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SOUTH AFRICAN LAW COMMISSION

DISCUSSION PAPER 77

Project 112

SHARING OF PENSION BENEFITS

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INTRODUCTION

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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 -

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PREFACE

This discussion paper (which reflects information gathered up to the end of March 1998), has been prepared by the research staff of the Commission to elicit responses and together with those responses, to serve as a basis for the Commission's deliberations. The discussion paper, which includes a proposed Bill, is published in full so as to provide persons and bodies wishing to comment or make suggestions for the reform of this particular branch of the law with sufficient background information to enable them to place focussed submissions before the Commission. The views, conclusions and recommendations which follow should not at this stage be regarded as the Commission's final views.

The Commission will assume that respondents agree to reference by the Commission to responses received and the identification of respondents, unless representations are marked confidential. Respondents should be aware that the Commission may be obliged to release information contained in representations under the Constitution of the Republic of South Africa, Act 108 of 1996, pursuant to the constitutional right to freedom of information.

Respondents are requested to submit written comments, representations or requests to the Commission by 31 July 1998 at the address appearing on the previous page.

SUMMARY OF RECOMMENDATIONS

It is recommended that—

1. separate legislation be enacted to regulate the sharing of retirement fund benefits between spouses on their divorce;
2. the spouse of a member of a retirement fund should on the divorce of the member and the said spouse acquire a right to share in the member's retirement fund benefits when they become payable;
3. a partner in a marriage relationship entered into in accordance with customary law or a recognised religion should for purposes of the proposed legislation be regarded as a spouse;
4. a non-member spouse's share of the retirement fund benefits should be paid direct from the member's fund by way of deferred retirement benefits. The rules operating in respect of the member's retirement fund benefits must, in so far as they can be applied, also be applicable to the non-member's share of the said benefits;
5. the formulae for determining the non-member spouse's share of the member's retirement fund benefits in respect of the various types of retirement schemes and the various categories of benefits should be clearly set out in the proposed legislation;
6. the division of retirement fund benefits on divorce should not be dependant upon the matrimonial property system which applies to the marriage of the spouse; and
7. the proposed legislation should not have retrospective effect but spouses falling outside the ambit of the proposed legislation should be able to make the proposed legislation applicable to their marriage by agreement between them.



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SOURCES AND CITATION

1987 report

South African Law Commission **Report on the Investigation Into The Possibility Of Making Provision For A Divorced Woman To Share In The Pension Benefits Of Her Former Husband** Pretoria: 1987

1995 report

South African Law Commission **Report on The sharing of Pension Benefits on Divorce** Pretoria: 1995

Law Reform Commission of Nova Scotia

Law Reform Commission of Nova Scotia **Matrimonial Property in Nova Scotia: Final Report** Halifax: 1997

SELECT LEGISLATION

Canada

Federal

Pension Benefits Act

British Columbia

Family Relations Act, 1979

Pension Benefits Standards Act, 1992

Family Relations Amendment Act, 1994

Nova Scotia

Matrimonial Property Act, 1989

Pension Benefits Act, 1989

South Africa

1936 Insolvency Act, 1936 (Act 24 of 1936)

1956 Pension Funds Act, 1956 (Act 24 of 1956)

1979 Divorce Act, 1979 (Act 70 of 1979)

1984 Matrimonial Property Act, 1984 (Act 88 of 1984)

CHAPTER 1

Background

1.1 The Divorce Amendment Act, 7 of 1989, introduced into our law the concept of the sharing of pension benefits upon divorce where one of the spouses (hereinafter referred to as the member spouse) is a member of a pension or provident fund. The relevant legislation resulted from recommendations made by the South African Law Commission in its report on the Investigation Into The Possibility Of Making Provision For A Divorced Woman To Share In The Pension Benefits Of Her Former Husband, brought out during August 1987¹. It appears that the Commission *inter alia* made a comparative study of the legal position relating to pension sharing in the Romano Germanic legal systems of the Netherlands, Germany, Switzerland and Austria as well as the Anglo American systems of England, the United States of America, New Zealand, Australia and Canada and the hybrid legal system of Scotland².

1.2 The Commission accepted the principle that the right which a member of a pension fund has to receive a pension in accordance with the rules of the fund at a future date or event specified by such rules, forms an important part of such member's assets even before the pension becomes payable although the pension is not realisable before the specified date or event. The said right was described as the member's "pension interest". It was further accepted that in the event of the divorce of such member his or her divorced spouse (referred to as the non-member spouse) ought to be able to share in the member's pension interest in accordance with the matrimonial property dispensation which is applicable to the marriage. It was therefore recommended that the pension interest of a member of a pension fund should, for purposes of the division of the assets of the spouses on divorce, be deemed to be part

1 The 1987 report.
2 Chapter 4 of the 1987 report.

of the assets of the member spouse³. The Commission, however, grappled with the difficult question of how the value of the member's pension interest at the date of the divorce should be determined. There are many types of pension schemes which provide for different kinds of benefits at different stages during a member's membership of a fund. The Commission was of the view that it would be almost impossible to implement a single formula for determining the true value of a pension interest at any particular time before the pension benefits become payable in terms of the rules of a fund. The most reliable method of determining the value of a pension interest would probably be an actuarial calculation which takes into account all the relevant factors. This would, however, be too costly and time-consuming to be of practical value for purposes of effecting pension sharing on divorce⁴.

1.3 The Commission was reluctant to bring about drastic changes to the pension laws. It endeavoured to devise a scheme whereby the pension interest which is to be divided on divorce would be readily ascertainable. The division should be fair to both spouses. It should further involve the least possible administration on the part of the pension funds. The Commission was of the view that these requirements could be met by defining the pension interest with reference to the amount the member spouse would have received, had he or she resigned from office at the date of the divorce. It was appreciated that this method of determining the value of a pension interest would in many instances yield a smaller amount than would have been the case if the value had been determined by actuarial calculation, but the suggested formula was regarded as the best practical solution⁵.

1.4 The non-member's spouse's entitlement to a share of the member spouse's pension interest on divorce was, however, left to be determined by the rules of the matrimonial property dispensation applicable to the marriage. This was effected by deeming the pension interest to be part of the assets of the member spouse for purposes of determining the patrimonial benefits to which the parties to the divorce

3 Section 7(7) of the Divorce Act, 70 of 1979.

4 Par. 6.8 - 6.9 of the 1987 report.

5 Par. 6.8 - 6.9 of the 1987 report.

action may be entitled⁶. The result is that pension sharing between spouses on divorce was brought about in an indirect manner. The pension interest as such is not divided between the spouses, but it is brought into account to determine the net value of the estate of the member spouse where, in terms of the applicable Matrimonial property system or an order of court, the non-member spouse is entitled to a portion of the estate of the member spouse or, in the case of a marriage in community of property, to half of the net value of the joint estate. In place of a share of the pension interest a non-member spouse usually receives compensating assets at the time when division of the assets takes place. Where this is not reasonably possible the court may make an order that any part of the pension interest of the member spouse which is due or assigned to the non-member spouse must be paid to the non-member spouse by the pension fund when the pension becomes payable⁷. Only in such instance does a form of pension sharing really occur. The amount ordered to be so paid to the non-member need, however, not necessarily represent the non-member's full share of the pension interest. At present no provision exists for the addition of interest to such amount, although payment may occur a long time after the divorce.

1.5 The Commission's recommendations contained in its 1987 report were adopted by Parliament in the Divorce Amendment Act, 7 of 1989. The relevant provisions, which now form part of the Divorce Act, 70 of 1979, are quoted below for the sake of easy reference.

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

1.5.2 The Pension Funds Act, 1956, defines "pension fund" as a "pension fund organization", which in turn is defined as:

6 Section 7(7) of the Divorce Act, 70 of 1979.
7 Section 7(8) of the Divorce Act, 70 of 1979.

- "(a) any association of persons established with the object of providing annuities or lump sum payments for members or former members of such an association upon their reaching 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."

1.5.3 "pension interest", in relation to a party to a divorce action who—

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

- (b) is a member of a retirement annuity fund which was *bona fide* established for the purpose of providing life annuities for members of the fund, and which is a pension fund, means the total amount of that party's contributions to the fund up to the date of the divorce, together with a total amount of annual simple interest on those contributions up to that date, calculated at the same rate as the rate prescribed as at that date by the Minister of Justice in terms of section 1(2) of the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975), for the purposes of that Act."

1.5.4 Section 7(7) of the Divorce Act provides as follows:

"(7) (a) In the determination of the patrimonial benefits to which the parties to any divorce action may be entitled, the pension interest of a party shall, subject to paragraphs (b) and (c), be deemed to be part of his assets.

