accrual régime

3.20 The accrual régime is regulated by Chapter 1 of the Matrimonial Property Act, 88 of 1984. Under the accrual régime 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 net 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.

3.21 The term accrual is defined as follows:¹⁷

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.

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

FORFEITURE OF BENEFITS

3.23 Section 9 of the Divorce Act, 70 of 1979, provides as follows:

(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

17 Sec 4(1)(a) of the Matrimonial Property Act, 88 of 1984; cf furthermore sections 4(1)(b) and 4(2).

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.

3.24 Hahlo and Sinclair¹⁸ 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.

3.25 In the strictest sense this means that in the case of a marriage out of community of property a person against whom the forfeiture operates may not claim any patrimonial benefits in terms of that contract and that any such benefits have to be returned. In the case of a marriage in community of property the person against whom the forfeiture order operates 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 the forfeiture operates has brought in the most.¹⁹ In terms of section 9(1) of the relevant Act the courts have a discretion to

18 Hahlo & Sinclair 51.

19 Joubert in 1982 De Jure at 219.

moderate 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.

3.26 The idea underlying forfeiture of patrimonial benefits is that the person who was mainly responsible for the break-down of the marriage should not profit financially on division.²⁰

REDIVISION OF ASSETS ON DIVORCE

3.27 Section 7(1) of the Divorce Act, 70 of 1979, provides as follows:

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.

3.28 If the parties cannot reach agreement as to the payment of maintenance, the court may order an equitable division only in respect of certain marriages.²¹ For the rest the parties' matrimonial property régime regulates the division of their property on divorce. In this process of liquidation the husband's accrued pension benefits are disregarded.

3.29 It is possible that the parties to a divorce action may reach an agreement whereby a spouse's pension benefits may be included on retirement in the future. Such an order may then be made an order of court. However, parties seldom enter into such an agreement. The reasons are probably, first, that under present law there is no such obligation on a spouse, secondly, that the value of the 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.

20 Barnard et al 258.

21 See par 3.19 supra.

3.30 It would therefore seem that the possibility of a settlement granting a spouse a claim to the member-spouse's pension benefits in the future would afford the former party only limited protection because it would depend on the goodwill of the member-spouse.

THE DUTY TO PAY MAINTENANCE

3.31 If the parties cannot reach agreement as to the payment of maintenance,²² section 7(2) of the Divorce Act, 70 of 1979, empowers the court to make a maintenance order:

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, an order in terms of subsection (3) 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.

3.32 Although in theory the court may order either lump-sum or periodical payments, in practice the latter is usually found.²³ Sinclair²⁴ 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 words 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.

22 See par 3.27 supra.

23 Joubert in 1980 De Jure at 80.

24 Sinclair in 1981 SALJ at 477.

3.33 Although Sinclair expresses doubts on this matter, it may still be regarded as res nova in our law, there being authority neither 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.

3.34 In determining the amount of maintenance payable, the court is guided by the factors referred to in section 7(2) of the Divorce Act, 70 of 1979. These factors include a party's existing and prospective means, the parties' respective earning capacities, the age of each of the parties, the duration of the marriage, the standard of living of the parties prior to the divorce, the parties' 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".

3.35 As regards the "other factors" referred to in section 7(2) of the Act, Joubert²⁵ suggests that they should be used to decrease the quantum of maintenance calculated with reference to the maintenance needs and the ability to pay maintenance.

3.36 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 10(1) of the Matrimonial Affairs Act, 37 of 1953, 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 Nel²⁶ Smuts J held:

In my opinion a court may award a nominal amount of maintenance which will have the result that the plaintiff will be able to apply subsequently for an increased amount of maintenance, if there is reason to believe that she will probably need maintenance in the future and it is proved that in the circumstances it is just and equitable that

25 1980 De Jure 80 et seq.

26 1977 2 SA 288 (O) at 290C.

the defendant should at that stage make provision for maintenance for her, even though the plaintiff is in a position to support herself on the date when the dissolution of the marriage is ordered. (Our translation.)

3.37 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.²⁷

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

(1) A maintenance order ... made in terms of this Act, may at any time be rescinded or varied or ... 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.

3.39 In terms of this provision the court may vary an existing order after divorce. It is suggested that the same factors as those that applied in determining the original maintenance award apply to the variation, but that particularly the extent to which the factors that played a role in the determination of the maintenance have changed, should be taken into account. It is therefore clear that a spouse who claims maintenance will, in the event of the variation of an order, never receive more than is needed to satisfy that spouse's reasonable needs.

3.40 The question is to what extent, if any, a spouse's pension interest is taken into account or should be taken into account when the amount of maintenance is fixed. If the defreezing contingency occurs prior to the divorce, a spouse's pension benefits are of course regarded as part of the assets or income out of which maintenance can be paid. If divorce takes place prior to the defreezing contingency, however, a spouse's claim to the other spouse's pension benefits is not taken into account for

27 Cf generally Schäfer in 1980 THRHR 57 et seq.

purposes of maintenance. The pension interests will at most play a role if the defreezing contingency is about to take place but then still with due regard to maintenance needs.

3.41 In the light of the foregoing it is clear that the present law relating to the financial arrangements on divorce does not provide for a spouse to share in the pension interests of the ex-spouse, mainly because a pension interest is at present not regarded as an asset in the estate of the member-spouse.

4. COMPARATIVE SURVEY OF LAWS

INTRODUCTION

4.1 In recent years matrimonial law and matrimonial property law have enjoyed the attention of w reformers the world over. One of the most pressing questions in this regard is the reallocation of matrimonial property on divorce. The discussion that follows is based on a study of the most important Romano-Germanic systems and the Anglo-American legal systems.

THE ROMANO-GERMANIC SYSTEMS

. The Netherlands

4.2 The general attitude in the Netherlands 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 disability or otherwise. Furthermore the pension provision is mainly built up by the payment of premiums. Therefore, when a member becomes involved in divorce it is said that equity requires that pension benefits should revert to the person from whose funds they were built up.¹ The Dutch law distinguishes between pension rights connected with employment (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.

"Pensioenrechten in verband met een werkkring"

4.3 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

1 Van Mourik & Jongsma 355 et seq.

en bed was opgebouwd, bij de verdeling van de gemeenschap door middel van verrekening in aanmerking moeten worden genomen."²

4.4 This principle laid down by the Hoge Raad created serious problems with regard to the manner of adjustment of the parties' interests. Arts and Clausing state the problem thus:³

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 ...

4.5 No universal solution suggests itself. Middelbos⁴ 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 an independent third party should also make a calculation or should be asked to give his opinion on the method of calculation used.⁵

Cases regulated specifically by legislation

2 1982 NJ 503; Arts & Clausing "Pensioenopbouw en pensioenverrekening" 1983 Advokatenblad at 337; "pension rights such as these should in general be taken into account by adjustment in the division of the community to the extent that they had been built up at the time of dissolution of the community by divorce or separatio a mensa et toro". (Our paraphrase)

3 Ibid. "In order to give a party to a divorce well-considered advice with regard to the pension adjustment, one would have to have an insight into the substance of the pension. That will be lacking in most cases. In most cases it would be wise to consult an actuary and/or fiscal expert." (Our paraphrase)

4 Middelbos in 1983 Advokatenblad at 343.

5 Ibid at 347.

4.6 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 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)

4.7 Everyone who has been insured under this Act, and who attains 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.⁶ 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 those married persons who do have a claim thereto.⁷

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

4.8 The object of this Act is to assist the widow and orphans of a member. Of interest is section 4(1) AWW which reads as follows:⁸

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:

6 Van Mourik & Jongsma 374.

7 Ibid.

8 "For the purposes of this Act and the decisions taken in order to give effect thereto, after the death of a man, a woman to whom he had been married is also regarded as a widow, if the marriage was dissolved or annulled prior to his death, provided that the woman:

a. did not remarry after the dissolution or annulment of the marriage and

b. would have had, under the provisions of this Act, a right to a widow's pension if the man was deceased on the date of dissolution or annulment of the marriage." (Our paraphrase)

- a. na de ontbinding of nietigverklaring van het huwelijk niet is hertrouwd en
- b. overeenkomstig de bepalingen van deze wet recht op weduwenpensioen 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)

4.9 This Act regulates the pension rights of civil servants. In terms of section G.4 ABP a special widow's pension is granted to the woman to whom the deceased, former or pensioned civil servant was married⁹ provided that:¹⁰

- (a) de vrouw recht op weduwenpensioen zou hebben gehad indien de man op de dag van 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 genoemd 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.

