

# Spouses' Pension Rights & Financial Settlement after Divorce

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## 1 Introduction

Pension reforms have taken place in many countries all over the world during the last ten to fifteen years. One of the main reasons for the reforms is the ageing population, which creates economic problems in the pension systems. State pensions, occupational pensions, and private pensions based on individual saving, usually form what is characteristically known as pension-protection. Primarily the state pension and occupational pension are affected by the reforms.

A common aim of the pension reforms is to give the pension system more of an insurance character. The last decade has been characterized by the implementation, or start, of pension reforms where the demands for a good pension return are more exigent than ever before. The trend is from so-called defined-benefit pensions to defined-contribution pensions; the size of a pension is today largely determined by a person's lifetime earnings, instead of the best salary accumulated during a set number of years.

Since there is generally a difference between women and men with regard to income from work, there is also a difference between women's and men's pensions. The difference will probably be more noticeable in the future when the demands for a good pension have been raised, after the pension reforms. One important reason why women often receive a lower pension than men is that women more frequently work part-time. This is especially so for women who are married or cohabited.<sup>1</sup> In a system with defined-contribution pensions, spouses whose earnings are lower due to part-time employment during the marriage will find that their pension rights are to a certain extent lost and cannot be recovered later.

The pension reforms that have taken place raise the question of how pension rights are dealt with in the financial settlement that follows a divorce. Family laws generally take social dimensions into consideration, given that protection of the weaker part is one of the primary objectives. When there is a sizable difference between spouses' pension rights, the spouse who will receive a low income-related pension could, in a divorce case, be acknowledged as the weaker party. In practice, the woman will often be the weaker party. Do family law and the rules of financial settlements that follow a divorce protect the weaker party in an appropriate way? Is the State responsible to maintain a divorced spouse with a limited pension? I will discuss these questions based on the conditions in Sweden, but the underlying problems are apparent in many other countries.

## 2 Swedish Family Law

When spouses divorce, their assets will usually be divided in accordance with what could be explained as a balancing of interests. The results of the balancing

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1 Cohabitation will not be discussed in this work since there are no general rules about dividing the cohabitantes' assets in case of a separation. In Sweden the Cohabitantes Act (2003:376) contains a limited right to divide the joint dwelling and household goods which have been acquired for common use, when the cohabitation ends. Savings, shares and pension right are not divided between the cohabitantes.

differ from country to country. In Sweden, and in the other Nordic states, the main rule is that when the marriage ends, the value of all assets are shared equally, when each spouse has met his/hers respective debts. This does not mean that spouses' pension rights will automatically be included in what will be distributed between the parties. In Sweden the main rule is that only private pension savings are included.

In accordance with the main principles of current law in Sweden, property law in relation to spouses should pay heed to each person's independence, to equality between men and women, and to protecting the weaker party.<sup>2</sup> Moreover, the rules concerning spouses' property should operate in a context where marriage is deemed to constitute a community in which the spouses' division of work and expenditure is determined by other factors than the acquisition of maximum financial gain for each party.

This is the background to the following rules in the Swedish Marriage Code (SMC, *äktenskapsbalken*). Each spouse constitutes an independent legal entity with assets and debts of his/her own, SMC 1:3. During their marriage the spouses have a mutual duty of maintenance and a right to the same standard of living, SMC 6:1. When marriage is entered into, each spouse's property becomes, under the main rule, *deferred community property* (*giftorättsgods*) SMC 7:1. This does not affect the right of ownership, but means that the value of assets is shared equally between spouses when each spouse has met his/her respective debts upon dissolution of the marriage, SMC 11:3. Sharing shall be effectuated through a *division of deferred community property* (*bodelning*) SMC 9:1. Spouses may, through an arrangement (marriage settlement, *äktenskapsförord*), determine that certain property shall constitute private property (*enskild egendom*) SMC 7:2. Private property shall not be included in a division of deferred community property, SMC 10:1.