(b) The amount so deemed to be part of a party's assets shall be reduced by any amount of his pension interest which by virtue of paragraph (a), in a previous divorce—

- (i) was paid over or awarded to another party; or
- (ii) for the purposes of an agreement contemplated in subsection (1), was accounted in favour of another party.

(c) Paragraph (a) shall not apply to a divorce action in respect of a marriage out of community of property entered into after 1 November 1984 in terms of an antenuptial contract by which community of property, community of profit and loss and the accrual system are excluded."

1.5.5 Section 7(8) of the Divorce Act provides as follows:

"(8) Notwithstanding the provisions of any law or the rules of any pension fund—

- (a) the court granting a decree of divorce in respect of a member of such fund, may make an order that—
 - (i) any part of the pension interest of that member which, by virtue of subsection (7), is due or assigned to the other party to the divorce action concerned shall be paid by that fund to that other party when any pension benefits accrue in respect of that members;
 - (ii) an endorsement be made in the records of that fund that that part of the pension interest concerned is so payable to that other party;
- (b) any law which applies in relation to the reduction, assignment, transfer, cession, pledge, hypothecation or attachment of the pension benefits, or any right in respect thereof, in that fund, shall apply *mutatis mutandis* with

regard to the right of that party in respect of that part of the pension interest concerned."

1.6 The provisions referred to above gave rise to a number of difficulties and uncertainties in respect of which representations have been made to the Department of Justice. These were referred to the Commission for consideration. The result was that during 1991 the Commission carried out a further investigation with a view to solving the alleged problems. A further report under the title. The sharing of Pension Benefits on Divorce was brought out during March 1995⁸. The main recommendations were:

- (a) an amendment of the definition of "pension interest" so as—
 - (i) to make provision for the difference in value of benefits on the resignation, death or disability of a member of a pension fund;
 - (ii) to provide for the actuarial calculation of the value of different types of deferred pensions;
 - (iii) to make the actuarial reserve value of a retirement annuity the norm for determining the value of such annuity at the date of divorce of a member;
- (b) to provide for the determination of the commencement value of pension interest in the case of a marriage which is subject to the accrual system;
- (c) an amendment of section 7(8) of the Divorce Act, 1979, to make it clear that a deferral of payment of a pension interest should be resorted to only when no other satisfactory method of accomplishing pension sharing exists⁹.

8 The 1995 report.

9 Par. 4.3 of the 1995 report.

1.7 The Commission made it clear that its investigation was aimed at solving specific problems raised in the representations and not at reviewing the basic principles underlying pension sharing¹⁰. The said problems and the Commission's views thereon are set out in Chapter 2 of the report. However, several respondents expressed dissatisfaction with the basis upon which pension sharing is effected in terms of the existing legislation¹¹. The fact that no provision is made for the payment of interest or the effect of inflation where the payment of the non-member's share of the pension interest is deferred until the pension benefits become payable was in particular severely criticised. The Commission nevertheless stood by its earlier standpoint in this regard that no provision should be made for the addition of interest¹².

1.8 The Life Offices Association and the Institute of Retirement Funds expressed the view that the inequitable manner in which the non-member spouse's portion of the pension interest is being dealt with is a source of great dissatisfaction. They suggested that in the long term more equitable solutions should be developed¹³. These views were echoed by other respondents. The Minister noted these views and on 17.6.1997 approved the inclusion in the Commission's programme of a comprehensive investigation into the whole field of pension sharing. The project was included in the Commission's programme under the title: Sharing of Pension Benefits.

10 Par. 4.1.1 of the 1995 report.

11 Par 3.1.4 - 3.1.10 of the 1995 report.

12 Par. 4.2.5 of the 1995 report.

13 Par. 3.1.10 of the 1995 report.

CHAPTER 2

Comparative Survey

3.1 During its first investigation the Law Commission made a comparative survey of the legal position in various countries in respect of pension sharing on divorce. The Commission's findings in this regard appear in Chapter 4 of its first report brought out in October 1986. In the survey the following states have been covered: The Netherlands, West Germany, Switzerland, Austria, England, the United States of America, New Zealand, Australia, Canada and Scotland. Although the survey was done more than 10 years ago and the legal position in some of the states have changed since then, it is not intended to carry out a fresh survey of the law of the said states. Reference will, however, be made to recent developments in some of the jurisdictions, particularly Canada. Because the Commission's 1987 report may not be readily available, a brief summary of the Commission's findings in respect of the above-mentioned states is given below.

The Netherlands

- 3.2 (a) A spouse's right on divorce to share in the pension rights of the other spouse is recognised in law.
- (b) The law does not lay down any hard and fast rule for determining the value of the pension rights at the time of the divorce.
- (c) Where necessary the value of the right must be determined actuarially.
- (d) The right to share in the pension benefits of a member spouse never

exceeds the value of the benefits accumulated during the marriage¹⁴.

West Germany

- 3.3 (a) Marriage is regarded as a partnership to which both spouses contribute in equal shares, whether by way of salary or the management of the household. On the dissolution of the marriage each spouse is entitled to an equal share of the sum of the accruals of their respective estates during the subsistence of their marriage. This also applies to pension entitlement by one of the spouses or by both spouses if they were both members of a pension fund.
- (b) The law lays down detailed rules which must be applied in respect of the various contingencies which could affect pension entitlement. The aim is to achieve the greatest possible equality between spouses with regard to their pension expectations.
- (c) Only the pension interest which accumulated during the marriage is taken into account^{15/}

Switzerland

3.4 At the time of the survey the Swiss matrimonial property law had just been reviewed but the new legislation had not yet been implemented. A system of sharing of accruals had been introduced. Although accruals would include pensions, it was not clear to what extent undistributed pensions would on the divorce of spouses be taken into account for purposes of determining the accruals of the respective estates¹⁶.

14 Par. 4.19 of the 1987 report.

15 Par. 4.27 of the 1987 report.

16 Par. 4.32 of the 1987 report.

Austria

3.5 It appears that the Austrian law does not recognise any claim by a spouse to the pension benefits of the other spouse in a divorce action¹⁷.

England

3.6 The British courts have wide powers to effect property adjustment on divorce. The courts accept that a spouse who loses his or her claim to the other spouse's pension benefits through divorce should be compensated for such loss. The form the compensation should take is entirely in the hands of the Court¹⁸.

United States of America

- 3.7 (a) Although the legal position differs from one state to the other, most states accept the principle that a non-member spouse has a right to share in the pension benefits of the other spouse in the case of a divorce.
- (b) The value of the right at the time of the divorce is actuarially determined. Alternatively provision is made for the non-member spouse to receive the benefits when they become payable to the member spouse.
- (c) The Uniform Matrimonial Property Act of 1984 provides that pension benefits are regarded as assets available for division on divorce. The Act is, however, silent on the manner in which the value of the pension benefits should be determined¹⁹.

New Zealand

17 Par. 4.36 of the 1987 report.

18 Par. 4.42 of the 1987 report.

- 3.8 (a) Any pension benefit to which a spouse may become entitled under any pension scheme forms part of the matrimonial property of the spouses.
- (b) On divorce the court has the power to make such order as it deems just regarding the determination of the respective shares of the matrimonial property to which each spouse is entitled.
- (c) In most cases compensating assets are transferred to the non-member spouse *in lieu* of his or her share of the pension benefits²⁰.

Australia

3.9 Although the courts have the power to effect equitable distribution of the assets of spouses on their divorce, pension rights have thus far not been regarded as matrimonial property capable of division on divorce. The eligibility of a party to a divorce action for a pension must, however, be taken into account in determining the quantum of maintenance to be awarded to such party²¹.

Canada

3.10 Although the Commission mentioned that in Canada matrimonial property is governed by provincial legislation, it only dealt with the position in the province of Alberta. In this province the courts have decided that a pension benefit is an asset capable of being divided as matrimonial property on divorce. Different methods are employed by the courts to account for pension benefits. In some instances the benefits are valued and placed in the pool of assets which are then divided on equitable grounds. In other

19 Par. 4.54 of the 1987 report.
20 Par. 4.56 of the 1987 report.
21 Par. 4.62 - 4.64 of the 1987 report.

instances the member spouse is ordered to pay to the non-member spouse his or her share of the benefits when they eventually become payable²².

Scotland

- 3.11 (a) Where a spouse has rights or interests under an occupational pension scheme the proportion of such rights or interests which relates to the period of the marriage is treated as matrimonial property.
- (b) The courts have the power to order the distribution of matrimonial property between the spouse if it is justified and reasonable, having regard to defined factors²³.

3.12 The law relating to pension sharing on divorce has in respect of some of the countries covered by the Commission's previous comparative survey changed considerably since that survey was carried out. In what follows a brief exposition will be given of the current position in Canada.