9 Ibid 379.

10 "(a) the woman would have had a right to a widow's pension if the man had been deceased on the date of the decree by which the divorce was granted,

(b) the date referred to under (a) fell on or after the commencement of the Act amending divorce laws and the divorce or dissolution of the marriage was not granted in terms of the law in force prior to that date, and

(c) the woman had not acquired a right to a widow's pension by remarriage to her former husband." (Our paraphrase)

4.10 The amount of the special widow's pension is the same as the ordinary widow's pension, but subject to the proviso that only the years of service during which the man had been married to the woman are taken into account.

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

4.11 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 hoedanigheid in die bedrijfstak werkzaam zijn, gelden worden bijeengebracht."¹¹ By business pension fund is meant "een aan een onderneming verbonden fonds, waarin ten bate van personen die aan die onderneming verbonden zijn, gelden worden bijeengebracht."¹²

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

- (i) The woman whose marriage to a member is dissolved by divorce 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 by divorce or otherwise or on the attainment of retirement age.
- (ii) The woman whose marriage to a former member is dissolved by divorce acquires the premium-free right to a widow's pension that the former member had acquired on her behalf at the termination of his membership.¹³

11 Ibid 381 n 63; "a fund operating in a branch of industry in which moneys are accumulated either for the benefit of employees only or also for the benefit of persons working in some other capacity in the industry". (Our paraphrase)

12 Ibid 381 n 64; "a fund connected with an enterprise in which moneys are accumulated for the benefit of persons attached to that enterprise". (Our paraphrase)

13 Ibid 383.

4.13 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

4.14 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 betreffende verplichte deelneming in een beroepspensioenregeling".¹⁴ Certain professional pension funds are however regulated by separate legislation, e.g. the schemes for pharmacists, notaries, etc.

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

Cases not specifically regulated by legislation

4.16 All the cases to which the above-mentioned laws do not apply fall under section 153 BWB:¹⁵

14 Ibid 385-386; "Act relating to compulsory participation in a professional pension scheme". (Our translation)

15 Bakels 50.

"1. If, as a result of the divorce for which an action is instituted, an existing prospect of a payment to the other spouse on the predecease of the spouse who instituted the action, were to be lost or decreased substantially, and if the other spouse contests the action for this reason, the matter may not be decided until provision has been made therefor which, in the light of the circumstances of each case, may be deemed to be fair to both spouses. The judge may set a time limit therefor.

2. The first subsection shall not apply:

a. if it may reasonably be expected that the other spouse could make adequate provision for that case;

(Footnote continued)

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 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:

- a. indien redelijkerwijs te verwachten is dat de andere echtgenoot zelf voor dat geval voldoende voorzieningen kan treffen;
- b. indien de duurzame ontwrichting van het huwelijk in overwegende mate te wijten is aan de andere echtgenoot.

4.17 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 court. It is also left to the court to decide whether the arrangement made is just or not.

4.18 As to the former, Van Mourik and Jongsma¹⁶ contend that a court 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, the writers¹⁷ suggest that each case has to be judged on its own merits and that no precise inferences can be made from court judgments.

4.19 The following conclusions may be drawn:

- (a) The law of the Netherlands recognises a spouse's right on divorce to share in the other spouse's pension benefits.

(Footnote continued)

- b. if the continued break-down of the marriage is due mainly to the other spouse." (Our paraphrase)

16 Ibid 368.

17 Ibid 369.

- (b) The BWB does not lay down any hard and fast rule to quantify this pension interest. 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 the methods of quantification of the interest are at present being debated. 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.
- (d) Where a spouse acquires a right to a share in the other's pension benefits, it never exceeds the amount which was built up for his or her benefit stante matrimonio.

West Germany

4.20 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 (accrual system) and provide for the party who has the smaller expectation of pension benefits on divorce.

Section 1587 BGB (Grundsatz)

4.21 This introductory section provides:¹⁸

18 Palandt 1442.

"(1) A pension equalisation is made between the divorced spouses in so far as during the subsistence of the marriage rights to or expectations of a pension by reason of age or disability or incapacity for employment of the nature specified in Section 1587a, para 2, have been created or maintained for them or one of them. Rights or expectations created or maintained by means of the property or labour of the spouses are not taken into account.

(Footnote continued)

(1) Zwischen den geschiedenen Ehegatten findet ein Versorgungsausgleich statt, soweit für sie oder einen vor ihnen in der Ehezeit Anwartschaften oder Aussichten auf eine Versorgung wegen Alters oder Berufs- oder Erwerbsunfähigkeit der in Section 1587a 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 stattfindet, gelten ausschliesslich die nachstehenden Vorschriften; die güterrechtlichen Vorschriften finden keine Anwendung.

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

The methods of equalisation of pension benefits

4.23 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 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

(Footnote continued)

(2) ...

(3) Only the following provisions apply to rights or expectations in respect of which the pension equalisation is made; the matrimonial property provisions do not apply." (Our paraphrase)

4.24 Section 1587(b)(i) BGB provides:¹⁹

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 No. 1, 2, die der andere Ehegatte in der Ehezeit erworben hat, so überträgt das Familiengericht auf diesen Rentenanwartschaften in Höhe 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

4.25 Section 1587(b)(iii) provides:²⁰

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 nicht erfüllt. Das

19 Ibid 1468. Subsection (b)(ii) contains a similar provision. "Transfer and vesting of pension rights by the family court. If during the subsistence of the marriage a spouse has acquired pension rights in a statutory pension insurance scheme within the meaning of S 1587a para. 2 No. 2 and these exceed the rights within the meaning of S 1587a para. 2 Nos. 1 and 2 which the other spouse had acquired during the marriage, the family court will transfer half the difference in value to these pension rights. Details are laid down in accordance with the provisions relating to the statutory pension insurance schemes." (Our paraphrase)

20 Ibid. "If the adjustment is not to be made in accordance with para. 1 or 2, the obliged spouse has to pay on behalf of the entitled spouse the amount required to make up the difference in value as a contribution towards the creation of rights to a particular pension under a statutory pension insurance scheme; this applies only so long as the entitled party does not yet satisfy the conditions for an old-age pension under a statutory pension scheme. Details are determined by the provisions relating to pension insurance schemes. Pension rights to be transferred in accordance with para. 1 or created in accordance with para. 2 shall be included in the adjustment; in determining the settlement only one single non-recurring adjustment may be made." (Our paraphrase)

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

4.26 Section 1587(g)(i) BGB provides:²¹

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 absehbare Zeit eine ihm nach Ausbildung und Fähigkeiten zumutbare Erwerbstätigkeit nicht ausüben kann oder das fünfundsechzigste Lebensjahr vollendet hat.