After divorce, each spouse is responsible for his/her own support, SMC 6:7 para. 1. Maintenance shall be payable only in exceptional cases and, in the few cases that it is applicable, it shall meet only the entitled spouse's basic subsistence needs. The level of the maintenance will at least be higher than the subsistence level which is granted by general supplementary public allowances.<sup>3</sup> A condition for receiving maintenance is that the need for such shall have been caused by the marriage, SMC 6:7 para. 2 and 3. Another condition is, of course, the other spouse's ability to pay the maintenance. If the conditions are fulfilled, the need shall be entirely met through maintenance without deduction by general supplementary public allowances.<sup>4</sup>

The comprehensive right to a division of property in Sweden found its justification at the beginning of the 20<sup>th</sup> century. It originated from the presumption that both spouses' efforts on behalf of the family were equally important. The one who looked after the common home was viewed as

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2 NJA II 1921, *Den nya giftermålsbalken* p. 6 ff and p. 23 ff. Proposition (Prop.) 1986/87:1 om *äktenskapsbalk m.m.* p. 39.

3 Agell, *Underhåll till barn och make*, Iustus 1988, p. 117 ff.

4 Tottie, *Äktenskapsbalken och promulgationslag m.m.*, Norstedts 1990, p. 136.

contributing indirectly to the furtherance of the family's financial resources.<sup>5</sup> The same reasons have been used in other countries to justify division of spouses' assets. In Sweden, simplicity has also been an important reason for the comprehensive rules concerning division of property: by dividing up everything, one avoids the problem – among others – of proving ownership of what is to be shared. Women's increased participation in gainful employment, and the financial interlacements that can occur when both spouses have earnings, is another reason to continue the practice of sharing spouses' total assets.<sup>6</sup>

It is common for the size of a pension to be closely linked to each individual's income from work. For that reason the same arguments underlying the provisions of property law regarding spouses can be adduced in favour of equalizing spouses' pension rights.

The state pension, the occupational pension, and the private pension based on individual savings, together form the pension security in Sweden. The state pension is governed by public-law legislation. Occupational pensions are usually based on agreements between employers and employees, or their unions. Private pensions based on individual savings relate to personal saving schemes and may consist of pension insurance or individual saving-linked pensions. All three forms of pension usually constitute deferred community property but can be exempted from a division with recourse to a special rule: "*property of a particular kind*" (egendom av särskilt slag) SMC 10:3.

A first condition for pension rights to be exempted as being property of a particular kind is that they are nontransferable; a further condition is that some special reason exists which can justify the exemption of those rights from the division of property.

The right to a state pension is always nontransferable, and the same is often true of the right to an occupational pension. The notion that pension rights should safeguard the entitled persons' ability to meet their economic needs in the future – when there is no mutual duty of maintenance between the spouses – has been deemed as a special reason for exempting them from a division of deferred community property.

Transference of private pension savings is not prohibited during a division of deferred community. Consequently, in cases of divorce, private pension savings are included in the division of deferred community property. However, the entitled persons' possibilities of disposing private pension savings are limited by the rules concerning the tax advantages for such savings.

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5 NJA II 1921 p. 10. Prop. 1986/87:1 p. 42 ff.

6 SOU 1981:85, *Äktenskapsbalk*, p. 98 ff. and p. 104 f. Prop. 1986/87:1 p. 43 f. and p. 53 ff.

### 3 Pension Rights

#### 3.1 Introduction

The division of accrued pension rights, and other ways of equalizing spouses' pension rights, has been the subject of extensive debates in Sweden.<sup>7</sup> At present we still have laws that largely correspond to those introduced a hundred years ago.

During the said period however, a great deal has changed in society. Whereas, at the beginning of the 20<sup>th</sup> century, almost all marriages lasted a lifetime, as many as half of those entered into today are likely to end in divorce. Over the same period, women's paid employment has gone from practically non-existent to now being almost equal to men's. Women's participation in the Swedish labour market is probably among the highest in the world.<sup>8</sup> However, the labour market is still segregated by gender and women generally receive lower wages than men. Statistically, women's salary is 83 % of males, if they work full-time. Women still bear greater responsibility than men for the home and caring for children. Witness *inter alia* the fact that more women take parental leave and more women work part-time than men. Women use about 80 % of the parental leave, 40 % of the women work part-time, and part-time work is more common when women live in a relationship (marriage or cohabitation). The statistics indicate that women – more often than men – run the risk of receiving a low pension and also seem to be the weaker party in case of a divorce.