Canada

3.13.1 Distinction must be drawn between Government service pensions, which is governed by federal legislation, and other pensions which is covered by provincial legislation. In respect of the last-mentioned category of pensions the legislation differs from one province to the other. Reference will therefore have to be made to the legislation of the various provinces.

3.12.2 In the case of Government service pensions the Pension Benefits Division Act makes provision for the transfer of 50% of the value of pension benefits that accrued to a member during the defined period (normally the duration of the marriage) to the spouse

or former spouse or to a pension plan selected by the spouse or former spouse and for the adjustment of the members pension benefits accordingly. The basis on which the value of the pension benefits that have accrued to a member in an unmatured pension is to be determined must be prescribed by regulation²⁴.

British Columbia

3.13.3.1 British Columbia legislation provides that spouses share family assets, including pensions, on marriage breakdown. The relevant legislation are:

- * The Family Relations Act, 1979;
- * The Pension Benefits Standards Act, 1992; and
- * The Family Relations Amendment Act, 1994.

The Pension Benefits Standards Act prohibits the assignment, alienation or attachment of pension benefits. Exempt from the prohibition is the transfer of pension entitlement in terms of a separation agreement or a court order for the dissolution or annulment of a marriage. The manner in which the division and transfer of pension rights must be effected is regulated by the Family Relations Act, as amended.

3.13.3.2 The Family Relations Act distinguishes between three categories of pension plans, namely a defined contribution plan, a defined benefit plan and a hybrid plan. A defined contribution plan (also referred to as a money purchase plan) is based on contributions made by or on behalf of the member and earnings made by the investment

of those contributions. A defined benefit plan is based on benefits tied to the salary level of the member on retirement. A hybrid plan contains elements of both a contribution plan and a benefit plan.

3.13.3.3 A defined contribution plan operates like a deposit account. Its value at any time is readily ascertainable. If a pension in an unmatured contribution plan is to be divided, the plan administrator is merely notified that a determined portion of the member's account balance at a determined date must be transferred to a separate account in the name of the non-member spouse who then becomes a member in respect of the portion so transferred²⁵.

3.13.3.4 If an unmatured pension in a defined benefit plan is to be divided, the non-member spouse is, upon notice to the plan administrator, entitled—

- (a) to have, before the member retires, a proportionate share of the commuted value of the pension transferred from the plan to the credit of the non-member spouse at any time the member is eligible to retire; or
- (b) to receive, when the member retires, a separate pension from the plan determined in accordance with the regulations²⁶.

3.13.3.5 In the case of a pension in an unmatured hybrid plan the division must be made in accordance with the provisions relating to a contribution plan to the extent that the plan is based on principles of a contribution plan or the member may choose to have those principles applied, and for the rest it must be divided in accordance with the provisions relating to a defined benefit plan. If this method of division appears to be inappropriate, the court may direct an appropriate method of division²⁷.

25 Section 73 of the Family Relations Amendment Act, 1994.
26 Section 74 of the Family Relations Amendment Act, 1994.
27 Section 75 of the Family Relations Amendment Act, 1994.

3.13.3.6 In the case of a matured pension (a pension in respect of which payments are already being made to the member) division is effected by notifying the plan administrator that the non-member spouse is entitled to receive from the plan a proportionate share of the benefits until the death of the member or until the termination of the pension, whichever occurs first. Separate deductions for income tax must be made in respect of the shares of the member and the non-member spouse²⁸.

3.13.3.7 (a) If a member dies before the limited member (the non-member spouse in a defined benefit plan) receives a share of the pension under section 74, the limited member is entitled to a proportionate share of any preretirement survivor benefits payable under the member's pension.

(b) If the member dies after the limited member receives a share of the pension under section 74, the limited member is entitled to no further share of the member's pension, unless designated as a beneficiary.

(c) If a limited member dies before the member and before receiving a share of the pension under section 74, the plan must transfer to the credit of the limited member's estate a proportionate share of the commuted value of the pension²⁹.

3.13.3.8 If a limited member is entitled to a separate pension or a proportionate share of the benefits payable under a pension the plan may require the limited member to accept a transfer of the commuted value of the separate pension or proportionate share to another fund³⁰.

3.13.3.9 In terms of section 80 of the Family Relations Act the spouses may enter into a written agreement—

28 Section 76 of the Family Relations Amendment Act, 1994.

29 Section 78 of the Family Relations Amendment Act, 1994.

- (a) for the sharing of the pension that departs from the proportionate shares required in terms of the Act, provided that the member is left with at least half of the value of the pension;
- (b) for the waiver of the non-member spouse's right or interest in the member's pension;
- (c) the satisfaction of the non-member spouse's interest in the pension by the payment of compensating money or the transfer of compensating assets.

3.13.3.10 In terms of section 81 of the Act the member and the non-member spouse are jointly responsible for paying the plan the prescribed amount of the administrative costs incurred by the plan in satisfying the share of the non-member spouse.

3.13.3.11 Among the matters that may be prescribed by regulations under the Act are the methods and assumptions to be followed for the valuation and transfer of a pension and benefits or the calculation of any compensating payment or commuted value at the end of a marriage³¹.

Nova Scotia

3.13.4.1 In Nova Scotia pensions are dealt with under two different laws vis the Matrimonial Property Law and the Pension Benefits Act. Under the Matrimonial Property Law the courts have the power to divide matrimonial property. Pensions are matrimonial assets. Until 1988 it was, however, not possible for a court to make a direct division at source of an unmatured pension on marriage breakdown. The pension benefit itself was not divided but it was valued and the member spouse was required to transfer cash or

other assets to the non-member spouse to acquit the obligation. If marriage breakdown occurred after maturity of the pension the member spouse could be ordered to execute a trust agreement whereby a portion of each pension payment received by the member is held in trust for the non-member spouse.

3.13.4.2 The Pension Benefits Act which came into operation on 1 January 1988 introduced a mechanism for the division of pensions. In terms thereof a non-member spouse is entitled to a separate pension upon the commencement of the member spouse's pension, or on the normal retirement date of the member, whichever date is the earlier. The non-member spouse becomes a limited member of the pension plan. The plan administrator must set up a separate account for the non-member and he or she will begin to receive payments directly from the plan. From that point onwards the pension will not be affected by the death of the member spouse since the separate pension of the non-member spouse will have been calculated using appropriate actuarial assumptions. The pension of the member spouse will also not increase if the non-member spouse dies after beginning to receive a share of the pension. If the member spouse should die before retirement, the practise is that the non-member spouse's entitlement is preserved, although this is not stated in the Act³².

3.13.4.3 The Pension Benefits Act does not allow an immediate "roll-over" of a share of pension benefits from the member-spouse's pension plan to another pension plan. A transfer is allowed only if the member changes employment after the court order but before retirement. In such case the non-member spouse may require the plan administrator to pay the commuted value of that spouse's pension to another pension plan or a retirement savings fund or to purchase a deferred life annuity.

3.13.4.4 The court may not award more than 50% of the pension benefit earned during the marriage to the non-member spouse and it may only take into account contributions made during the marriage.

3.13.4.5 The Pension Benefits Act did not replace the kind of orders that may be made under the Matrimonial Property Act. The parties are free to agree on whichever method of sharing pension benefits suits them. If the parties fail to agree and it is possible to deal with the pension under either law the court may make an order as to the method which should be applied.

3.13.4.6 The Law Reform Commission of Nova Scotia brought out a Final Report on the Law Dealing With Matrimonial Property In Nova Scotia during March 1997. Its recommendations, which are very much in line with the present position in British Columbia, may be summarised as follows:

- (a) Pensions should continue to be treated as a shareable asset and subject to division.
- (b) The existing options available for pension division on the ending of a relationship should all be located in a draft Domestic Property Division Act and pensions should be divided only in accordance with that Act.
- (c) Pensions should, as far as possible, be treated like other shareable assets, in particular with regard to the period of contribution included, the presumption of equal sharing and the principles applicable to an unequal division.
- (d) If couples are unable to agree on a method of dividing pension entitlements, then unmatured pensions should be divided presumptively through a deferred benefit split, with an asset transfer/cash buy out available only where a deferred benefit split would be inequitable or impracticable.

- (e) A member of a pension plan should be able to pay out the non-member's entitlement to another locked-in retirement savings vehicle where the parties agree.
- (f) With regard to valuation of a pension entitlement for purposes of an asset transfer/cash buy out or a payout to another retirement savings vehicle, an acceptable standard for calculating the value of the non-member's entitlement should be adopted by regulation. Future enhancements to the pension plan should be taken into account in the valuation process.
- (g) Where the amount of pension payment to the non-member would be below the threshold for administration contained in the Pension Benefits Act, the plan administrator should be authorized to make a cash settlement with the non-member.
- (h) Division at source should be authorized in all cases where breakdown of a relationship occurs after a pension is in pay.

