

Divorce orders

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Introduction

The Operations & Administration division (O&A) issue practice notes to:

- Increase awareness and provide insight into the best practices and procedures adopted by AlexForbes for the effective administration of your fund
- Clarify our administration role
- Align expectation between AlexForbes, trustees, employers and members of the retirement funds.

Please note that in an event of a conflict, the fund's rules, applicable legislation or the signed service level agreement will take precedence over the processes set out in this practice note.

In this issue, we set out the practice with regards to divorce orders granted against members of retirement funds administered by AlexForbes.

Background

The Pension Funds Amendment Act, 2007 ("the Amendment Act") was promulgated with effect from 13 September 2007. This Amendment Act makes reference to the Divorce Act, 1979, and introduced a "clean break approach" upon divorce. This means that the payment of the benefit from the retirement fund in terms of the divorce order will be paid to the non-member spouse immediately upon receipt of the duly composed divorce order, on the premise that the benefit (which is payable from the pension interest of the member to the non-member spouse) has accrued to the non-member spouse (for purposes of the Divorce Act).

What is 'Pension interest'

'Pension interest' is defined as the benefits a member of a pension fund or provident fund would have been entitled to, if his or her membership of the fund would have been terminated on date of divorce on account of his or her resignation from office. In short, it means his or her net cash (pre-tax) withdrawal benefit, after deducting housing loans (including tax) and any other previous legal orders (including tax), which he or she would be entitled to in terms of the fund's rules if he or she theoretically resigned on the date of divorce.

Example:

Member's total fund credit as at date of divorce 1 October: R100 000 Current housing loan balance (including tax): R40 000 Member's balance of fund credit (pre-tax): R60 000

If the divorce order specifies 50%, the non-member spouse is due R30 000.

This allows a non-member spouse to claim a portion of the member's pension interest, in terms of a divorce order that is enforceable against the fund, at the date of divorce.

The Pension Funds Act allows for divorce payments to be deducted from deferred pension(er) benefits, the capital value of a pensioner's pension after retirement and in terms of a court order dividing the assets of a marriage under Islamic law. In relation to deferred pensioners, such orders will be referred to the trustees to assess and make a decision.

Timelines

- The pension fund must, within **45 days** of the receipt of the divorce order from the non-member spouse, request the non-member spouse to choose whether he or she wants the benefit paid in cash or transferred to an approved fund.
- The non-member spouse must, within **120 days** of being requested, inform the pension fund of how the money must be dealt with.
- The pension fund must transfer the amount within **60 days** of being informed how the money must be dealt with, in accordance with the non-member spouse's election. AlexForbes's best administration practice will be that the **60 days** will start from the date the fund receives the fully completed and signed divorce benefit application form and supporting documentation including a certified copy of ID of the claimant, bank stamped bank statement or bank stamped confirmation of account, the full divorce order and settlement agreement if applicable, stamped by the Registrar, assistant Registrar or Magistrate.
- If the non-member spouse fails to make a choice within the **120 days**, the pension fund should pay the amount directly to the non-member spouse within **30 days** from the **120 days** (within **150 days** of requesting the non-member spouse to make an election). This provision is however on condition that the fund is in possession of valid bank account details for the non-member spouse and a valid divorce order that is enforceable against the fund.

Where payment is made after the expiry of the **120 day period**, the amount due will earn fund return (bank interest) for the period in which the benefit remains unpaid longer than **120 days**.

NOTE

- Section 37D (4)(c) of the Pension Funds Act states that a non-member spouse is not a member or beneficiary in relation to the fund.
- The non-member spouse is only entitled to fund return (interest) on their benefit from the date of the deduction, which is the date on which an election is made or, if no election is made within the **120 day period**, the date on which that **120 day period** expires.
- The non-member spouse is not entitled to any other growth or interest, this has been confirmed by the Pension Funds Adjudicator.

Taxation

- **Divorce orders dated pre-13 September 2007 – payable on or after 1 March 2012.**

The date of accrual for tax purposes is the earlier of the date that the non-member spouse makes an election to receive cash or transfer the benefit to an approved fund or **120 days** from the date the fund has to request the election.

Who pays the tax?

Neither parties pay tax. The amount is payable tax-free.

- **Divorce orders dated post-13 September 2007 or later – payable on or after 13 September 2007.**

The date of accrual for tax purposes is the earlier of the date that the non-member spouse makes an election to receive cash or transfer the benefit to an approved fund or **45 days** from the date the fund has to request the election.

Who pays the tax?

Date of accrual is pre 1 March 2009, the member pays the tax. The member does however have a right of recovery against the non-member spouse.

Date of accrual is post 1 March 2009, the non-member spouse pays the tax but can transfer the benefit tax-free to an approved fund.

Frequently asked questions

Are all divorce orders binding or enforceable?

No. The following minimum requirements must be contained in the divorce order otherwise the order would not be enforceable against the fund:

- The date of the divorce must be during the course of the individual's membership of the fund.
- It must state the correct name of the fund concerned or sufficient information must be given that will enable the fund to be identifiable.
- The benefit payable to the non-member spouse must be clearly established.

Can my divorce order refer to a post-tax amount to be paid to my ex-spouse?

No. These divorce orders will be deemed unenforceable against the fund. An individual's tax liability is only known to SARS, it is thus impossible to determine a post-tax amount to be paid to the non-member spouse.

Where it is established that a divorce order is unenforceable against the fund, would it mean that no payment will be made to the non-member spouse?

Not necessarily. A divorce order would need to meet certain minimum requirements before the order is enforceable against the fund. Should the divorce order not meet some of those requirements the parties are advised to amend the order. It is important to note that amending the order may not be a suitable corrective step in every case. The reason for unenforceability would need to be determined.

I did not give permission to AlexForbes to pay my ex-spouse, is this legal?

Yes. Payment of pension interest in terms of a valid and enforceable divorce order is a mandatory deduction in terms of Section 37D of the Pension Funds Act. AlexForbes need not to obtain a member's consent in complying with the order.

Can I take a part cash portion and transfer the remainder into an approved fund?

No. The non-member spouse can only elect to transfer the full benefit to another approved fund or elect to have the full benefit paid out in cash subject to taxation. A part cash or a part transfer option is not permitted.