The state pension and occupational pensions made their appearance at the beginning of the 20<sup>th</sup> century and largely replaced the local authorities' poor relief and charitable donations made by employers, of which many elderly people had till then been the recipients. To begin with, the state pension and occupational pensions provided a basic protection. Gradually, more and more occupational pensions became earnings-related and, in 1960, the state pension went the same way with its *State Supplementary Pensions Scheme* (AllmänTilläggsPension, ATP).

7 For example SOU 1959:32, *Förbättrade familjeförmåner från folkpensionering m.m.*, p. 99 ff., Prop. 1960:75, *förslag till lag angående ändring i lagen den 29 juni 1946 (nr.431) om folkpensionering*, p. 91 ff., SOU 1961:39, *Lagen om allmän försäkring m.m.*, p. 34 ff; Prop. 1962:90, *förslag till lag om allmän försäkring m.m.*, p. 305 ff., SOU 1971:19, *Familjepensionsfrågor m.m.*, p. 74 ff., SOU 1981:61, *Familjepension*, p. 220 ff., SOU 1990:76, *Allmän pension*, p. 326, Ds 1992:89, *Ett reformerat pensionssystem – Bakgrund, principer och skiss*, p. 65 ff., SOU 1994:20, *Reformerat pensionssystem*, p. 306 ff., Ds 1995:41, *Reformerat pensionssystem – Lag om inkomstgrundad ålderspension, m.m. Del 1*, p. 145 ff., Prop. 1993/94:250, *Reformering av det allmänna pensionssystemet*, p. 133 ff., Prop. 1997/98:151, *Reformering av det allmänna pensionssystemet*, p. 296 ff., Agell, *Nordisk Äktenskapsrätt – En jämförande studie av dansk finsk, isländsk, norsk och svensk rätt med diskussion av reformbehov och harmoniseringsbehov*, Nord 2003:2, p. 404 ff., Brattström, *Makars pensionsrättigheter*, Iustus förlag 2004, p. 95 ff., p. 166 ff., p. 223 ff and p. 295 ff.

8 Prop. 2006/07:1, *Budgetpropositionen för 2007, Bilaga 4: Fördelningen av ekonomiska resurser mellan kvinnor och män*, p. 11.

It has been customary for the size of an earnings-related pension to be determined by the best salary earned over a number of years or by the final salary, this being known as the defined-benefit system. Since the 1990s there has been a development whereby the individual's lifetime income determines the size of the pension, and is known as a defined-contribution system.

### 3.2 *The State Pension System*

The state pension system recently underwent a major reform; it started in the mid-1990s and has been operating at full strength since 2003. One of the main aims of the reform was to give the pension systems more of an insurance character.

The younger part of the population – those born after 1954 – will be entitled to a defined-contribution pension whose size is determined by the amount of the individual's lifetime earnings. Its makeup brings to mind the manner in which private pension insurances operate. A substantial part of the pension will constitute the “*income pension*” (inkomstpension). A smaller part of accrued pension rights is made up of funded resources that the individual is allowed to invest in various funds; it is known as the “*premium pension*” (premiepension). The value of accrued pension rights can be calculated at any time, but that value is only one of the factors that influence the size of the pension. It follows from this that the pension amount cannot be stated exactly until it is time for payment. According to various calculations, pensions can be expected to represent 50 – 60 % of lifetime earnings.<sup>9</sup>

The older segments of the population – those born before 1937 – are scarcely affected by the pension reforms. They will continue to have defined-benefit pensions, which are now called “*supplementary pensions*” (tilläggs pension). The pension's size is 60 % of the individual's 15 most profitable years of income. To qualify for a full pension, however, 30 years of labour have to be achieved.

The size of the pension will vary greatly between the old and the new system. One can note a dramatic divergence when 60 % of the individual's 15 best income years is compared to 50 – 60 % of the individual's average lifetime income.

People born between 1937 and 1954 are affected in varying degrees by the new pensions system. They will receive a pension consisting of a mixture of the various kinds of pensions.

For all state pensions, pension rights are receivable for earnings of up to 7.5 times the basic income amount, which corresponds to annual earnings of 320,000 Swedish crowns. Higher earnings give no entitlement to further pension rights. Every fourth man, but only every tenth woman, has an income exceeding that which gives entitlement to a pension under the state pension system.