Other Canadian Provinces

3.13.5 Most Canadian provinces, except Alberta and Newfoundland have pension legislation that allows the division of pensions. Although provincial legislation differs with regard to the manner in which pensions are to be divided, three basic methods of pension divisions are employed. These are benefit split, separate pension and transfer of pension rights.

3.13.5.1 In a benefit split a prescribed portion of a member's pension is paid to the non-member spouse. The amount payable to the non-member spouse can be determined in accordance with a formula or it could be a pre-determined fixed amount. Payments to the non-member spouse are administered either by the member spouse or by the plan

administrator. Benefit splits administered by plan administrators are provided for in Manitoba, Saskatchewan, British Columbia and Ontario.

3.13.5.2 Several Canadian jurisdictions provide for the division of unmatured pensions at source by way of separate pensions. A separate pension is created by transferring a prescribed portion of the value of a member's pension to a separate account in the same plan for the benefit of the non-member spouse. The non-member spouse acquires a form of membership of the plan in respect of his or her account. This form of pension division is available in British Columbia, Nova Scotia, Quebec and Saskatchewan.

3.13.5.3 The division of pensions by way of transfer is effected by transferring a prescribed portion of the commuted value of a pension out of the pension plan to another pension instrument for the benefit of the non-member spouse. In most instances transfer occurs on the date of the dissolution of the marriage or other marriage relationship. The value of the pension available is calculated as if the member's employment terminated on that date. This form of transfer is available in Manitoba, Saskatchewan, New Brunswick and Quebec. In British Columbia provision is made for the transfer of the non-member spouse's proportionate share of the commuted value of the pension in a defined benefit plan where the parties have opted for separate pensions at marriage breakdown.

CHAPTER 3

Identifying the Issues

2.1 One of the main issues that needs to be reassessed is the question whether pension sharing on divorce could be accomplished satisfactorily merely by treating the pension interest of a member spouse as property for purposes of determining the patrimonial benefits to which the spouses may be entitled. In other words, should the matrimonial dispensation which applies to a marriage alone determine the extent, if any to which pension sharing is effected on the divorce of the spouses, or is this a matter that requires more specific legislation? In order to answer this question it is suggested that one must take another look at the nature and purpose of pensions and at the legal consequences of the various matrimonial property dispensations.

Nature and purpose of pensions

2.2.1 Pension schemes take many different forms. They make provision for different kinds of benefits during different stages of the membership of a member of the fund. Basically, however, the purpose of all pension schemes is to provide pensions for members during their retirement years. A pension right is a very special kind of property. It is accumulated over an extended period with a view to making funds available in order to ensure the financial security and independence of the member and his or her dependants when he or she may no longer be in a position to earn an own living. Before a pension reaches maturity (the date or event upon which the benefits become payable) it does not constitute a realisable asset in the hands of the member of the fund. In fact, strict statutory limitations on the alienation of pensions and pension rights and on the attachment thereof for debts exist³³. A pension also does not form part of the insolvent

estate of a member of a pension fund³⁴. These statutory measures are aimed at protecting and preserving pensions in order that their basic purpose, namely providing for the retirement years, may be achieved.

2.2.2 There are two basic kinds of pension plans. The first kind provides pensions based on contributions made by or on behalf of the member and earnings on the investment of the contributions. This kind of plan is referred to as money purchase plans or defined contribution plans. The second kind of plan provides pensions based on a benefit formula which is usually tied to the salary level of the member, for instance, the average annual salary over the last five years of employment before the member's retirement. This kind of plan is referred to as defined benefit plans.

2.2.3 Pension plans usually require that a member must maintain membership for a prescribed period before the pension vests - that is, before the member becomes entitled to the pension benefits provided for by the rules of the fund. If membership is terminated before the vesting of the pension, the member would be entitled only to the refund of his or her own contributions, but not those of the employer. If membership is terminated after the vesting of the pension but before its maturity, the member is entitled to defined benefits, which could consist of a cash payment, an amount available for transfer to another pension fund or a pension preservation fund, or an amount which is retained by the original fund as a paid up pension which would become available on the maturity of the pension. A pension matures when the member reaches the retirement date. Some schemes provide for retirement options at various ages - 50, 55, 60 or 65 years or at any time after the age of, say 50 years.

2.2.4 In the event of the death of a member spouse before retirement, the surviving non-member spouse is usually entitled to death benefits in terms of the rules of the fund. Such benefits may take the form of a lump sum payment or a monthly widows pension which is payable for a defined period or for the life of the surviving spouse. These benefits are paid to the non-member spouse irrespective of the matrimonial property

dispensation which governed the marriage of the spouses. Only if there is no surviving spouse nor any other dependants or nominees of the deceased member is the pension paid into the member's deceased estate for distribution together with the other assets in accordance with the law of succession.

2.2.5 A divorce terminates any expectation which a non-member spouse may have of benefitting from the member spouse's pension in terms of the rules of the fund concerned. It is for this reason that it was found necessary to make statutory provision that a non-member spouse may share in the pension benefits that have accumulated before the date of divorce.

Matrimonial property dispensations

2.3 The matrimonial property dispensations which are relevant for purposes of this discussion are firstly, a marriage in community of property, secondly a marriage subject to the accrual system, and thirdly a complete separation of property in accordance with an antenuptial contract. Each of these will be examined in relation to pension sharing. It must be borne in mind that the only substantive provision in our law which provides for the division of pension benefits is section 7(7) of the Divorce Act, 70 of 1979. This subsection provides that in the determination of the patrimonial benefits to which the parties to a divorce action may be entitled, the pension interest of a party is deemed to be part of his or her assets.

A marriage in community of property

2.3.1.1 A marriage in community of property brings about a joint estate which embraces all the assets and liabilities of the spouses, whether acquired before or after the date of the marriage. On divorce each spouse is entitled to a half share of the net value of the joint estate, unless an order for the forfeiture of patrimonial benefits is made by the court, and subject to certain exceptions which are not relevant for purposes of the present

discussion. An order for the forfeiture of patrimonial benefits could prevent a spouse from sharing in assets brought into the joint estate by the other spouse. It is however, an exceptional order which is made against a spouse whose reprehensible conduct led to the breakdown of the marriage.

2.3.1.2 If one of the spouses to a marriage in community of property is a member of a pension fund, the value of the pension interest as at the date of the divorce is deemed to be an asset of the joint estate of the spouses for purposes of determining the share of the joint estate to which each spouse is entitled on divorce. It is the net value of the joint estate which is divided in equal shares between the spouses. The deeming of a pension interest as part of the assets of a joint estate means that the pension interest is thrown into the pool of assets against which the liabilities of the estate must be set off to arrive at a net value for purposes of the division of the estate. It follows that the extent to which the non-member spouse shares in the pension interest of the member spouse depends on the state of the joint estate. It is possible that the liabilities of the joint estate may exceed the assets, inclusive of the deemed asset of the pension interest. In such event the non-member spouse will in real terms derive no benefit from the member spouse's pension³⁵. The pension benefits will, however, remain intact for the member spouse or his or her dependants to enjoy when these benefits eventually become payable.

2.3.1.3 If upon divorce the non-member spouse receives his or her full half share of the net value of the joint estate it means that compensating assets to the value of his or her half share of the pension interest have been made available to him or her. Because the pension interest is a notional asset it is possible that the member spouse will not have sufficient assets at his or her disposal to make up the non-member spouse's share of the joint estate. Any shortfall will constitute a debt owing by the member spouse to the non-member spouse. In terms of section 7(8) of the Divorce Act, 1979, the court may make an order that any part of the pension interest of a member spouse which is due or assigned to the non-member spouse must be paid by the pension fund to the non-

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In terms of section 23(7) of the Insolvency Act, 1936 (Act No. 24 of 1936), an insolvent may receive any pension due to him or her by reason of his or her employment. It is, however, submitted that this provision applies only in respect of the sequestration of an insolvent estate. It has no bearing on the division of assets on divorce where the

member spouse when the pension benefits become payable in respect of the member spouse. It should, however, be noted that the amount so payable to the non-member spouse need not necessarily bear any relation to the share of the pension interest to which he or she may be entitled.

2.3.1.4 It is submitted that the matrimonial property dispensation following upon a marriage in community of property is not a suitable vehicle for effecting pension sharing between the spouses in the sense of providing for the retirement years. What is needed appears to be a method by which the non-member spouse could be provided with a share of the member's pension when it becomes payable or a separate pension (e.g. in the form of a retirement annuity), proportionate to the pension entitlement accumulated up to the date of the divorce.

