



Goals for 2010 & beyond

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2010 PLA CONFERENCE - SPIER - WESTERN CAPE
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- Speaker* DAVID GERAL
- Company* BOWMAN GILFILLAN ATTORNEYS
- Topic* PENSION BENEFITS ON DIVORCE:
THE LEGAL POSITION


PFA: SECTION 37A(1)

Pension benefits not reducible, transferable or executable

- (1) “Save to the extent permitted by this Act, the Income Tax Act, 1962 (Act No. 58 of 1962), and the Maintenance Act, 1998, no benefit provided for in the rules of a registered fund (including an annuity purchased or to be purchased by the said fund from an insurer for a member), or right to such benefit, or right in respect of contributions made by or on behalf of a member, shall, notwithstanding anything to the contrary contained in the rules of such a fund, be capable of being reduced, transferred or otherwise ceded, or of being pledged or hypothecated, or be liable to be attached or subjected to any form of execution under a judgment or order of a court of law...”,

PFA SECTION 37D(1)(d)

Fund may make certain deductions from pension benefits

- (1) A registered fund may – ...
 - (d) deduct from a member's benefit or minimum individual reserve, as the case may be-
 - (i) any amount assigned from such benefit or individual reserve to a non-member spouse in terms of a decree granted under section 7(8)(a) of the Divorce Act, 1979 (Act No. 70 of 1979); ... 
- Includes customary marriages because those may only be dissolved (on limited grounds) by a court by a decree of divorce [Recognition of Customary Marriages Act, s8]

DIVORCE ACT 70 OF 1979: section 7(7)

- (a) “ In the determination of the patrimonial benefits ... the pension interest of a party shall ... be deemed to be part of his assets”
- To achieve a fair/realistic division of the estate
- Statutory deeming provision: no order required
- Not applicable to marriages on/after 1 November 1984 in terms of an antenuptial contract which excludes:
 - community of property;
 - community of profit and loss; and
 - the accrual system.

DIVORCE ACT 70 OF 1979: s 7(8)

- (a) “ the court granting a decree of divorce ... may make an order that –
 - (i) any part of the pension interest ... due or assigned ... shall be paid by that fund to that other party when any pension benefits accrue in respect of that member;
 - (ii) the registrar of the court in question forthwith notify the fund ...”
- An order of payment to anybody other than former spouse is invalid (eg. minor children, other nominee) for purposes of s 37D(1)(d)
- If court does not order registrar to notify fund, and fund does not endorse but s 7(8)(a)(i) order is made, too bad for fund



DIVORCE ACT/PFA Interplay

- S 37D contains the exceptions to 37A
- Divorce order must contain the order of payment to trigger s 37D(1)(d)
- Failure to obtain an order does not mean that the former spouse can never access that part of the joint estate


Maharaj [2002] 2 All SA 34 (D) supporting *Sempapalele* 2001(2) SA 306

- Former spouse precluded from attaching benefit in terms of S 37A, but may obtain declaratory relief and/or attachment upon member's receipt of payment of accrued benefit



PFA SECTION 37D (2)-(6): Substantive issues (1)

- Deduction deemed to be withdrawal benefit [subs(2)]
- Ranking: home loan/guarantee predating divorce order (whether or not due and payable), maintenance, divorce decree [subs(3)] 
- Aggregate deductions may not exceed pension interest available “at any given time” [subs (3)(a)] 
- Assigned portion deemed to accrue to member on date of divorce if divorce is on or after 13 September 2007 [subs (4)(a)]; deemed accrual date is 13 September 2007 for divorce preceding that date [subs(4)(d)]


PFA SECTION 37D (2)-(6), substantive issues (2)

- Non-member spouse is not a member or beneficiary [subs (4)(c)(i)]
- Non-member spouse entitled to fund return from date of election (not date of divorce) to date of payment (and if no election made, from 121st day after request to make election). In underwritten fund, the measure is “growth rate” as defined in LTIA Regulations. Other interest/growth prohibited. 
- RA funds: Divorce Act [s1] defines “pension interest” as contributions plus annual simple interest in terms of Prescribed Rate of Interest Act. But PFA s 37D(5) caps that at actual fund return.