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9 *Pensionssystemets årsredovisning 2006* p. 34. There is a risk that the pension will be less than 50–60% of the lifetime earnings, see Normann, *Hur långt räcker pensionerna*, Pensionsforum 2003 p. 10, p. 31 ff; Normann, *Har vi råd att bli äldre*, Länsförsäkringsbolagens forskningsfond 2006, p.8 ff.

Since the size of an earnings-related pension depends on past remuneration, women are, in general, considerably worse off than men. At present, women statistically receive 78 % of what men receive in state pension.<sup>10</sup> Since the wage level still differs a lot between men and women, the differences in pension will persist in the foreseeable future and will probably even increase because of the pension reform.

Pensioners who have low or no income-related pension are entitled to a “*guaranteed pension*” (garantipension). In this way society guarantees all pensioners an annual income from the state equaling approximately 86,000 Swedish crowns, which is at least 100,000 Swedish crowns less than what is possible to receive as an income-related state pension. Guaranteed pension can be compared with general supplementary public allowances. More than 50 % of Swedish pensioners, 846,000, are in need of a guaranteed pension, and 80 % of them are women.<sup>11</sup> Why more women than men need guaranteed pension can be explained by the fact that many of the older pensioners are women with less experience from gainful work. Since the demands for a good pension have increased after the pension reforms, it is not certain that younger women with more gainful work will be better off.

Since the 1960s, a broad debate has arisen due to the apparent link between a person's earnings and the size of his/her pension.<sup>12</sup> One main question has been how spouses' rights to a state pension might be equalized. The same arguments underlying the provisions of property law regarding spouses have been adduced in favour of equalizing spouses' pension rights. The various proposals put forward have, however, been technically complicated and likely to increase the cost of pensions. Determining the value of accrued rights has proved particularly problematic. It was believed that, with the transition to defined-contribution pensions, the difficulties would be surmountable. A premise underlying the 1990s' pension reforms was that it would be possible to share pension rights between spouses; the sharing would be a continuous process as pension rights accrued.<sup>13</sup> Despite these efforts there were technical problems, mainly as a result of the link between earnings-based pensions and guaranteed pensions.<sup>14</sup> Consequently, the possibility for spouses to share accrued rights to a state pension still awaits legislative mandate.

The discrepancy between the ways in which the various pension rights are dealt with when deferred community property is divided after divorce is subject to criticism.<sup>15</sup> The technical problems to which the latest proposal on pension-sharing gave rise could possibly have been solved if sharing of assets was to take

10 Årsredovisning 2006, Försäkringskassan p. 76.

11 Prop. 2006/07:1, *Budgetpropositionen för 2007, Utgiftsområde 11: Ekonomisk trygghet vid ålderdom utgiftsområde 11* p. 24; interview with Gudrun Eriksson, Försäkringskassan 2007-02-28.

12 See above footnote 7.

13 Prop. 1993/94:250 p. 133.

14 Ds 1997:67, *Inkomstgrundad pension – finansiella frågor m.m.*, p. 125 ff.

15 Brattström 2004, p. 95 ff.

place upon dissolution of marriage instead of being a continuous process as pension rights accrued. It is, moreover, only when a marriage is dissolved that there is a need to equalize spouses' pension rights; during marriage, as already mentioned, a mutual maintenance obligation exists.

Despite the fact that spouses pension rights do not equalize in the case of divorce, the legislators have pointed out that a spouse's pension needs can affect the settlement that follows a divorce.<sup>16</sup> Since 1999, the law explicitly expresses that insufficient pension protection may affect the question of maintenance, SMC 6:7 para. 3. A condition for receiving maintenance is, as already mentioned, that the need for such shall have been caused by the marriage and maintenance shall be payable only in exceptional cases.<sup>17</sup> In the few cases where maintenance is paid out, it shall meet only the entitled spouse's basic subsistence needs. In that respect, maintenance differs markedly from the equal sharing of assets as a consequence of a division of deferred community property. A spouse who can look upon a future as a pensioner with guaranteed pension will however probably be in need of some maintenance. The spouse's basic subsistence needs – in the way interpreted in the Swedish Marriage Code – cannot be fulfilled through a guaranteed pension. If this need can be connected with the marriage, *inter alia*, because of part-time work during the marriage, the spouse will be entitled to some maintenance. In this case the amount of maintenance will be the difference between the need and the amount of guaranteed pension. The state has a fundamental responsibility to secure for all pensioners a subsistence level of living.<sup>18</sup>