A marriage subject to accrual system

2.3.2.1 The accrual system of dealing with matrimonial property provides for the separation of the property of spouses during the subsistence of their marriage and the sharing of the profits or accruals of their respective estates at the dissolution of their marriage. The accrual of the estate of a spouse is the amount by which the net value of his or her estate at the dissolution of his or her marriage exceeds the net value of his or her estate at the commencement of the marriage. At the dissolution of the marriage each spouse is entitled to a half share of the accruals of the estate of the other spouse. In practical terms it means that the spouse whose estate shows no accrual or a smaller accrual than the estate of the other spouse has a claim against the other spouse for an amount equal to half of the difference between the accruals of the respective estates of the spouses³⁶.

2.3.2.2 Certain property does not form part of the accrual of a spouse's estate. In terms of section 4(1)(b)(i) of the Matrimonial Property Act, 1984, any amount which accrued by

way of damages (other than damages for patrimonial loss) is left out of account in determining the accrual of an estate. Also excluded, are assets which the spouses have excluded from the accrual system in terms of their antenuptial contract, as well as assets acquired by virtue of the possession of such first-mentioned assets³⁷. Any inheritance legacy or donation which accrued to a spouse during the subsistence of the marriage as well as any asset acquired by virtue of the possession of such inheritance, legacy or donation does not form part of the accrual of the state of a spouse, except in so far as the spouses may have agreed otherwise in their antenuptial contract or in so far as the testator or donor may have stipulated otherwise³⁸.

2.3.2.3 It is to be noted that a pension or a pension interest is not an asset which is excluded from the accrual of the estate of a spouse unless it is specifically excluded by the prospective spouses in their antenuptial contract or in terms of a declaration contemplated in section 6 of the Matrimonial Property Act, 1984. If not so excluded, it would in terms of section 7(7) of the Divorce Act, 1979, be deemed to form part of the assets of the member spouse. This means that the value of the member spouse's pension interest must be put into the pool of his or her other assets in order to determine the net growth of his or her estate (if any) during the marriage. If the member spouse's estate (inclusive of the pension interest) shows no accrual or a smaller accrual than the estate of the non-member spouse the last-mentioned spouse will in real terms derive no benefit from the member spouse's pension. Because the pension interest is merely a deemed asset for purposes of determining the spouse's entitlement to matrimonial property, the pension will nevertheless remain intact for the enjoyment of the member spouse or his or her dependants or nominees when the pension becomes payable. Only where the member spouse's estate shows a larger accrual than the estate of the non-member spouse and the said accrual is equal to or in excess of the value of the pension interest at the date of the dissolution of the marriage can one say that a form of pension sharing between the spouses takes place. In the absence of an order in terms of section 7(8) of the Divorce Act, 1979, deferring payment of the pension interest debt,

37 Section 4(1)(b)(ii) of Act No. 88 of 1984.
38 Section 5 of Act No. 88 of 1984.

compensating assets will have to be transferred to the non-member spouse to make up for his or her share of the pension interest.

2.3.2.4 It must be concluded that the matrimonial property dispensation following upon an accrual marriage is not a suitable vehicle to effect pension sharing on divorce. It is submitted that it would be better to account for pension accrual separately and to find a method of providing the non-member spouse with a share of the member spouse's pension, proportionate to the pension entitlement accumulated during the marriage.

Complete separation of Property

2.3.3.1 Complete separation of property comes about where the prospective spouses have excluded community of property, community of profit and loss and all forms of sharing of profit and loss by means of their antenuptial contract. In respect of such marriages one must distinguish between marriages entered into before 1 November 1984, and in the case of certain black persons, 2 December 1988, and marriages entered into after the said dates. On the first-mentioned date the Matrimonial Property Act, 88 of 1984, came into operation and on the last-mentioned date the Marriage and Matrimonial Property Law Amendment Act, 1988, came into operation. The Matrimonial Property Act, 1984, introduced into our law the accrual system of matrimonial property and also brought about drastic changes in respect of marriages in community of property. *Inter alia* the marital power of the husband over the wife was abolished and spouses married in community of property were given equal powers of management of their joint estate. The Marriage and Matrimonial Property Law Amendment Act, 1988, brought about similar changes in respect of black persons who were married out of community of property not by way of antenuptial contract but in terms of the Black Administration Act, 1927.

2.3.3.2 Section 7(3) of the Divorce Act, 1979, provides that a court granting a decree of divorce in respect of a marriage—

- (a) entered into before the commencement of the Matrimonial Property Act, 1984, in terms of an antenuptial contract by which community of property, community of profit and loss and accrual sharing in any form are excluded; or
- (b) entered into before the commencement of the Marriage and Matrimonial Property Law Amendment Act, 1988, in terms of section 22(6) of the Black Administration Act, 1927 (Act No. 38 of 1927), as it existed immediately prior to its repeal by the Marriage and Matrimonial Property Law Amendment Act, 1988,

may (subject to certain provisions to which reference will be made below), on the application of one of the parties to the marriage, order that such assets or part of assets as the court may deem just be transferred to the first-mentioned party. The order may be made only if the parties failed to reach agreement with regard to the division of their assets. The court must furthermore be satisfied that the transfer of assets from one party to the other would be equitable and just by reason of the fact that the party in whose favour the order is granted has contributed directly or indirectly to the maintenance or increase of the estate of the other party during the subsistence of the marriage. In determining the assets which are to be transferred from one spouse to the other the court must have regard to a number of factors, namely the contribution made directly or indirectly by the party in whose favour the order operates, to the maintenance or increase of the state of the other party; the means and obligations of the parties; any donation made by one party to the other during the subsistence of the marriage; any order made for the forfeiture of patrimonial benefits of the marriage, and any other factor which should in the court's opinion be taken into account³⁹.

2.3.3.3 The satisfaction of an order for the transfer of assets in terms of section 7(3) of the Divorce Act, 1979, may, on the application of the party against whom the order is granted, be deferred on such conditions, including conditions relating to the furnishing of

security, the payment of interest, the payment of instalments, and the delivery or transfer of specified assets, as the court may deem just⁴⁰.

2.3.3.4 Section 7(7)(a) of the Divorce Act, 1979, provides that in the determination of the patrimonial benefits to which parties to a divorce action may be entitled, the pension interest of a party is deemed to be part of his or her assets. This deeming provision does, however not apply to a divorce action in respect of a marriage out of community of property entered into after 1 November 1984 in terms of an antenuptial contract by which community of property, community of profit and loss and the accrual system are excluded⁴¹. The result is that in respect of such marriages no provision exists for the sharing of pensions. The reason for this provision must be sought in the historical developments in respect of the matrimonial property law. Before November 1984 the choice was essentially between a matrimonial property system which left no room for the sharing of assets between spouses on divorce, or a marriage in community of property where the wife was subject to the husband's marital power and the control of the joint estate was in the hands of the husband. The changes brought about in 1984 afford the spouse who fulfils the role of homemaker and who has little opportunity to amass an own state the chance to share in the accruals of the estate of the other spouse. Furthermore the marriage in community was made a much more attractive choice through the abolition of the marital power and the institution of joint control over the joint estate. If despite the new choices available to prospective spouses, they still opt for a complete separation of property with the exclusion of profit and loss and accrual sharing, then there exists no provision for pension sharing in the event of their divorce.

2.3.3.5 A court making an order in terms of section 7(3) of the Divorce Act, 1979, for the transfer of assets from one spouse to the other has a discretionary power to order that particular assets or assets equal to a determined value be transferred. In terms of this provision it would be possible for a court to order that a determined share of a member spouse's pension interest be transferred to the non-member spouse. If such a transfer is to take place at the time of the divorce, compensating assets will have to be transferred

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Section 7(6) of Act 70 of 1979.

in place of the share of the pension interest. Otherwise an order may be made in terms of section 7(8) of the Divorce Act, 1979, that an amount representing the non-member's share of the pension interest, or any portion thereof, must be paid to the non-member spouse when the pension benefits become payable in terms of the rules of the fund. It was, however, the intention that this provision should be invoked only in cases where there is no other satisfactory manner in which the non-member spouse could be compensated in respect of his or her share of the pension interest⁴².

Conclusion

2.3.6 It may be concluded that the deeming of a pension interest to be part of the assets of a party to a divorce action for purposes of determining the patrimonial benefits to which the parties to such action may be entitled, is a very ineffective and unsuitable manner of endeavouring to effect pension sharing on divorce. What appears to be necessary is to recognise a non-member spouse's right to share in the member spouse's pension interest irrespective of the matrimonial property dispensation that exists between the spouses unless the spouses have excluded pension sharing between them explicitly in their antenuptial contract.

