

Divorce and your retirement savings

09 March 2021: Although the official statistics for South Africa's divorce rate during COVID-19 are yet to be released, globally, the pandemic sent divorce rates soaring by up to 30% or more during 2020. According to DIY Legal, South Africa ranks in 83rd place out of 154 countries for divorce.

"An issue that is often overlooked in the process leading up to divorce, but equally messy to navigate, is what the implications of such a decision are on a couple's financial affairs," says Jaya Leibowitz, senior legal adviser at Allan Gray.

Leibowitz says that divorce is a traumatic and life-altering experience with wide-ranging implications, especially when it comes to retirement savings.

"A 'pension interest' deduction allows a non-member spouse to be eligible for a pension benefit from the member spouse's pension from the date of divorce. It doesn't take into consideration the duration of the marriage or whether you were married when you first became a member of the retirement fund," she says.

A pension interest distinguishes between pension interest in a retirement annuity fund, and pension interest in any other retirement fund (e.g. a pension fund, provident fund, pension/provident preservation fund).

"It is therefore important to be aware that a 100% pension interest deduction from a [retirement annuity](#) fund may not be the full value in the fund. Furthermore, if a member has multiple accounts in a retirement fund, pension interest is calculated at fund level and not at account level. The divorce order must therefore refer to the fund and not an individual account. However, the member may elect which account in the retirement fund the pension interest deduction must be made from," says Leibowitz.

Does pension interest apply to all matrimonial property regimes?

Leibowitz explains that the three different matrimonial property regimes in South Africa are 1) marriage in community of property, 2) marriage out of community of property without accrual, and 3) marriage out of community of property with accrual.

"The default if you marry without concluding an antenuptial contract is a marriage in community of property. In this regime, you and your spouse each own 50% of the assets and liabilities in the estate (joint estate), and upon divorce each spouse has a 50% claim against the other," she says. "If you do not want to have a joint estate you must conclude an antenuptial contract, either with or without accrual."

If without accrual, each spouse keeps their own assets and there is no claim against the other's assets. If accrual is included, at divorce, the spouse with the larger estate (assets less liabilities) must pay the difference between her/his estate and the estate of the other spouse with to the spouse with the smaller estate.

"Importantly, if you are married out of community of property without accrual after 1 November 1984, your spouse has no claim for pension interest from your retirement savings."

Leibowitz urges couples to consult with a lawyer and financial planner before deciding which matrimonial property regime is best suited.

Who is responsible for the tax?

In terms of the provisions of the Income Tax Act, if the non-member spouse elects to take a cash lump sum, the benefit will be taxed in his/her hands. However, if the benefit is transferred to another retirement fund, the benefit will be transferred tax-free. When the non-member [retires or withdraws](#) from that retirement fund, he/she will be liable for tax on the retirement or withdrawal benefit.

What about living or life annuities purchased with retirement benefits?

Pension interest deductions only apply to retirement funds and do not apply to compulsory annuities, such as living annuities. Once a member has exited the fund, the pension interest in the retirement fund no longer exists. Despite the annuity policy not being a consideration for pension interest, a recent court judgement held that the future value of annuity income forms part of the policyholder's estate and must be included when calculating the accrual for a marriage out of community of property with accrual.

"Most importantly, if you are in the process of a divorce, ensure that the wording of the court order and settlement agreement is in line with legal requirements. If the order is granted and the wording is not competent, the fund will not be able to give effect to the order. This will require the court to formally amend its original order, which is a lengthy and costly exercise," concludes Leibowitz.

-ends-