

# LEGAL FOCUS

Newsletter of Sanlam Employee Benefits: Legal

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## Divorce orders and pension interest

### 1. Introduction

Sanlam Employee Benefits in its capacity as fund administrator still receives many requests for payment of a part of a fund member's pension interest to a former spouse, where the divorce court order does not comply with section 7(8) of the Divorce Act. The purpose of this Legal Focus is to highlight the requirements of a valid section 7(8) order.

### 2. Meaning of pension interest

The term "pension interest" is defined in the Divorce Act, as far as a member of a pension fund or provident fund is concerned, as:

"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".

### 3. Pension interest deemed to be an asset in divorce proceedings

A fund member does not become entitled to a benefit before termination of service. However, in terms of section 7(7) of the Divorce Act a member's pension interest (i.e. resignation benefit as at date of divorce) is deemed to be an asset in any divorce action. (The only exception is in respect of a marriage out of community of property on or after 1 November 1984 that excluded profit and loss and the accrual system).

4. No automatic right that fund must pay

However, the fact that pension interest is deemed to be an asset does not automatically mean that the fund concerned must pay any part of the pension interest to the former spouse. Section 7(8) of the Act states that a court granting a divorce “may” (not “must”) make an order –

- a. that any part of the pension interest allocated to the non-member spouse must be paid to her/him by the fund when any benefit accrues to the member (section 37D(4) of the Pension Funds Act creates a deemed accrual on the date of divorce), and
- b. that the fund’s records be endorsed.

The court therefore has a discretion to make a section 7(8) order or not. Unless the court order (or the deed of settlement agreed upon by the parties that has been made an order of court) provides that the fund must pay the part of the pension interest awarded to the non-member spouse, the fund may not make such payment. In terms of section 37A of the Pension Funds Act no benefit from a fund may be reduced, transferred, etc. except in certain very limited circumstances, one of which is a valid section 7(8) divorce order against the fund.

5. Wording of deed of settlement

In the majority of divorces the parties reach an agreement, called a deed of settlement, which is then made an order of court. An example of wording that could lead to a valid section 7(8) order is attached hereto. Note that the fund(s) concerned must be identifiable from the order.

6. Tax

Where the spouse makes an election (cash or transfer) on or after 1 March 2009 with regard to a section 7(8) award –

- In any divorce on or after 13 September 2007, the amount is taxable in the hands of the non-member spouse. If the amount is transferred to another approved retirement fund, the transfer is tax-free (except in the case of a pension to provident fund transfer).
- In a divorce granted before 13 September 2007 the amount is not taxable, but a nil tax directive must be obtained from SARS.

7. Housing loan / guarantee

The fund's security in respect of any prior housing loan/guarantee in respect of a member in respect of whom a section 7(8) order was obtained, is protected in terms of section 37D of the Act, i.e. the amount payable by the fund must be reduced to take account of the housing loan / guarantee.

8. No pension interest if service terminated before divorce

As "pension interest" is defined as the resignation benefit that would be payable if the member resigned on the date of divorce, there is no pension interest that can be awarded in terms of section 7(8) if the member's service was terminated before the date of divorce. This has been confirmed by the Supreme Court of Appeal in the case of Eskom Pension Fund v Krugel. The only exception (based on section 37D(6) of the Pension Funds Act) is in the case of a preservation fund – such exception applies with effect from 1 November 2008.

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**Wording of deed of settlement in order to obtain a court order in terms of section 7(8) of Divorce Act**

1. Defendant (Note: Change all references to Defendant to “Plaintiff” if applicable and vice versa) is a member of the ..... Fund (Note: Indicate name of each Fund against which order must apply).
2. The parties agree that the said Fund be ordered to pay ..... percent of the pension interest of the Defendant in the Fund to the Plaintiff or to a retirement fund elected by the Plaintiff.
3. The Defendant must submit a copy of the divorce order to the said Fund or its administrator so that the Fund’s records can be endorsed accordingly.