Value of pension interest

2.4.1 As was mentioned in Chapter 1⁴³, one of the main causes of dissatisfaction with the present system of pension sharing is the manner in which the value of an unmatured pension (a pension interest) is determined. In terms of section 1 of the Divorce Act, 1979, "pension interest" means the benefits to which a member of a pension fund would have been entitled if he or she had terminated his or her membership of the pension fund on the date of the divorce by resignation from his or her office, or in the case of a retirement annuity, the total of the contributions made up to the date of the divorce plus

41 Section 7(7)(c) of Act 7 of 1979.

42 See par. 4.3.4 of the 1995 report and clause 2(a) of the proposed Bill.

43 Par. 1.2 above.

simple interest thereon, calculated at the prescribed rate of interest. In other words, the value of an unmatured pension is the withdrawal value at the date in question. This method of determining the value of an unmatured pension was chosen because of its simplicity and because it does not place an undue burden on the administrators of the pension scheme in question. However, the value of a pension determined in this manner would be substantially less than the value one would arrive at if a proper actuarial determination of the value of an unmatured pension was made, having regard to all the relevant factors. Of course an actuarial calculation could be costly and time-consuming.

2.4.2 A question that needs to be considered is whether it is in fact necessary that the value of an unmatured pension should be determined at the time of a divorce for purposes of effecting equitable pension sharing between the spouses. The valuation of the pension would be necessary only if the non-member spouse is to receive his or her share of the pension at the time of the divorce. If pension sharing could be deferred until the maturity of the pension there would be no need for the valuation of the pension at the time of the divorce of the spouses. It would only be necessary to recognise the non-member spouse's right to share in the member's pension in accordance with a formula which is based on the duration of the marriage.

2.4.3 The advantage of determining the value of an unmatured pension is that it facilitates a clean break between the spouses. On the other hand, making provision that the non-member spouse's share of the member's pension be paid to the non-member by way of a deferred pension does not necessarily mean that the divorced spouses remain bound to each other in some manner. It is possible for the division of the pension to be made administratively without involving the member spouse in the process.

Compensating assets in place of share of pension interest

2.5.1 A matter that is closely connected to the deeming of a pension interest to be part of the assets of a member spouse for purposes of pension sharing on divorce, is the idea of replacing the share of the pension interest to which the non-member is entitled with

other assets of the member spouse or of the joint estate. It was the Commission's approach throughout that pension sharing should be kept as uncomplicated as possible.

The Commission, therefore, tried to avoid involving the pension fund in bringing about pension sharing on divorce. In its 1995 report it specifically recommended that an order for the deferred payment of a non-member's share of the member's pension interest in terms of section 7(8) of the Divorce Act should not be made unless the court is satisfied that the non-member spouse cannot be compensated in any other satisfactory manner in respect of his or her interest in the member spouse's pension interest⁴⁴.

2.5.2 This method of making provision for pension sharing between spouses on their divorce has the advantage that it facilitates a clean break between the spouses. It is also uncomplicated and easy to apply. However, it also has disadvantages. The main disadvantage is that it does not promote the idea underlying pension sharing, namely providing retirement benefits for the years of retirement when one may no longer be in a position to provide for oneself. A further disadvantage is that it requires a value to be placed on the pension interest at the time of the divorce in order to be able to set the pension interest off against other assets. In the case of a defined benefit scheme one either has to settle for the withdrawal benefit at the date of the divorce (which in most cases would be an unrealistic amount in relation to the non-member spouse's pension expectations) or otherwise the true value of the pension interest would have to be determined actuarially, which could be an expensive exercise.

2.5.3 A further disadvantage of making pension sharing dependant upon the transfer of compensating assets is that it links pension sharing to the matrimonial property system which is applicable to the marriage of the spouses. It was pointed out above that this has the result that in some instances there is no room for pension sharing whereas in others the extent to which pension sharing between spouses takes place is dependant upon the financial state of the estate of the member spouse, or the joint estate in the case of a marriage in community of property.

2.5.4 There are, of course, instances where spouses would prefer that compensating assets be made available to a non-member spouse in place of a share of the member's pension interest. It is submitted that this should be an option available to a non-member spouse upon divorce, but it should not be forced upon such spouse.

Relationships other than formal marriages

2.6.1 A question that needs to be considered is whether pension sharing ought to be extended to relationships other than formal marriages. At present provision exists for pension sharing only upon the divorce of a member of a pension fund and his or her spouse. A divorce pre-supposes a marriage recognised under the Marriage Act, 19.. nevertheless a "dependant" is defined in section 1 of the Pension Funds Act, 1956 (Act 24 of 1956), *inter alia* as "the spouse of a member, including a party to a customary union according to Black law and custom or to a union recognised as a marriage under the tenets of any Asian religion." There are no doubt other relationships that people would want to be recognised as marriages.

CHAPTER 4

Proposed reform

4.1.1 A person who is married to a member of a retirement fund ought in principle to be entitled to share in the retirement fund benefits of the member of the fund, even in the event of the divorce of the spouses. The principle is based on the premise that retirement fund benefits are accumulated for the benefit of the member and his or her family during the member's retirement or for the member's dependants upon his or her death. The member's marriage partner therefore, has a legitimate expectation in regard to the member's retirement fund benefits. The principle that this expectation is not destroyed by the member's divorce is already recognised in our law, albeit in an indirect manner. It is submitted that the whole matter of the sharing of retirement fund benefits between spouses on their divorce ought to be regulated by direct and specific legislation dealing exclusively with this matter. This object is sought to be attained by means of the attached draft Bill — Annexure A.

4.1.2.1 In clause 1 of the Bill a number of concepts are defined. Attention is drawn in particular to the definitions of marriage and divorce. The scheme of the proposed legislation is to afford the divorced spouse of a member of a retirement fund the right to share in the retirement fund benefits that will eventually become available or are already being paid to the member. This presupposes the existence of a valid marriage between the member and the non-member spouse. There are in South Africa a great many customary marriages (so called customary unions) which are not recognised as marriages for all purposes. There are also marriages contracted in accordance with Muslim law or other religious laws which are not recognised in South African law as valid marriages. It is suggested that for purposes of the sharing of retirement fund benefits these matrimonial relationships have equal claim to recognition as marriages. Although there is in principle no objection to recognising such relationships as marriages, there are practical difficulties. In the proposed legislation the date of the commencement and the

date of the dissolution of a marriage is of crucial importance since the extent of the non-member spouse's right is determined in proportion to the duration of the marriage with the member spouse. Since the majority of customary marriages are not registered, there is no ready proof of the date of commencement of such marriages at hand. Furthermore the dissolution of a customary marriage is effected in an unofficial and informal manner with the result that no formal proof of such dissolution is available. Also in the case of certain religious marriages there is no formal record of the commencement or dissolution of the marriage. In order to accommodate customary and religious marriages for purposes of the sharing of retirement fund benefits provision is made in clause 6 of the proposed Bill for a means of proving the date of commencement and the date of dissolution of such marriages.

4.1.2.2 There are those who are of the opinion that the definitions of "marriage" and "divorce" and the provisions of clause 6 of the Bill ought to be extended so as to include so called "gay" marriages between partners of the same sex and shacking-up relationships where a man and a woman lives together in a marriage relationship without concluding a formal marriage between them. As regards relationships between members of the same sex, it is submitted that the development of our law has not reached the stage where such relationships are recognised as marriages in the true sense. It is further submitted that the underlying ratio for the sharing of retirement fund benefits does not apply with equal force in respect of such relationships. As regards shacking-up relationships the partners in such relations are free to enjoy the advantages of the proposed legislation by formalising their relationships.

4.1.3 In clause 2 of the proposed Bill the broad principles of the proposed legislation are set out. The right of a non-member spouse to share in the retirement fund benefits of the member in the event of the dissolution of the marriage between the member and the non-member spouse is embodied in clause 2(1) of the Bill. The contractual freedom of spouses to exclude the sharing of retirement fund benefits between them is recognised in clause 2(2) of the Bill. It is possible that spouses may have made their own arrangements as regards providing for their retirement and that they don't need the

protection envisaged by the proposed legislation. It is further submitted that spouses should be free to exchange other assets in substitution of a share of a retirement fund benefits. (clause 2(4) of the Bill). Such a substitution should, however, not be forced upon a non-member spouse.

4.1.4 It is important to note that the right to share in retirement fund benefits of one's marriage partner is a reciprocal right. If both spouses are members of retirement funds each spouse has a right to share in the retirement fund benefits of the other spouse.