PFA SECTION 37D (2)-(6), substantive issues (3)

- Named or identifiable fund, or transferee fund(s), must deduct [subs(4)(a)(i)] 
- Fund must retain 'divorce benefit' indefinitely if it 'cannot reasonably ascertain how the payment to the non-member spouse must be effected' [subs(4)(b)(v)] 

PFA SECTION 37D (2)-(6), Procedure

- Non-member must present 'the court order' in writing [subs(4)(a)]
- Fund must request claimant's election –pay out or transfer – within 45 days of receipt of claim [subs(4)(b)(i)] 
- Claimant has 120 days to make election [subs (4)(b)(ii)]
- Deduct on (with effect on ?) date of election or – absent an election - 121st day after fund requested election [subs(4)(a)(ii); (4)(b)(ii)]
- Deduction as at date of decree [subs(4)(a)(iii)]
- Pay in accordance with election within 60 days of election; between 121st and 151st day if no election [subs(4)(b)(iii), (iv)]

NOTES & ANOMALIES

- Only a “non-member spouse” can access this remedy; apparently a former spouse who is a member of the same fund cannot.
- Ranking (1) : all maintenance orders in chronological order, then all divorce orders in chronological order, interspersed with loans/guarantees per date of grant – any other logical interpretation?
- Ranking (2): What about employer compensation [subs (1)(b)(ii)], medical, insurance and other registrar-approved deductions [subs (1)(c)]? They are only deducted on member exit: effect of subs (3)(a) is only reduce portion available for ‘divorce benefit’.
- Pension interest “at any given time”: at time deduction granted or effected?

NOTES & ANOMALIES , contd

- Does subs (4)(c)(ii) preclude encashment of benefit deemed accrued? What if fund policy is to disinvest? Definition of “fund return” is not the problem; intention of subs (4)(c)(ii) is. Can this be clarified in rules and/or by member education?
- Subs (4)(a)(i)(bb) talks of “pension funds to which the [original fund] transferred the pension interest referred to in the decree”. Envisages split and subsequent transfers, which suggests the non-member spouse can/must ‘follow the money’ and conversely that a fund that has ‘passed the parcel’ has a defence. Split transfers: several liability? This can only refer to transfers prior to decree.

NOTES & ANOMALIES , contd

- In light of subs (4)(b)(v), what does fund do in s14 transfer or liquidation? Cannot deregister.
- Fund should not be tardy to request election, although 45 days allowed: risk of market movement.
- MIC: Member – elections during period between claim and payment – only rules could limit this.
- Effect of deductions (and need to liquidate investment) in underwritten funds: whose risk, fund, member or insurer? The fund bears the risk, legally speaking. Commercially, insurers may need to write off upfront costs, or factor in the risk.

NOTES & ANOMALIES , contd

- “Public sector funds “ not subject to PFA but subject to Divorce Act. Are they immune? For the time being ...

DESIRABLE AMENDMENTS

- Spouses in same fund
- Disinvestment
- Several liability of transferee funds
- Underwritten funds: cost recovery

FUNDS RULES AND POLICY

- Actuarial policy/risk reserve re: divorce decrees not notified
- Disinvestment of claimed portion
- Costs of litigation in money purchased fund (eg. Recission)
- MIC restrictions between claim and payment
- Underwritten funds/costs recovery

FUND ACTION ITEMS

- Test marital regime
- Test non-member status
- Test decree or payment order
- Test decree for valid beneficiary
- Educate members
- Tighten administration process (SLA re factual assessment, disinvestment etc)

Thank you

QUESTIONS ARE WELCOME

PENSION LAWYERS
ASSOCIATION

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