4.27 The following conclusions may be drawn:

(a) Gray²² 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

21 Ibid 1481. "Claim to payment of pension. The spouse whose pension that is to be adjusted exceeds that of the other has to pay the other spouse an equalising allowance to the amount of half the excess at that particular time. This allowance may be demanded only when both spouses have acquired a pension or the obliged spouse has acquired a pension and the other spouse, by reason of illness or any other disability or physical or mental infirmity, cannot for the foreseeable future make a reasonable living in keeping with his training and abilities or has completed his sixty-fifth year of life." (Our paraphrase)

22 Gray 10.

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 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 are applied alternatively 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 that have been accumulated during the marriage are eligible for equalisation.

Switzerland

4.28 The Swiss Zivilgesetzbuch (ZGB) makes no provision for the question under discussion. Tuor and Schnyder²³ explain the general position as follows:

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

4.29 It is evident that a spouse's expectations stante matrimonio of sharing in the other spouse's future pension benefits also cease to exist on divorce.

23 Tuor & Schnyder 156. "On divorce the spouses' relationship under matrimonial property law also ends. If there was a marriage contract it falls away. No claim to inheritance exists between divorced persons whether statutory or in terms of testamentary dispositions in favour of the other that a divorced spouse may have made before the divorce. The same principle holds good for benefits under insurance law." (Our paraphrase)

4.30 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 to the payments.²⁴

4.31 Reform of the matrimonial property law has however recently been completed. In 1976 the "Expertenkommission für die Revision des Familienrechts" was appointed in Switzerland. Far-reaching changes to the matrimonial property law resulted from this Commission's activities. New fifth and sixth parts (relating to marriage law and matrimonial property law) were recently inserted in the ZGB.²⁵

4.32 Unless otherwise provided in an antenuptial contract, the accrual régime (Errungenschaftsbeteiligung) applies by law.²⁶ A distinction is made between Errungenschaft (accrual) and Eigengut (personal property).²⁷ Accrual includes inter alia "die Leistungen von Personalfürsorgeeinrichtungen, Sozialversicherungen und Sozialfürsorgeeinrichtungen"²⁸ or pension income. As the report of the Expertenkommission was not published, and since the Swiss courts have not yet had the opportunity of interpreting the provision, it is not possible to determine whether an undistributed pension falls within the ambit of this provision.

24 Ibid 159.

25 This legislation was passed on 5 October 1984 and approved by referendum on 14 January 1985. It is understood that the new Act will come into operation on 1 January 1988.

26 Sec 181 ZGB.

27 Secs 197-198 ZGB.

28 Sec 197.2.2.

4.33 The present Swiss law shows many similarities to the South African law on this subject. The recent reforms take cognisance of pensions, but the extent of such cognisance is still uncertain.

. Austria

4.34 The Austrian Allgemeine Bürgerliches Gesetzbuch (ABGB) makes no specific provision for the case in question. On divorce a simple division of "eheliche Gebrauchsvermögen" (matrimonial property) and "eheliche Ersparnisse" (matrimonial savings) takes place. Section 81 ABGB provides as follows:²⁹

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 Ehegatten während aufrechter ehelicher Lebensgemeinschaft angesammelt haben und die ihrer Art nach üblicherweise für eine Verwertung bestimmt sind.

29 Schwind 305.

"1. If the marriage is dissolved, set aside or annulled, the matrimonial property and the matrimonial savings have to be divided between the spouses. In the division, any debts which are closely connected with the matrimonial property and the matrimonial savings have to be taken into account.

2. Matrimonial property comprises the movable or immovable corporeal things that were available for the use of both spouses during the subsistence of the marriage; it also includes the household effects and the common home.

3. Matrimonial savings comprise investments of value of whatever kind that the spouses have accumulated during the subsistence of the marriage and which by their nature are normally realisable."
(Our paraphrase)

4.35 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". Schwind³⁰ 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 in this definition in the light of the view that a true value can in fact be attached to the investment on divorce. Schwind³¹ 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.

4.36 In the light of the arguments above, it would seem that the Austrian law does not recognise any claim of a spouse to the pension benefits of the other spouse.

THE ANGLO-AMERICAN SYSTEMS

England

4.37 It may be said 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 position as follows:³²

The court is vested with extremely wide and flexible powers of financial provision and property adjustment. These powers are to be so exercised (as observed in Chamberlain v Chamberlain (1973) 1 WLR 1557 at 1564) "as to place the parties, so far as it is practicable, and having regard to their conduct, 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".

30 Ibid 310.

31 Ibid 309.

32 Gray 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 not however discussed here.

The court is thus directed to carry out a discretionary readjustment of the spouses' economic relations on divorce in the light of their future circumstances and needs.

4.38 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."³³

4.39 The question is how far this provision improves one spouse's position on divorce as regards the other spouse's pension benefits. In 1976 the Occupational Pensions Board stated 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."³⁴ Gray³⁵ 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 Trippas³⁶ 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". Gray³⁷ 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."

4.40 That this view eventually prevailed is evident from the following statement by Harper:³⁸

33 Ibid 157. Our underlining.

34 Ibid.

35 Ibid.

36 1973 Fam 134 at 141.

37 Gray 158.

38 Harper 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.

4.41 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 has been built into English pension law.³⁹ In addition, English law has far-reaching measures relating to social pensions.⁴⁰

4.42 The following conclusions may be drawn:

- (a) English law accepts the principle that one spouse loses his or her claim to the other's pension benefits on divorce, but accepts also that he or 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.

. The United States of America

State measures

4.43 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 distribution of assets on divorce.

4.44 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

39 Gray 158.

40 Cf Cretney 941 et seq for a discussion of the English "supplementary benefit system" and other social pension schemes.

assets should be placed in the pool for distribution. In some states, pension expectations are in this pool, in others not. Thus Freed⁴¹ 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 right has "vested" at the time of the divorce.

4.45 It would seem however that the modern tendency is to acknowledge one spouse's interest in the other spouse's pension to a larger extent:⁴²

The growing judicial trend, however, has been to recognize a vested, unmatured pension as marital property to the extent it was earned during the marriage. Recent decisions by several State Courts both reflect the current trend and accelerate it.

4.46 The majority of authors take California as an example.⁴³ The approach is that "the pension payment serves as a remuneration for services rendered by the employee; if those services were discharged during the marriage, that remuneration must compose a community asset".⁴⁴

4.47 Initially the courts held that "non-vested pension rights" were not "property" but "mere expectations".⁴⁵ This decision was however

41 Freed in Economics of divorce 25.

42 Kess & Westlin in 1984 Estate Planning Review at 68-69.

43 Fain in Economics of divorce 35 et seq.

44 Waite v Waite 1972 Cal Rptr 325; Gray 160. The judgments referred to in paragraphs 4.46 - 4.51 are from Gray.

45 French v French (1941) 112 P. 2d 235; Gray 165.

overruled by the Californian Court in In re Marriage of Brown,⁴⁶ in which case it was decided that all pension rights are distributable on divorce as "a form of property".

4.48 The next question is how to go about quantifying the wife's interest. Gray⁴⁷ 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.

4.49 The courts are not, however, unanimous in this regard. In In re Marriage of Freiberg⁴⁸ the Californian Court took into account the full number of years of the husband's service (including those after divorce), while in In re Marriage of Rister⁴⁹ the Texas Court took the view that only the years of service during the marriage should be taken into account. Gray⁵⁰ 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.

4.50 Next it must be determined how effect should be given to these principles in practice. Gray⁵¹ suggests the following:

Another major problem which arises in relation to the distribution of pension benefits between husband and wife concerns the manner in

46 (1976) Cal Rptr 633; Gray 166.