4.1.5 It is submitted that one's right to share in the retirement fund benefits of one's spouse should not be dependant upon the matrimonial property system which regulates one's matrimonial property regime, nor should the share of such benefits to which one may be entitled be determined by the matrimonial property law. In other words, unless the spouses have explicitly otherwise agreed, the sharing of retirement fund benefits between them should be effected in accordance with the provisions of the proposed legislation, irrespective of the matrimonial property system regulating their marriage. This approach may on the face of it appear to be drastic but it is submitted that it is in conformity with the principle underlying of the sharing of retirement fund benefits. It is also not foreign to matrimonial property law. In terms of the definition of "dependant" in section 1 of the Pension Funds Act, 1956 (Act No. 24 of 1956), the spouse of a member of a retirement fund is deemed to be a dependant of the member irrespective of whether the member is legally liable for the maintenance of the said spouse. This means that on the death of the member his or her spouse will be entitled to death benefits payable under the rules of the fund and the matrimonial property system applicable to the spouses plays no role in regard to the non-member spouse's entitlement to such benefits. Furthermore, in terms of section 4 of the Matrimonial Property Act, 1984 (Act No. 88 of 1984), certain property is excluded for purposes of determining the accrual of the estates of spouses married in accordance with the accrual system. In terms of section 5 the spouses may include or exclude property from the accrual of their estates. Also in the case of a marriage in community of property a testator or donor may exclude a legacy or donation from the joint estate of the spouses. These examples show that

certain kinds of property may be excluded from the operation of an applicable matrimonial property regime. It is submitted that the sharing of retirement fund benefits between divorced spouses can best be effected outside the matrimonial property system that applies to the spouses. Clause 10 of the Bill therefore provides for the repeal of section 7(7) of the Divorce Act, 12979, in terms of which a pension interest is deemed to be part of the assets of a member of pension fund. Clause 11 of the Bill provides specifically that no retirement fund benefit and no right to such benefit forms part of a member's estate for purposes of determining the accrual of his or her estate. In general the provisions of the Bill are aimed at providing the non-member spouse with a share of the member's retirement fund benefits without reference to the matrimonial dispensation applicable to the spouses.

4.1.6.1 As regards the retirement fund benefits to which a non-member spouse should become entitled to on his or her divorce from the member spouse, it is suggested that a distinction should be drawn between matured benefits and unmatured benefits and in the case of unmatured benefits, between defined contribution schemes and defined benefit schemes. In the case of matured benefits there is no uncertainty with regard to the amount that is available for division between the spouses on their divorce. It is only necessary to determine the non-member spouse's share with reference to the duration of the marriage in proportion to the total period during which retirement benefits have been earned by the member. This is provided for in clause 4(1) of the Bill. It is suggested that the non-member spouses should receive his or her share of the retirement fund benefits direct from the fund.

4.1.6.2 A defined contribution scheme operates like a deposit account. The account balance, which includes contributions to the fund and investment returns thereon allocated from time to time, can be ascertained at any time. It is therefore possible to effect a division of a member's retirement fund benefits in a defined contribution scheme at the time of the member's divorce. The non-member spouse would be entitled to a half share of the amount which accumulated in the fund during the subsistence of the marriage. It is suggested that on the date of the divorce a splitting of the member's

account balance should be effected and the non-member's share should be transferred to a separate account in his or her name. Such share should earn investment returns and be subject to the same rules as regards the date of payment and the form in which payment is made, as applies to the member's benefits. (Clause 3 of the Bill).

4.1.6.3 In the case where the member's retirement fund benefits are embodied in a defined benefit scheme it is suggested that the non-member spouse should upon the divorce of the spouse become entitled to a deferred retirement fund benefit which will become payable when the member's benefits become payable. The determination of the non-member's share is, however, different because it is dependant upon certain contingencies. It is submitted that a distinction should be drawn between the case where the benefits become payable as a result of the member's resignation, dismissal or the dissolution of his or her retirement fund on the one hand and any other circumstances (such as retirement or death) on the other hand. In respect of the first-mentioned category it is suggested that the non-member spouse's share should be a proportion of the benefits that accrue to the member as a result of his or her resignation, dismissal or the dissolution of the fund (as the case may be), determined with reference to the benefits accumulated during the subsistence of the marriage in proportion to the total period during which benefits have been accumulated. (Clause 4(1)(a) of the Bill).

4.1.6.4 In the case where benefits become payable in circumstances other than the resignation or dismissal of the member or the dissolution of the retirement fund it is suggested that the non-member spouse's share should be determined with reference to the period during which pensionable service was accumulated during the subsistence of the marriage, in proportion to the total period during which pensionable service was accumulated and the actuarial liability of the retirement fund in respect of the member immediately before the benefits become payable. The proposed formula is contained in clause 4(1)(b) of the proposed Bill. It is understood that the actuarial liability is readily ascertainable without significant delay or costs.

4.2 In clause 12(1) of the Bill provision is made for the disposal of pending matters in accordance with the law existing immediately prior to the commencement of the new legislation. Clause 12(2) is meant to prevent the proposed legislation from impacting on choices made by spouses prior to the commencement of the new legislation. Provision is nevertheless made for spouses who fall outside the ambit of the proposed legislation to make the provisions thereof applicable to their marriages by agreement between the spouses.

4.3 The proposed Bill was drafted in close consultation with representatives of the Institute of Retirement Funds, the Life Offices Association and the Actuarial Society of South Africa. The said representatives together with the researcher formed an informal workgroup which met on several occasions. At one stage a representative of the South African Revenue Service was also included in the workgroup. It was endeavoured throughout also to involve a representative of Cosatu but, although the documentation and draft Bills were sent to the said representative he did not find it possible to attend the meetings of the workgroup.

ANNEXURE A

REPUBLIC OF SOUTH AFRICA

DIVISION OF RETIREMENT FUND BENEFITS ON DIVORCE ACT

(As introduced)

(MINISTER OF)

[B - 98]

REPUBLIEK VAN SUID-AFRIKA

..... WETSONTWERP

(Soos ingedien)

(MINISTER VAN)

[B - 98]

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GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from
existing enactments.
_____ Words underlined with a solid line indicate insertions in existing
enactments.

B I L L

**To provide for the division of retirement fund benefits on the divorce of spouses;
and to provide for matters related thereto.**

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Definitions

1. In this Act, unless the context otherwise indicates—
- (i) "beneficiary" means a person who is entitled or may become entitled to receive benefits from a retirement fund on the death of a member in terms of the rules of the fund;
 - (ii) "defined benefit scheme" in relation to a retirement fund means a scheme which is not a defined contribution scheme;
 - (iii) "defined contribution scheme" in relation to a retirement fund means a scheme under which the retirement benefits payable thereunder are based solely on—
 - (a) contributions made by or for the benefit of a member;
 - (b) investment returns on such contributions; and
 - (c) any surplus allocated to a member;
 - (iv) "divorce" includes the dissolution of a marriage in accordance with recognised customary or religious law;
 - (v) "marriage" includes a union or relationship between a man and a woman that is recognised as a marriage in accordance with customary law or any recognised religion;
 - (vi) "matured" in relation to retirement fund benefits means benefits that, at the date of divorce, have become payable to a member on his or her retirement or permanent disability in terms of the rules of the fund;
 - (vii) "member" means a member of a retirement fund;
 - (viii) "non-member spouse" means the spouse of a member, irrespective of whether that spouse is also a member of the same or any other retirement fund;

- (ix) "pensionable service" in relation to retirement fund benefits in respect of a member means the period during which such benefit was earned by the member;
- (x) "retirement fund" means—
 - (a) any pension fund organisation registered under the Pension Funds Act, 1956 (Act No. 24 of 1956); or
 - (b) any retirement fund or retirement scheme established by law; or
 - (c) any retirement fund or retirement scheme established in terms of an industrial agreement under the Labour Relations Act, 1995 (Act No. 66 of 1995);
- (xi) "retirement fund benefit" means any benefit payable in terms of the rules of a retirement fund on the occurrence of a specified event;
- (xii) "spouse" means a partner in a marriage and includes a divorced spouse;
- (xiii) "unmatured" in relation to retirement fund benefits means that the stage where such benefits become payable to a member or a beneficiary in terms of the rules of a fund has not been reached.

Sharing of retirement fund benefits on divorce

2. (1) If the marriage of a member and his or her spouse is dissolved by divorce, the non-member spouse is, in accordance with the provisions of this Act, entitled

to share in the retirement fund benefits which accumulated in respect of the member during the subsistence of the marriage.

(2) Spouses may in their antenuptial contract explicitly exclude the sharing of retirement fund benefits between them in the event of their divorce.

(3) A spouse may in writing waive any right he or she may have to share in the retirement fund benefits of the other spouse in terms of the provisions of this Act.

(4) Spouses may by written agreement between them make provision for the settlement of other assets on a spouse in lieu of that spouse's share or right to a share of the other spouse's retirement fund benefits.

Division of unmaturred retirement fund benefits in defined contribution scheme

3. (1) If a retirement fund benefit which is to be divided between spouses on their divorce is unmaturred and is embodied in a defined contribution scheme, the non-member spouse's share of the said benefit shall be equal to one half of—

- (a) the total of all contributions made to the fund by or for the benefit of the member from the date of his or her marriage to the non-member spouse; plus
- (b) the net investment returns allocated or to be allocated in respect of those contributions up to the date of the divorce; plus
- (c) any surplus allocated by the fund to the member during the said period.