### 3.3 *Occupational Pension*

In Sweden, occupational pensions are usually the result of collective agreements between employer and employee or their organizations. Approximately 90 % of employees in Sweden are covered by a collectively agreed right to an occupational pension. The younger part of the population often works in branches without collective agreements, and might not receive any occupational pension.<sup>19</sup>

The occupational pension supplements the state pension and compensates higher incomes than the state pension does. Under collective agreements, pension rights accrue for incomes of up to 30 times the basic income amount, i.e. annual incomes of up to 1,270,000 Swedish crowns, or higher, which can be compared with the 320,000 Swedish crowns that give entitlement to the state pension. As already mentioned every fourth man, but only every tenth woman, has an income exceeding that which gives entitlement to a pension under the state pension system. The results of the difference between women's and men's income is that women typically receive less than 30 % of what men receive in occupational pension.<sup>20</sup>

16 Prop. 1997/98:106, *Pensionsrättigheter och bodelning*, p. 49.

17 Prop. 1997/98:106 p. 53.

18 Agell 1988, p. 119 ff.

19 Adolphson & Hellman, *Den pensionslösa generationen*, Alecta 2007, p. 3 ff. and p.11 ff.

20 Prop. 2006/07:1, bilaga 4 p. 31.



The form of the pension agreements is influenced in large part by tax legislation. During the time the employees are earning pension rights the employer can continuously deduct pension contributions. This however presupposes that several preconditions are fulfilled. Firstly, pension rights shall correspond to that which applies to private pension insurance schemes; for instance, disposal possibilities have to be limited. Secondly, the employee's right to a pension shall not be affected by a change in employment. Thirdly, future payment of the pension shall be guaranteed in a certain way, namely through pension insurance, a pension foundation or credit-insured provision. The two last-mentioned forms should be converted to pension insurance if the employer becomes insolvent, goes bankrupt or for any other reason ceases its business activity. Either the employer or the employee may be the owner of pension insurance. In the first case, pension rights are excluded from a division of deferred community property; in the second case, they are included. Pension insurance is definitely the most common way of guaranteeing an employee's right to an occupational pension.

In the same way as the state pension, occupational pensions have undergone a transition from defined-benefit to defined-contribution schemes. This has a negative effect on the younger part of the population, who will probably receive less in occupational pension because they enter the labour market when they are rather old. Another development is that employees have been given greater possibilities than before to influence their pension rights; for instance, they are now able to control how resources set aside are to be invested and to decide on the extent and type of survivor's pensions. It has, in recent times, also become customary for employees to elect to have their wages go unpaid and instead receive further, often higher, pension rights in what is known as a "wage exchange".<sup>21</sup> For individual employees, wage exchange is usually profitable if the person's income is more than 7.5 times the basic income amount, otherwise he/she loses the right to state pension. A consequence of using wage exchange is often that the received pension right becomes property of a particular kind and is therefore not included in a division of deferred community property.

Rights to occupational pensions and to privately contracted pensions are very similar to one another, which is not so strange as payment of most occupational pensions is guaranteed through pension insurances. Both where private pension insurance and where occupational pension rights are concerned, the person entitled to a pension makes one categorical demand: that when pensionable age is reached, the pension that has accrued will be paid out. For said reasons, I believe it is not entirely satisfactory that occupational pension rights should in some cases be included in a division of deferred community property following divorce but be excluded in other cases.

### **3.4 Private Pension Savings**

Under Swedish civil law, pension insurance consists of a normal annuity insurance, payment being made for as long as the insured person or nominated beneficiary is alive at the time the insurance falls due. This form of savings

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21 Brattström 2004, p. 182.

receives tax advantages and, consequently, there are a number of tax requirements that have to be met in order for it to be recognized as pension insurance. For example, limits are set on the disposition rights and on who may be entitled to receive payments from the insurance. Since the mid-1990s, the same tax advantages and limitations have also been applicable to individual pension saving schemes (*individuell pensionssparande*), which are pure saving schemes without any insurance element.