47 Ibid 165.

48 (1976) Cal Rptr 792, 797; Gray 166.

49 (1974) 512 SW 2d 74; Gray 166.

50 Ibid 167.

51 Ibid 167-168.

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 affecting 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". (In re Marriage of Brown 1976 Cal Rptr 633, 639) 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, the claim of mere administrative burden surely cannot serve as support for an inequitable substantive rule which distinguishes between vested and non-vested rights.

4.51 In the recent past methods of division of spouses' accrued pension interests have however developed into two possibilities. First there are courts which allocate a lump sum equal to a fair share of the present value of the pension of the spouse that is entitled to the pension, in so far as the pension has been accumulated during the marriage. This possibility however presents problems of quantification. Secondly, there are courts which allocate a fair share of the employee-spouse's pension interest to the non-employee-spouse "if, as and when it is paid out". Because of the ease and certainty with which this method can be followed, it nowadays appears to be an attractive method to the American courts.⁵²

The Uniform Marital Property Act (UMPA)

4.52 On 8 August 1984 the National Conference of Commissioners on Uniform State laws adopted the Uniform Marital Property Act. In terms of section 13 of this Act pension benefits are regarded as an asset available

52 Kess & Westlin in 1984 Estate Planning Review at 69.

for division on divorce. Quantification is done at the time of divorce.⁵³ The Act is however silent on the method of division or the alternative orders which the court may consider. In justifying these recommendations the Uniform Law Commissioners submit the following:⁵⁴

There is no consensus in the existing state of the law that justifies the formulation of more than the general policy in the section. Adopting states will already have dealt with many of these problems and the Act does not alter that case law, but simply operates to establish an appropriate marital property interest. The existing body of state case law may be applied to that property interest.

4.53 A basic distinction is made between "marital property" and property not being "marital property". Both parties jointly control the former, while the latter is controlled by the spouse concerned.⁵⁵ Section 13 UMPA establishes a classification of "deferred employment benefits":

Classification of Deferred Employment Benefits

(a) A deferred employment benefit attributable to employment of a spouse occurring after the determination date is marital property.

(b) A deferred employment benefit attributable to employment of a spouse occurring during marriage and partly before and partly after the determination date is mixed property. The marital property component of that mixed property is the part resulting from multiplying the entire benefit by a fraction of which the numerator is the period of employment giving rise to the benefit that occurred after the determination date and during marriage and the denominator is the total period of the employment. Unless provided otherwise in a decree, marital property agreement, or written consent, valuation of a deferred employment benefit that is mixed property shall be made as of the death of a spouse or a dissolution.

(c) Ownership or disposition provisions of a deferred employment benefit which conflict with subsections (a) and (b) are ineffective between spouses, former spouses, or between a surviving spouse and a person claiming under a deceased spouse's disposition at death.

53 UMPA Sec 13(b) at 27.

54 UMPA at 28.

55 UMPA Sec 5 at 16.

4.54 The following conclusions may be drawn:

- (a) Otherwise than in English law, the non-employee-spouse in the opinion of American jurists, has a right on divorce to the pension benefits of the employee-spouse, and this right has to be divided on divorce.
- (b) The former's right on divorce is actuarially quantified and he or she receives a financial share which is determined by the court. If that is impossible, he or she receives a share of the benefit when it is eventually paid out. The latter method is, however, becoming more popular nowadays.
- (c) Although the courts are not unanimous in this regard, the weight of opinion seems to support the principle that only the period of service stante matrimonio should be taken into account in quantifying the benefits.
- (d) The Uniform Matrimonial Property Act now also recognises the principle that a pension benefit is an asset, divisible at the time of divorce.

New Zealand

4.55 The New Zealand matrimonial property law is governed by the Matrimonial Property Act, 1976. This Act maintains the principle that the matrimonial property régime out of community of property operates ex lege, but provides for the accrual régime 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".⁵⁶

4.56 Section 8(i) of the Matrimonial Property Act, 1976, provides:⁵⁷

56 Fisher 1.

57 Ibid 155.

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

4.57 It is interesting to note that section 8(g) of the Act also includes insurance policies in the definition of "matrimonial property":⁵⁸

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 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 ...

4.58 On divorce an equal division of "matrimonial property" takes place.⁵⁹ 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.

4.59 The court, therefore, receives a virtually unfettered discretion to order a reallocation of property on divorce. Fisher⁶⁰ says the following about the way in which section 25(1) is applied in practice:

58 Ibid.

59 Sec 15(1) of the relevant Act.

60 Fisher 127.

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

4.60 In addition to these powers, the court may make an agreement between the parties on a redistribution 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.⁶¹

4.61 The following conclusions may be drawn:

- (a) New Zealand law regards pension expectations as a form of "matrimonial property" which can be divided equitably on divorce.
- (b) Since such pension expectations are difficult to divide in practice, in cases 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.

Australia

4.62 Bailey⁶² explains the underlying principle of financial adjustments 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 s. 79 of the Family Law Act to distribute and allocate assets and the distribution made will by no

61 Sec 31(1) of the relevant Act.

62 Bailey in 1980 Australian Law Journal at 190.

means be determined by the 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.

4.63 Section 79 of the Family Law Act, 1976, provides that the court may order an equitable distribution of assets on divorce.⁶³ In Finnis v Finnis⁶⁴ 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 were 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.

4.64 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".⁶⁵

4.65 The following conclusions may be drawn:

- (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.

63 Rose 2185.

64 (1978) Fam LR No 15 as referred to by Rose 2190.

65 Rose 2159.

- (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.

. Canada

4.66 The Canadian matrimonial property law is regulated separately by the states. The Matrimonial Property Act (Alberta) is an example of such measures. In terms of this Act the courts may order an equitable division of the marriage property on divorce.

4.67 The question whether a pension benefit is an asset capable of being divided, initially drew conflicting answers. However, an answer in the affirmative was given in Alberta in Herchuk v Herchuk⁶⁶ and Moravcik v Moravcik.⁶⁷ The Supreme Court of Canada has however not yet decided the matter.⁶⁸

4.68 Various methods of quantifying a pension are employed. No statutory measures are laid down, the courts being allowed to use their own discretion. The following are examples of the courts' methods of quantifying the pension:

- (a) In Kopecky v Kopecky⁶⁹ the court took the employee's contributions, plus the employer's contribution plus interest as the basis.⁷⁰

66 1983 35 RFL (2d) 327; Institute of Law Research 30. The judgments referred to in paragraphs 4.67 - 4.69 were taken from Institute of Law Research.

67 37 RFL 2d 102; Institute of Law Research 30.

68 Ibid.

69 (1983) 24 Alta LR (2d) 79 QB; Institute of Law Research 34.

70 Cf Institute of Law Research 34.

- (b) In Shumyla v Shumyla⁷¹ the court took the value of the pension it would have had had the employee resigned on the day of the hearing.
- (c) In Kunysh v Kunysh⁷² the court accepted the "present value".
- (d) In Howell v Howell⁷³ the court accepted the value between the "present value without deduction for tax liability" and the "present value after deduction for tax liability".

4.69 How, then, does the court divide the assets? Two methods are used. First, the "valuation and accounting" system by which the pension benefits are placed in the pool of marriage assets which take their turn to be divided on equitable grounds, and not as an asset per se. Secondly, in McAlister v McAlister⁷⁴ the court made an order imposing a trust on the employee-spouse to pay part of the benefits to the non-employee-spouse when the pension was paid out.