(2) The administrator of the member's retirement fund must upon receiving notice in the prescribed form that a division of the member's retirement fund benefits is to be effected at the date of the divorce of the spouses, effect a splitting of the member's account balance as at the said date and open a separate account for the benefit of the non-member spouse in respect of his or her share of the member's retirement fund benefits as determined in accordance with subsection (1). The balance in the separate account earns investment returns as if the non-member spouse became a member of the retirement fund concerned.

(3) After the splitting of retirement fund benefits as contemplated in this section, the rules of the retirement fund concerned shall apply to the non-member spouse's share as if he or she is the member with regard to such share: Provided that—

- (a) the stage where benefits become payable and the form in which benefits may be paid shall be subject to the rules which would have applied if no splitting of benefits had been effected; and
- (b) the non-member spouse's entitlement to his or her share of the benefits shall, in proportion to their effect on the member's share of the benefits, be subject to any rules of the fund pertaining to the vesting of benefits in accordance with the member's period of service or membership of the fund.

(4) The said administrator may, with the written consent of the non-member spouse, and must if requested thereto in writing by the non-member spouse, transfer the non-member spouse's share of the retirement fund benefits as determined in accordance with subsection (1), to another fund for the benefit of the non-member

spouse: Provided that the transfer of the said benefits shall not take place before the benefits have become fully vested as contemplated in subsection (3).

Division of unmaturred retirement fund benefits in defined benefit scheme

4. (1) If a retirement fund benefit which is to be divided between spouses on their divorce is unmaturred and is embodied in a defined benefit scheme the non-member spouse shall, on the date when the benefit becomes payable under the rules of the fund, be entitled—

(a) in the case of a benefit which accrues to the member as a result of his or her resignation, dismissal or the dissolution of the fund, to the proportion of such benefits determined in accordance with the following formula:

$$\frac{1}{2} \frac{A}{B}$$

where—

A = the period of pensionable service accumulated by the member during the subsistence of his or her marriage to the non-member spouse;
and

B = the total period of pensionable service accumulated by the member;

(b) in the case of a benefit which becomes payable in any other circumstances, to a benefit the value of which shall be determined in accordance with the following formula:

A

$$\frac{1}{2} \frac{A}{B} \times C$$

where—

A = the period of pensionable service accumulated by the member during the subsistence of his or her marriage to the non-member spouse;

B = the total period of pensionable service accumulated by the member;
and

C = the actuarial liability of the fund in respect of the member on the day preceding the day on which the benefit becomes matured as calculated by the actuary of the fund concerned: Provided that where such benefit is payable by way of periodic payments the benefit as determined above shall take the form of an annuity payable during the lifetime of the non-member spouse, as calculated by the actuary of the fund concerned.

(2) In the event where the retirement fund benefit contemplated in subsection (1) is superseded by an alternative benefit on account of the death of the member (other than a benefit payable to a member's dependant child), the non-member spouse shall be entitled to a proportion of the said benefit determined in accordance with the formula contemplated in the said subsection.

(3) The administrator of the member's retirement fund must, if notified in the prescribed form of a non-member spouse's right to a share of the member's retirement fund benefits, pay to the non-member spouse his or her share of those benefits direct from the fund when the said benefits become payable.

(4) If the non-member spouse dies before the date on which his or her share of the member's retirement fund benefits become payable, the non-member spouse's estate shall have a claim against the administrator of the member's retirement fund in respect of such share of those benefits when they become payable.

Division of matured retirement fund benefits

5. (1) If matured retirement fund benefits must be divided between a member and his or her spouse on their divorce, the share of those benefits to which the non-member spouse shall be entitled must be determined in accordance with the following formula:

$$\frac{1}{2} \frac{A}{B} \times C$$

where—

A = the period of pensionable service accumulated by the member during the subsistence of his or her marriage to the non-member spouse;

B = the total period of pensionable service accumulated by the member;
and

C = the amount of the said retirement fund benefits.

(2) The provisions of section 4(2) and (3) shall, with the necessary changes, apply in respect of a non-member spouse's share of a matured retirement fund benefits as determined in accordance with this section.

Proof of date of commencement and dissolution of certain marriages

6. Whenever the date of the commencement of a marriage concluded otherwise than in accordance with the Marriage Act, 1961 (Act No. 25 of 1961), or the date of the dissolution of a marriage dissolved otherwise than by a decree of divorce granted by a competent court is relevant for purposes of this Act and such date is in dispute between the parties concerned, the said date may be proved by a certificate issued by a magistrate after he or she has satisfied himself or herself as to the true date of the marriage or the dissolution of the marriage, as the case may be.

Regulations

7. The Minister may make regulations prescribing—
- (a) the form in which an administrator of a retirement fund must be notified of any division of retirement fund benefits of a member;
 - (b) the apportionment of the costs relating to the division of retirement fund benefits;
and
 - (c) any other matter that may or must be regulated in order to give effect to principles underlying the provisions of this Act.

Amendment of section 37A of Act 24 of 1956

8. Section 37A of the Pension Funds Act, 1956 (Act No. 24 of 1956), is hereby amended by substituting the following for subsection (1):

"(1) Save to the extent permitted by this Act, the Income Tax Act, 1962 (Act No. 58 of 1962), **[and]** the Maintenance Act, 1963 (Act No. 23 of 1963), and the Division of Retirement Fund Benefits on Divorce Act, 19...., 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 to contained in the rules of such a fund, be capable to being reduced, transferred or otherwise ceded, or of being pledged or hypothecated, or be liable to be attached or subjected to any form execution under judgment or order of a court of law, or to the extent of not more than three thousand rand per annum, be capable of being taken into account in a determination of a judgment debtor's financial position in terms of section 65 of the Magistrates' Court Act, 1944 (Act No. 32 of 1944), and in the event of the member or beneficiary concerned attempting to transfer or otherwise cede, or to pledge or hypothecate, such benefit or right, the fund concerned may withhold or suspend payment thereof: Provided that the fund may pay any such benefit or any benefit in pursuance of such contributions, or part thereof, to any one or more of the dependants of the member or beneficiary or to a guardian or trustee for the benefit of such dependant or dependants during such period as it may determine."

Amendment of section 1 of Act 70 of 1979

9. Section 1 of the Divorce Act, 1979 (Act No. 70 of 1979), is hereby amended by deleting the definitions of "pension fund", "pension interest" and "rules".

Amendment of section 7 of Act 70 of 1979

10. Section 7 of the Divorce Act 1979, is hereby amended—

(a) by substituting the following for paragraph (a) of subsection (7):

"(a) In the determination of the patrimonial benefits to which the parties to a divorce may be entitled, the **[pension interest of a party shall, subjected to paragraphs (b) and (c), be deemed to be part of his assets]** rights to which a party may be entitled under the provisions of the Division of Retirement Fund Benefits on Divorce Act, 19...., must be taken into account.";

(b) by deleting paragraph (b) and (c) of subsection (7); and

(c) by deleting subsection (8).

Amendment of sections 5 of Act 88 of 1984

11. Section 5 of the Matrimonial Property Act, 1984 (Act No. 88 of 1984), is hereby amended by the addition of the following subsection:

"(3) (a) No benefit paid to or which is being received by a member of a retirement fund or any other asset which the member acquires by virtue of his or her possession or former possession of such benefit, and no right which such a member has to the payment of retirement fund benefits in the future, shall for purposes of determining the accrual of that member's estate upon divorce, form part of the said member's estate.

(b) No right which the spouse of a member of a retirement fund may have in terms of the Retirement Fund Benefits Act, 19..., or any other law to a share of the member's retirement fund benefits and no part of such benefits which has been or is being paid to such spouse shall for purpose of determining the accrual of the estate of such spouse on divorce, form part of his or her estate."

Application of Act

12. (1) Any right which a party to a divorce action instituted before the commencement of this Act may have in respect of the retirement fund benefits of the other party to such action must be determined as if this Act had not been adopted.

(2) Spouses married before the commencement of this Act, but after 1 November 1984, and who have in terms of their antenuptial contract excluded community of property, community of profit and loss and the accrual system in respect of their marriage shall for purposes of section 2(2) be deemed to have explicitly excluded the sharing of retirement fund benefits in accordance with the provisions of this Act,

unless they have by written agreement between them elected to make the said provisions applicable to them in the event of their divorce.

Short title and commencement

13. This Act shall be called the Division of Retirement Fund Benefits on Divorce Act, 19.., and shall commence on a date fixed in the *Gazette* by the President.