As it has been more common for persons with high incomes to set aside resources to fund pension saving schemes, more men than women have committed to this type of saving. In the last ten years however, more and more people have begun saving through pensions, this being particularly characteristic of middle-aged women. One reason for this might be the higher demands now being made on those who wish to receive a good state pension.

Historically there have been no special rules for pension insurances governing the treatment of private pension savings when there is a division of deferred community property. They were dealt with in the same way as other annuity insurances and were thus included in a division of property if the insurance was transferable.

In the drafting of the Swedish Marriage Code in the 1980s, it was observed that the possibilities for having access to the pension insurance were limited. Such pension savings were deemed to fulfill the same function as other pension rights. For that reason pension insurances, just like all other pension rights, had to be exempted upon a division of property in case of divorce.<sup>22</sup> A rule to this effect was introduced by the Swedish Marriage Code of 1987. It very soon became clear, however, that exempting pension insurances from division of property could, in the case of divorce, lead to unreasonable consequences.<sup>23</sup> One reason for this was that pension insurances could be used for making capital investments instead of providing for future subsistence. Therefore, in 1989, the possibility was introduced to allow, subject to adjustment, the inclusion of pension insurances in property division.

The latest modifications of the rules on the treatment of private pension savings regarding division of property were made in 1999. When division of property takes place following divorce, private pension savings shall again be included therein, SMC 10:1 & 10:3 para. 3.

The modifications were based on the principle underlying the state pension reform: that it should be possible to share state pension rights between spouses. The basic principle of "the right to share" was deemed so important that it was made applicable to private pension savings even though no option to share state pension rights had been introduced.<sup>24</sup> Allowing the inclusion of private pension savings in the division of deferred community property may help smooth out inequalities in the spouses' pension rights. Such an arrangement has been deemed an important protection for the financially weaker spouse.

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22 Prop. 1986/87:1 p. 162 f.

23 Prop. 1989/90:30, *Om vissa äktenskapsrättsliga frågor*, p. 13 ff.

24 Prop. 1997/98:106 p. 37.

However, the rules governing private pensions are not peremptory and may be set aside by spouses through a marriage settlement or through an agreement regarding division of deferred community property. Even if spouses cannot agree, it is possible, by adjustment, to exempt private pension savings if the result of property division would otherwise prove unreasonable.

It could be argued that a spouse with less state or occupational pension should have the right to exclude private pension savings from a division of deferred community in order to equalize the spouses' pension rights. This would protect the financially weaker spouse. However there is no judicial judgment about this question, maybe because the legislators have, in pronouncements made in the preparatory works, indicated that the adjustment rule should be applied restrictively.<sup>25</sup> The effect can be that a spouse who has found it necessary to commit to a private pension savings plan to meet the higher demands now being made to receive a good state pension or occupational pension, will have to share the private pension savings in a divorce settlement even if the other spouse has better pension protection.

Problems may arise when private pension savings are brought into the division of deferred community property; the problems are general and would appear even if other pension rights were included. The value of pension rights can seldom be capitalized in advance and the time at which payment is to be made is not altered by a change of ownership.

A special problem occurs when a spouse runs a business in the form of a limited company over which he or she has controlling influence. If the company holds a pension insurance where the beneficiary is the owner-spouse, the latter has, formally speaking, a nontransferable right to pension, which should be grounds for excluding that right from a division of property. If, on the other hand, an owner-spouse has a pension insurance for which the company pays the premiums, this is transferable and may therefore be included in a division of property. Since persons with controlling influence over a company may themselves designate the proprietorship of specific pension insurance, I believe that the value of pension rights should, in both cases, be taken into account upon a division of property. A spouse who enjoys the same right to pension through an ordinary employment, will seldom have to share his or her pension in a divorce settlement. This shows the haphazardness of the Swedish system today.

#### **4 Conclusions**

In the case of divorce, it is essential that the division of spouses' assets can be perceived as fair. Such a division is enshrined in the Swedish Marriage Code's principle of equal sharing. In light of the way various forms of pension rights have evolved, it would be reasonable for pension rights, just like other assets, to be equally shared following a divorce. The distinction between transferable and nontransferable pension rights is of crucial importance for the treatment of those rights in a division of property. At the same time, disposal rights are greatly

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<sup>25</sup> Prop. 1997/98:106 p. 43.

limited for all pension rights and, moreover, they resemble each other in construction. It is, in my opinion, difficult to achieve the aim of the Marriage Code when not all accrued pension rights receive the same treatment in the division of deferred community property. However, in the matter of pension rights, the division could be restricted to those rights that have accrued during the marriage, seeing that only those rights could have been influenced by the marriage. The problems of unraveling and proving ownership giving rise to grounds for sharing other property, no matter how or when it was acquired, do not apply to pension rights.