4.70 It is important to remember that it is left to the courts to make an equitable order in their discretion. The Institute of Law Research and Reform in Edmonton, Alberta, made the following provisional recommendations inter alia:⁷⁵

- (a) Valuation: The Institute recommends that the contribution and interest formula be used as a basis;

71 Unreported case of 19 March 1982. Cf Institute of Law Research 34.

72 Ibid.

73 (1984) 54 AR 134 (QB); Institute of Law Research 34.

74 (1982) 41 AR 277 (QB); Institute of Law Research 35.

75 Cf Institute of Law Research 42-44 and 59.

(b) Division: The Institute recommends that, with due regard to the principles of the Matrimonial Property Act, and especially the principle of a "just and equitable division", the method of division should be one of the following:

- (i) valuation and accounting - in terms of which the employee-spouse would retain the pension benefit and compensate the non-employee-spouse only for his or her share;
- (ii) valuation and division - in terms of which the administration of a pension scheme should pay the present value of benefits to which the non-employee-spouse is entitled to such person and reduce the employee-spouse's interest accordingly.

4.71 The Institute however rejected the idea that a pension should be divided into two shares on divorce and that both shares should be preserved until the employee-spouse's retirement.

4.72 The following conclusions may be drawn:

- (a) The Canadian law provides for pension interests to be assets capable of being divided on divorce.
- (b) It is left to the courts to make an appropriate order regarding the valuation and division of the spouses' pension interests.

THE HYBRID SYSTEM OF SCOTLAND

4.73 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.⁷⁶

4.74 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.⁷⁷ The effect of the 1964 Act was therefore essentially the same as the position in South Africa today.

4.75 This matter has been under investigation by the Scottish Law Commission since 1976. In a published working paper the Commission maintained that the court should be empowered to order an equitable redistribution.⁷⁸ However this initial recommendation was not accepted by the Commission. Instead of an unfettered discretion, the following principle was accepted:⁷⁹

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;

76 Family law report 68.

77 Ibid 69.

78 Memorandum 206.

79 Family law report 92.

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

4.76 With regard to life insurance policies and pension schemes the Commission accepted the following principles:⁸⁰

- (a) Only those 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.
- (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 each case."⁸¹

4.77 The Commission's recommendation was then formulated as follows:⁸²

Where either spouse has rights or interests under a life policy or occupational pension scheme or similar arrangement, the proportion of

80 Ibid 97-98.

81 Ibid.

82 Ibid 98.

such rights or interests which relates to the period from the marriage until the date of financial separation should be treated as matrimonial property.

4.78 The recommendations of the Scottish Law Commission have since been embodied in legislation.⁸³

4.79 The following conclusions may be drawn:

- (a) The Scottish law did not recognise the wife's right to share in the benefits of her husband's pension scheme on divorce.
- (b) The Scottish Law Commission recommended, 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 should be relevant.
- (d) These proposals have now been put into operation.

83 Twentieth annual report 1984-85 at 13. Cf the Family Law (Scotland) Act, 1985.

5. COMMENTS RECEIVED

GENERAL

5.1 In the working paper that was distributed for comment during 1984 the Commission made certain proposals for the reform of the existing law. These proposals were of course tentative and were made with a view to eliciting comment.

5.2 The proposals embraced the following:

- . that the principle be adopted that a spouse should be able to share in the accumulated pension benefits of the other spouse;
- . that the legislature should lay down a formula for the quantification of the parties' pension interests according to certain guidelines;
- . that the quantified pension interests be divided according to the spouses' matrimonial property régime;
- . that, as far as it is possible, division should take place at the time of divorce.

5.3 In order to elicit meaningful comments a questionnaire was attached to the working paper. Commentators were requested to express their views on aspects in the working paper as well as in the questionnaire.

5.4 Most useful comments were received from a wide diversity of individuals and bodies. Because the matter was so controversial, it was however a question of quot homines tot sententiae. An attempt will be made below to accentuate the essence and the common ground of the replies. Where views are too divergent, the salient point will be set out.

THE QUESTIONS

5.5 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?

Nearly all the persons who commented were agreed that if there were inequities not only the husband's accumulated pension benefits but also those accumulated by the wife should be taken into account.

The commentators were however divided on the question whether legislation was really necessary.

On the one hand it was argued (and the majority appear to hold this view) that a spouse's interest in the accumulated pension interests of the other spouse cannot at present be regarded, and are not regarded, as an economically realisable asset; that this creates an unfair situation, and that legislation is necessary in this regard in order to obviate resultant inequities.

On the other hand it was argued that the present dispensation makes adequate provision for a fair division on divorce: either under the matrimonial property régime the parties chose at the time of their marriage, or under the parties' deed of settlement on divorce.

Commentators who expressed an opinion on the extent of the legislative intervention generally recommended that only a discretion should be conferred upon the courts, as in the case of maintenance, to order a fair distribution of the pension interests.

5.6 If so, what would the correct theoretical basis for such intervention be?

Quite a number of those who favoured legislation argued that both parties, be it as breadwinner or as home-maker, make contributions to the family unit. Considerations of fairness therefore dictate that the spouse who is not in a position to accumulate a pension of his or her own should share in the pension benefits that would in any case have been shared had the marriage lasted.

On the other hand those who were against legislation took the line that the parties' matrimonial property régime regulated the distribution of pension interests. Others felt that for that very reason legislation should be passed to ensure that the pension interests would in fact be divided in accordance with the matrimonial property régime.

5.7 What guidelines should be applied in quantifying the wife's "right" and what weight should be attached to each guideline?

Several persons who commented agreed with the guidelines¹ in the Commission's working paper. Others, however, thought that any relevant factor should be taken into account, for instance the parties' age, life style, future needs, inflation, the parties' "fault" with regard to the divorce, etc.

Others again, were in favour of simply using a formula such as the following: $\frac{A}{B} \times C = \text{Benefits}$, where A equals the duration of the marriage while the spouse was a member of the fund; B equals the total number of years of membership of the fund; and C equals the total pension benefits accumulated up to the time of the divorce.

The majority of those who commented however felt that it would be almost impossible to lay down an ideal formula for the quantification of a pension interest according to predetermined guidelines. Some of them thought that it should be left to the courts to make a fair distribution at the time of the divorce on the strength of an actuarial determination of the pension interest based on, inter alia, the particular circumstances of the parties concerned.

5.8 How and when should the wife's "right" be liquidated?

Widely divergent proposals were received in this regard.

1 Viz the duration of the marriage; the parties' contributions to pension schemes; the contributions of other parties, e.g. employers, to such schemes; the defreezing contingency that results in payments from the funds.

Some were of the opinion that a pension interest should be liquidated only at the time of the defreezing contingency (usually resignation, retirement or death). Others were in favour of a "clean break" on divorce and recommended a cash payment by the member-spouse.

From the actuarial profession the desirability of the allocation of a lump sum was mentioned, but it was pointed out that the court would then actually be called upon to predict the future since the lump sum would have to cover future expectations and events. This could however be done by an actuarial quantification. As against this it was proposed that the pension interest should be determined according to the value of the benefit if the member-spouse were to die at the time of divorce. In this case the rules of the pension fund would provide a satisfactory solution and it would not be necessary to resort to actuarial quantification.

Some of the commentators were of the opinion that the pension interest, as quantified at the time of the divorce, should merely be divided in accordance with the deed of settlement, or else the parties' matrimonial property régime. Alternatively courts should be granted an unfettered discretion to make a fair division.

Many who commented pointed out the problems created by the absence of a provision for the compulsory preservation of pension benefits. As a result a spouse's pension interest is difficult to determine at the time of the divorce. Some of the commentators were nevertheless in favour of a division of the various pension interests when they actually fall due to a member-spouse. The possibility of the registration of a court order against the pension fund was mentioned in this regard.

A further possibility that was mentioned was that the pension interest should be actuarially quantified at the time of divorce and that the member-spouse should cede or take out a policy equivalent to the other spouse's share.

One commentator pointed out that if the terms of the antenuptial contract were to be the decisive factor, parties whose contracts do not provide for pension benefits should be granted an opportunity to alter the contract.

5.9 Should any restriction be imposed on the duration of marriages eligible on divorce for a division of pension interests?

Commentators were again divided.

Some were of the opinion that a considerable period should elapse before a person should be able to lay claim to any share of the other's pension interest. Others again thought that time should not play a role – pension interests should for instance be divided in accordance with the matrimonial property régime. One commentator who thought that the duration of the marriage should play no part also pointed out that a member-spouse might at some point or over a period of a few months buy back a considerable share of pension benefits from the fund, while the marriage might only last for, say, one year. In such case the duration of the marriage could therefore not be taken as a criterion.

The position in which a non-member-spouse might be placed if the marriage were dissolved, say a year before the member-spouse's retirement, was also brought to the Commission's attention.

Some of those who thought that the duration of the marriage should not be such a predominant factor were of the opinion that it should only be a factor when it comes to the calculation of the pension interests and that the courts should still have a wide discretion in this regard to order a fair distribution.

5.10 Should insurance policies not be dealt with on the same basis as pension benefits? If not, why not?

Some of the persons who commented were of the opinion that in many instances insurance policies served a different purpose from that of pension benefits. The former might have been taken out as an endowment policy, or as security for outstanding debts, while pension benefits are out and out aimed at providing for old age. They consequently felt that insurance policies should not be taken into account.

Others again were of the opinion that insurance policies should indeed be taken into account, because they form part of the "family assets".

Some were of the opinion that insurance policies should be taken into account only in so far as the specific matrimonial property régime provides therefor.

One of the commentators recommended that this matter should be considered only once the division of pension interests is working properly in practice.

5.11 Would the proposed division be unfair to the husband? If so, to what extent should his rights be protected?

In answering this question commentators again emphasised that any reform should take not only the husband's pension benefits into account, but also the wife's accumulated pension benefits.

It was pointed out that if divorce were to be regarded as a defreezing contingency, it would be unfair if a spouse were to have to transfer a large lump sum to the other spouse. The pension of the former, in most cases the husband, would be seriously reduced as a result. Furthermore the wife might remarry and also share in the pension benefits of that marriage.

Should divorce not be regarded as a defreezing contingency, the lump-sum payment that the member-spouse has to transfer to the other spouse might be so great that the former would be obliged to sell another asset, e g a house, in order to be able to pay the pension interest. Quite possibly the member-spouse might not even have the money or a realisable asset out of which to pay the pension interest.

Several of the commentators thought that if a suitable formula for distribution could be found or if the court were empowered to order a just and fair division on divorce, any injustices would be obviated.

The position of ministers of religion who get divorced and are then placed under church censure was also brought to the Commission's attention. In such a case the minister's pension benefits are reduced and he receives

only his contributions together with interest. Divorce in itself therefore reduces the member's financial expectations.

Some of the commentators pointed out that the division of pension interests might have certain income tax implications. On retirement a member-spouse might be taxed on his total pension benefits while the pension had in actual fact been reduced because of the divorce and the payment of the non-member's share.

5.12 What economic implications would the proposed system have?

Commentators pointed out that if a spouse's interest were linked to the pension of the member-spouse on divorce, the result would be increased administration costs to the fund and consequently an increase in members' contributions.

Others again believed that the welfare task of the State would be eased if provision were made for the division of pension interests. Yet other commentators thought that sociological problems might arise because the member-spouse's pension might be reduced to such an extent that it would not be enough to live on.

One commentator expressed the opinion that if divorce were to be regarded as a defreezing contingency upon which the pension interests are divided, pension funds would be destabilised because of the high divorce rate. In this regard it was also pointed out that the employer's contribution to pension benefits in most cases exceeds those of the employees.

SUMMARY

5.13 A large number of the commentators were of the opinion that since there is no provision at present for the compulsory preservation of pension benefits it is impossible at this stage to attempt to make provision for the division of pension benefits on divorce. A member-spouse who is contemplating divorce, might resign earlier out of pure spite just to have only his contributions plus interest returned. The amount available on

divorce would then be much smaller than it would have been had the member not resigned. On the other hand a person who is contemplating resignation might, for the sake of convenience, obtain a divorce prior to his resignation, whereupon the non-member-spouse's interest would be calculated on the member's contributions together with that of the employer. The commentators were of the opinion that, unless the basis and essential features of pension funds were changed, a fair division of pension interests would not be possible.

5.14 On the other hand there were commentators who agreed basically with the recommendations in the working paper, but who foresaw practical problems.

5.15 A third group of the commentators did not think that legislation was necessary - legal representatives and their clients should merely be made aware that spouses do have a conditional right to share in the accumulated pension benefits and that spouses can accomplish a fair division by settlement.

6. GENERAL CONCLUSIONS AND RECOMMENDATIONS

GENERAL CONCLUSIONS

6.1 It was pointed out in Chapter 3 that a spouse's interest in the unrealised pension interests of the other spouse can at most play a role only if the defreezing contingency is about to take place, but then still with due regard to maintenance needs. In view of the practical difficulties involved in quantifying pension interests it seems tempting to leave things as they stand. That, however, does not bring one any nearer to an equitable distribution of pension interests.

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

Consultation: The majority of persons who commented adopted the approach that one spouse should also benefit from the pension interests of the other spouse on divorce. There were however some differences of opinion as to the manner of distribution. There were also some who thought that the existing law provided sufficiently for a distribution by settlement.

Developments abroad: As shown in Chapter 4 reform has recently taken place in several developed legal systems in order to grant a divorcée some share in her former husband's pension interest. For example, this is already an accepted principle in England, Scotland, the USA, New Zealand, the Netherlands, West Germany, Canada and Switzerland.

Justice and equity: In Chapter 3 the inequity that could apparently arise from the present legal position was pointed out. Potential injustice and inequity is always a good argument in favour of reform.

6.3 The following views in favour of maintaining the status quo, emerged from the comments:

(a) Reform of the law as envisaged has the potentiality of dispute and litigation. The fact of the matter is that the majority of divorce actions are settled by agreement. There is no real reason to fear that this trend would be changed by reform.

(b) Implementation of the principle of distribution of pension interests would give a spouse a right on divorce which such spouse did not have during the marriage. While the marriage lasts a spouse in fact has an economic interest in the member-spouse's pension scheme although that interest is not realisable before divorce.

(c) A spouse's interest cannot be determined. In the past this investigation has foundered on this argument. In order to surmount this problem the legislature could -

- . lay down a formula for quantification; or
- . leave the task of quantification to the court.

It could be argued against the first option 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 second 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. On the other hand it might be argued that a certain amount of flexibility could be introduced into the quantifying process in this way which would be conducive to settlements.

(d) 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 of giving effect on divorce 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.

The principle underlying the division of pension interests is one of equity. Our matrimonial property law is founded on this very principle, and by giving the spouses the opportunity of also sharing the pension interests, this principle is extended for the better.

RECOMMENDATIONS

6.4 The fundamental problem at present is that there is no legal certainty that pension interests that will become payable in the future should be regarded as an asset.

- . The Commission recommends that a spouse's accumulated pension interests should for purposes of settlement on divorce be regarded as an asset of the estate of the member of the pension fund.