There are overwhelming arguments in favour of having pension rights shared in the event of divorce. Foremost among those arguments is that, at present, the various forms of pension rights greatly resemble one another and are comparable with other forms of savings. The size of both the state pension and occupational pensions are linked to earnings, which means that the spouse with the highest earnings acquires the largest pension rights. This is in marked contrast to the situation originating more than a hundred years ago when the rule on "property of a particular kind" was formed. At that time, various forms of state pension and occupational pension afforded only basic protection but the rule governing property of a particular kind meant that most pension rights were exempted from a division of deferred community property.

A sharing of accrued pension rights would give both spouses the same financial possibility to provide for their future subsistence. It would also afford both spouses the same basis for financial independence after a divorce. Since the transition from defined-benefit to defined-contribution pensions, the size of a pension is today largely determined by a person's lifetime earnings. If those earnings are lowered as a consequence of part-time employment, pension rights will to a certain extent be lost and will not be recoverable later. As long as their combined pension rights are not shared after a divorce, the spouse working part-time in favour of the family, will, in that situation, be obliged to alone bear the consequences of the spouses' division of employment during their marriage. This state of affairs does not harmonize well with the provision, under property law for spouses, that their interests be paid due heed and cannot be a good way of balancing the spouses' interests. Moreover, a sharing of pension rights might be particularly desirable from a social welfare perspective, since their benefits would help provide for a spouse's subsistence at a time of life when gainful employment could no longer be expected. Sharing of accrued pension rights would indeed prove an important protection for the financially weaker spouse.

If pension rights are to be shared the special character of pension rights requires, in my opinion, that their division be dealt with in special regulations separate from those governing division of deferred community property. Division need not mean that each pension right should be shared equally between the spouses, but its result should, as a rule of thumb, be that the spouses, after division, hold pension rights of the same value. However, to avoid complications in connection with the rule governing guaranteed pensions, the value of accrued rights to the state pension could always be shared equally between spouses.

One condition that is essential if a division is to create true pension protection for both spouses is that it will be possible to adapt the date of payment for the various forms of pension to the age of the new beneficiary.

In some countries it is possible to share spouses' pension rights. This kind of arrangement is for example established in England/Wales and Germany. In both these countries, the fact that women and men are deemed of equal value and that both the spouses' efforts on behalf of the family are considered equally important are adduced as reasons why it should be possible for pension rights to be shared.

The rules governing how sharing should proceed are adapted to the various systems obtaining in Germany and England/Wales respectively for dividing up spouses' assets and are linked to the form taken by pension rights. The fact that pension rights differ on important points from traditional assets has, in the legislation of both countries, led to special rules for the sharing of those rights. There are comprehensive rules on how the value of accrued rights shall be calculated and on how the sharing shall take place. These two examples show that if there is a will there is also a way to implement rules on the sharing of spouses' pension rights.

If the treatment of accrued pension rights does not change in Sweden one can predict that maintenance after a divorce will become more common. From a European perspective, payment of maintenance ought to be the most usual method of providing for a spouse's need of pension protection after a divorce. The difference between the Nordic states and the rest of Europe regarding the size and duration of maintenance has the effect that maintenance constitutes real protection to a much greater extent in other European states than in the Nordic ones.<sup>26</sup> The use of maintenance is open to criticism because, for one thing, it means that spouses continue to be dependent on each other and their financial circumstances are therefore not settled once and for all after a divorce.

An alternative development, instead of sharing pension rights or maintenance, is that society alone bears the responsibility for those with a low income-related pension. A rough estimation is that a large number of people will then have to rely on guaranteed pension and other social benefits. At present more than 50 % of citizens entitled to pension actually receive guaranteed pension.

## References

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<sup>26</sup> Boele-Woelki, Braat & Sumner (ed.), *European Family Law in Action, Volume II, Maintenance between former spouses*, Intersentia 2003, p. 175.

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