6.5 A further problem lies in the question what precisely is meant by the expressions "accumulated pension interests" and "pension fund".

6.6 The Pension Funds Act, 24 of 1956, applies to an important source of provision for old age viz pension funds, provident funds and retirement annuity funds. The Act does not, however, apply to pension funds created under an agreement published in terms of section 24(1) of the Labour Relations Act, 28 of 1956. Furthermore, official funds i e funds established by special legislation for employees of the State and semi-Government institutions, are exempted from the provisions of the Act. Together, these various funds however constitute the most important source of provision for old age since the greatest number of people belong to one or more of these funds. These funds may therefore be regarded as the starting point for the division of accumulated pension interests.

6.7 So far as accumulated pension interests are concerned the Commission considers that it would be almost impossible to lay down a single formula for the quantification of pension interests that would be an equitable formula for every marriage, especially since each marriage has its own peculiar circumstances that might play a role in this regard. The Commission is furthermore of the opinion that for the present there should be no radical intervention in the existing law of pensions; that the amount

available for division should be readily ascertainable; that the amount should be within the means of the member-spouse; and that a future spouse or future spouses should be prejudiced as little as possible.

6.8 These requirements could probably be met by defining the pension interest with reference to the amount the member-spouse would receive if, at the time of the divorce, he should cease to be a member of the fund because of his resignation. In most instances the amount is calculated according to the member's contributions during his membership of the fund plus such interest as is determined by the fund. In the case of retirement annuity funds section 1 of the Income Tax Act, 58 of 1962, provides inter alia that a member who discontinues his contributions prematurely shall be entitled to an annuity payable only from the date on which he would have become entitled to the payment of an annuity if he had continued his contributions, and determined in relation to his actual contributions. The definition furthermore provides that no member's rights to benefits shall be capable of surrender, commutation or assignment, or of being pledged. A retirement annuity therefore does not have a resignation value as in the case of pension and provident funds. An amount comparable with the resignation value of a pension could however be obtained if it were specified in the case of retirement annuities that the accumulated pension interest equals the member's contributions to such a retirement annuity fund plus interest at a fixed rate. Such a provision would not be unusual since a similar provision is already found for example with regard to the definition of "property" in section 3(3) of the Estate Duty Act, 45 of 1955, where the valuation of a "domestic policy" (as defined in section 1 of the Insurance Act, 27 of 1943) and the valuation of a "benefit which is due and payable by any fund" are set forth.

6.9 Although these amounts would be less than they would have been if the interest had been quantified actuarially with due regard to the various defreezing contingencies provided for by the fund or the retirement annuity, they none the less offer a benefit that a non-member-spouse does not have at present. Moreover, where the marriage has lasted for several years the resignation value or the contributions with interest may amount to a considerable sum. In the opinion of the Commission these amounts boil down to the minimum that should be available for division on divorce. Such

a benefit would furthermore be readily ascertainable and ought to obviate or limit litigation in this connection.

- . The Commission accordingly recommends that the pension interest be defined with reference to those benefits which the member would have received if he had resigned as a member of the pension fund, as defined in the Pension Funds Act, 24 of 1956, on the date of his divorce irrespective of whether the Act is applicable or not, or, in the case of a retirement annuity fund, the contributions of a member of such a fund as at the date of divorce together with interest calculated at the ruling rate at that date as prescribed by the Minister of Justice under section 1(2) of the Prescribed Rate of Interest Act, 55 of 1975.

6.10 With regard to this recommendation two members viz the Chairman and Mr G G Smit, held a dissenting view on the grounds that this method of quantification of the pension interest would be neither realistic nor equitable.

6.11 The Commission is of the opinion that if the accumulated pension interest is regarded as an asset it should be capable of being divided in accordance with the parties matrimonial property régime, just as any other asset -

- . in the case of a marriage in community of property: in equal shares;
- . in the case of a marriage out of community of property subject to the accrual régime: according to the accrual;
- . in the case of a marriage out of community of property and of profit and loss: absolute separation.

6.12 In the case of absolute separation of property and of profit and loss the court is empowered by section 7(3) of the Divorce Act, 70 of 1979, to order the equitable division of assets of marriages entered into before 1 November 1984.

6.13 The Commission considered the question whether the courts should not be empowered to order an equitable division of pension interests in every case.

6.14 The Commission however sees no justification for treating pension interests differently from other assets of the parties. It would run counter to the essential features of the various matrimonial property régimes if a single asset were to be treated differently from the rest of the parties' assets. For instance, in a marriage in community of property each party has an equal share in the joint estate. Save for the forfeiture of benefits, effect is given to this principle on divorce because the order of divorce at the same time authorises the division of the joint estate into equal shares. Factors such as the duration of the marriage, the means and needs of the parties, or each party's contribution to the joint estate are irrelevant. Why, then, should a single asset be made an exception to the rule and divided according to different principles?

6.15 The same problem would arise in the case of marriages subject to the accrual régime: The purpose of this régime is to give effect to the idea underlying the division of pension interests viz that the party who fulfilled the role of home-maker should be able to share in the assets that the other marriage partner accumulated during the marriage. If the pension interest is regarded as an asset in the estate of the member-spouse, that asset would automatically be included in the calculation of the accrual. If the pension interest is to be calculated on a different basis from that of other assets it would mean that two different divisions would be necessary - one in accordance with the matrimonial property régime and, so far as the pension interest is concerned, the other according to other considerations.

6.16 In the case of marriages out of community of property entered into before 1 November 1984 and in the case of a division of the spouses' assets in terms of section 7(3) of the Divorce Act, 70 of 1979, the court takes precisely those factors into consideration which in its opinion would result in an equitable division. In this case too, there is therefore no necessity to divide the pension interest on a different basis from that of

the other assets. This amount should simply be regarded as an asset in the estate of the member-spouse.

6.17 The only case where a pension interest would not be divisible, and, in the opinion of the Commission, should not be divisible, is in the case of marriages out of community of property excluding profit and loss and the accrual régime entered into after 1 November 1984. The reason why pension interests should not be divisible in cases of such marriages is to be found in the spirit of the reforms effected by the Matrimonial Property Act, 88 of 1984. In the first place that Act endeavoured to make marriage in community of property a more attractive option by introducing the principle of equal powers of administration. Secondly, the accrual régime was introduced which embodies the principle of sharing in the growth of the spouses' estates during the marriage. Thirdly, provision was made for an equitable division of assets on divorce in the case of existing marriages where absolute separation is in force. Fourthly, the possibility was created of changing the matrimonial property régime during the subsistence of the marriage. If parties still prefer the absolute separation of property notwithstanding all these options, the division of certain assets (pension interests) should in the opinion of the Commission not be forced upon them. The legislature probably adopted the same attitude in not entitling such spouses to the equitable division of assets on divorce.

6.18 So far as the payment of pension interests is concerned, the Commission is of the opinion that if a spouse were entitled to a certain part of the pension benefits (because the pension interest is regarded as an asset) such a spouse would have a lever in bargaining for a compensatory benefit during the settlement negotiations. Such a compensatory benefit might, for instance, be -

- . an undertaking by the member-spouse to cede a policy to the other spouse equal to the latter's share in the pension interest plus interest;
- . the transfer of a sum of money or some other asset to the name of the non-member spouse.

6.19 Section 37A of the Pension Funds Act, 24 of 1956, at present prohibits the reduction, transfer or cession of pension benefits.

6.20 In some instances, especially in a case where a member's contributions to a fund amount to a substantial sum of money, it might not be practicable to transfer an amount of money or any other asset to the non-member. On the other hand the non-member-spouse might prefer the share of the pension benefit to remain frozen until the normal defreezing contingency takes place.

- . The Commission recommends that the courts should be empowered to order that the books of the pension fund be endorsed to the effect that an amount determined by the court shall be paid to the beneficiary when the pension benefits are paid out.

6.21 In conclusion it might be mentioned that the Commission considered the question whether insurance policies should not be included in the present investigation.

6.22 Because of the wide variety of insurance policies that are found, this would have called for an investigation of a highly complicated nature requiring intensive consultations with experts in this field. The Commission would prefer to wait and see whether the present recommendations, if they are embodied in legislation, produce satisfactory results before investigating the possibility of taking insurance policies into account for purposes of division.

6.23 One of the problems with the term "insurance policies" is that it is not a clearly defined concept - especially as such a wide variety of investments can be subsumed under this term.

6.24 Furthermore insurance is a rapidly changing field in which new and improved types of insurance policies are constantly being designed, so much so that it would be very difficult at present to find a single, uniform basis upon which to evaluate the interest of an insured person in an insurance policy. One only has to think of endowment insurance, life

insurance, term insurance (to mention but a few examples) and the different variations and combinations of these.

6.25 Unlike provision for a pension insurance policies cannot generally be said to be taken out as provision for old age. Insurance policies and especially endowment policies are often taken out for other specific purposes such as, to insure outstanding debts, to provide for children's future education debts, to pay for an overseas tour, etc.

6.26 It must also be remembered that any one is free to take out an insurance policy, or even a retirement annuity. In this regard the Commission would not like to go so far with its present recommendations - on the one hand by increasing the extent of the pension interest, and on the other hand by including every form of provision for old age as well as insurance policies - that spouses will eventually be discouraged or even deferred from making their own provision for the day when they will no longer have a fixed income.

6.27 In the light of the foregoing the Commission recommends the draft Bill contained in Annexure B.

ANNEXURE A

INDIVIDUALS AND BODIES WHO SUBMITTED COMMENTS ON THE COMMISSION'S WORKING PAPER

* Universities

1. University of Pretoria
 - Dean of the Faculty of Law
2. University of Zululand
 - Acting Director: Institute for Public Service and Vocational Training

* Pension and insurance profession

1. The Association of Trust Companies in South Africa
 - Secretaries
2. K J Creasey, Newlands
3. Department of Health and Welfare (as it then was)
 - Director-General
4. The Life Offices' Association of South Africa
 - Executive Director
5. The Prudential Assurance Company of South Africa Ltd
 - Manager: Legal Services

* Actuarial profession and accountants

1. The Actuarial Society of South Africa
 - Honorary Secretary
2. Robert J Koch, Cape Town
3. The South African Institute of Chartered Accountants
 - Director: Membership Services

* The Bar

The Cape Bar Council
At the request of the Bar Council an individual member submitted comments

* The Side Bar

1. The Law Society of the Transvaal

Mr L N Shapiro
Mr P Strydom
Mrs C Wolfaardt

2. The Association of Law Societies of the Republic of South Africa
(views of members of an ad hoc committee)

Prof F Bosman
- Director: Development

Mr A M Brokensha
- President of the Natal Law Society

Mr M Searle
- Member of the Law Society of the Cape of Good Hope

Messrs J C Pretorius and B R Ashman
- Members of the Law Society of the Orange Free State

Mr L N Shapiro
- Member of the Law Society of the Transvaal

3. The Law Society of the Cape of Good Hope

M H Hales

* **Banks and Building Societies**

1. Nedbank Group Pension Fund
- Chairman
2. Standard Bank of South Africa Ltd
- Principal Officer
3. United Building Society
- Deputy General Manager
4. Volkskas Pension Fund
- Secretary

* **Commerce and Industry**

1. Afrikaanse Handelsinstituut
- Executive Director
2. Central News Agency Limited Provident Fund
- Chairman
3. Electricity Supply Commission Pension and Provident Fund
- Manager (Pensions)
4. Trade Union Council of South Africa
- Legal Adviser

* **City Councils**

1. City Secretariat of Johannesburg
 - City Secretary
 - Chairman: Staff Board
2. City Council of Pretoria
 - Town Clerk
 - Manager: Pretoria Municipal Pension Fund
 - Deputy Manager: Pretoria Municipal Pension Fund

* **Women's, Church and other organisations**

1. Family and Marriage Society of South Africa
 - Director
2. National Council of Women of South Africa
 - National President
3. Nederduitse Gereformeerde Kerk van Transvaal
 - Church administrator
4. Oranje Vrouevereniging Hoofbestuur
 - Director
5. South African Federation of Business and Professional Women
 - National President
6. Women's Legal Status Committee
 - Conveners

* **Others**

1. The Master of the Supreme Court, Bloemfontein
2. Department of Finance - Registrar of Financial Institutions

* **Members of the public**

1. N Bennett, Port Elizabeth
2. V T Boll, Cape Town
3. H F Bosman, Pretoria
4. C Clement, Rondebosch
5. H de V du Toit, Pretoria
6. E Hagen, East London
7. A C Robinson, Pretoria
8. Y T Seaman, Cape Town
9. T Venter, Pretoria
10. R Vos, Cape Town
11. D H Watkin, Pinelands

BILL

To amend the Divorce Act, 1979, so as to provide that a spouse may share in the pension interest of the other spouse upon divorce; to amend the Pension Funds Act, 1956, so as to empower the court to order that an endorsement be made in the books of a pension fund to the effect that a specific amount shall be paid to a beneficiary designated by the court; and to provide for matters incidental thereto.

Introduced by the Minister of Justice

BE IT ENACTED by the State President and the Parliament of the Republic of South Africa, as follows:-

Amendment of
section 1 of
Act 70 of 1979.

1. Section 1 of the Divorce Act, 1979 (hereinafter referred to as the principal Act), is hereby amended by the insertion after the definition of "divorce action" of the following definition:

"'pension interest' means that amount to which
a member of a pension fund, as defined in
the Pension Funds Act, 1956 (Act No 24 of
1956), irrespective of whether the provisions
of that Act apply to the fund or not, would
have been entitled in terms of the rules of
the fund if, at the date of his divorce, he
would have ceased to be a member of the
fund on account of his resignation from his
office or as a member of the fund and, in the
case of a retirement annuity fund, the
contributions of the member of such fund up
to the date of the divorce together with such
interest as may have been prescribed by the
Minister of Justice in terms of section 1(2) of
the Prescribed Rate of Interest Act, 1975
(Act No. 55 of 1975).".

Amendment of
section 7 of
Act 70 of 1979
as amended by
section 36 of
Act 88 of 1984.

2. Section 7 of the principal Act is hereby
amended—

(a) by the insertion after subsection (6) of
the following subsection:

"(7) For purposes of the division of
the assets of the parties in terms
of this section or the division of
their joint estate or the division
of the accrual of their estates

upon divorce the pension interest of a party shall be deemed to be part of his assets."

Insertion of section 37E in Act 24 of 1956.

3. The following section is hereby inserted in the Pension Funds Act, 1956, after section 37D:

"Endorsement in the books of the fund.

37E Notwithstanding the provision of any other law or of the rules of a pension fund, the court granting a decree of divorce in respect of a member of a pension fund may order that an endorsement be made in the books of the pension fund to the effect that when the pension benefits become payable such part of the benefits as the court may determine shall be paid to the person designated by the court."

Short title and commencement.

4. This Act shall be called the Divorce Amendment Act, 1987, and shall come into operation on a date fixed by the State President by proclamation in the Gazette.
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