

New Decision from the Superintendency of AFPs:

Women who are Divorced or whose Marriages have been Annulled are not Entitled to a Widow's Pension

- ❖ **The new civil marriage law, in force since November 2004, introduced the new marital status of divorced, which was not envisaged in Decree-law N° 3,500, which regulates the Pension System.**
- ❖ **The interpretation made by the Superintendency of AFPs concludes that the former wife, whether the marriage has been terminated or annulled in accordance with Law N° 19,947, is not a beneficiary of a widow's pension in the AFP System.**
- ❖ **The AFP Association considers that an update of the social security legislation is called for.**

Summary

Civil marriage law N° 19, 947 sought to settle family matters, while attempting to protect the best interests of the children and the weaker spouse; however, it did not include modifications to the social security law, which does not provide for the new marital status of divorced, or for annulments of marriage.

In view of this situation, the Superintendency of AFPs has been the one to interpret the legal provisions by means of "decisions". As a result, former wives whose marriages have been annulled or who have been divorced are not entitled to receive a widow's pension, even if they have children by the originator and have lived at his expense until the time of his death.

The AFP Association considers that this legal situation needs to be reviewed and modified, in order to introduce the figure of divorce and clarify the pension rights of women whose marriages have been annulled. It would also seem appropriate to review the position of disabled husbands whose marriages have been annulled.

The new law on civil marriage, Law N° 19,947, which has been in force since November 2004, introduced the marital status of legal separation and divorce, replacing the 1884 regulations and the Civil Code, but did not adapt DL 3,500, which regulates the Pension system, to fit this new legal position. This has called for interpretation from the Superintendency of AFPs, as a result of which many women currently have no right to survivorship benefit.

Until a short time ago, the married woman whose marriage had been annulled was entitled to a widow's pension, because her situation was similar to that of a mother of children born out of wedlock.

The New Civil Marriage Law

The State has sought to safeguard individuals and their families in areas such as health, old age, industrial accidents, unemployment, etc. by means of social security policies. The civil marriage law regulates marriage, nullity, the separation of the spouses and divorce a vinculo matrimonii.

The earlier legislation envisaged the indissolubility of marriage, whilst now it establishes the possibility that the marriage contract may be annulled when the marital bond has been broken in a definitive and irreparable

manner.

When the marital union has been destroyed and the possibilities of restoring it are non-existent or very slight, one of the following situations may occur:

a) Separation: this corresponds to an area in which the effects are limited to the suspension of certain reciprocal rights and obligations between the spouses, such as co-habitation and fidelity, without this affecting the legal situation of the marriage bond. This separation does not terminate the marriage nor does it change the filiation of the children. The separation may be:

- Ipse facto separation
- Legal separation

If the separation is legal, the spouses acquire "separated" status as from the moment when the annotation is entered in the marriage register. However, this does not allow them to re-marry.

b) Termination of the marriage: this refers to a valid marriage, which has produced its normal results, but which, for some subsequent reason, comes to its end. This may occur due to the death of one of the spouses, a final verdict of nullity or a final verdict of divorce.

i) death of one of the spouses (natural or presumed). The death of a spouse, as a cause of termination, does not alter the filiation of the children or their position with regard to the estate. The same is not true of the other two motives.

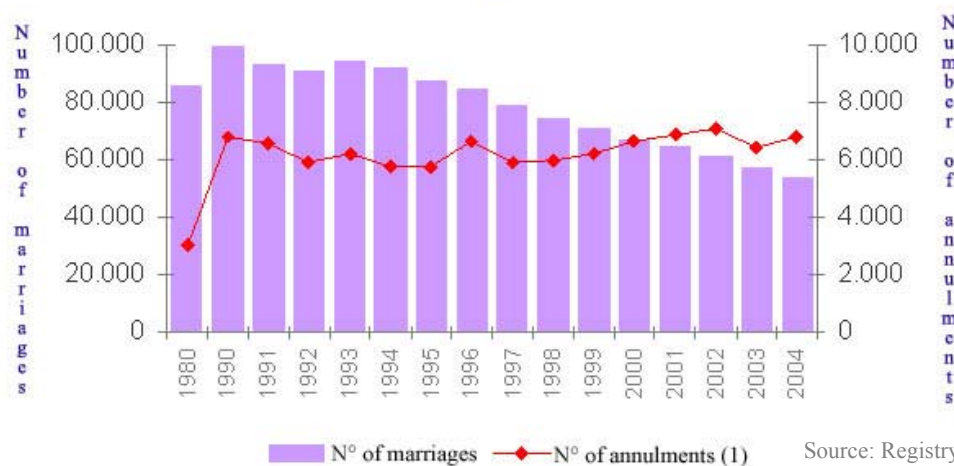
ii) final verdict of nullity. Nullity occurs when the marriage takes place in the context of one of the legal incapacities expressed in the law, such as being under 16 years of age; having an existing marital bond; being an ancestor or descendent by consanguinity or affinity, etc. Its effect is to return the parties to the status in which they were at the time of the marriage, but in no circumstances affects the filiation of the children.

iii) final verdict of divorce. Divorce terminates the marriage, as also the obligation and rights concerning inheritance, but without affecting the children's filiation. The divorce produces effects from the moment at which the final decision is pronounced. The spouses acquire the marital status of divorcees once the verdict is noted in the margin of the corresponding marriage register. As from that moment, the former spouses are able to marry again.

Economic Compensation

This becomes effective when there is dissolution of the marriage bond, in other words, in cases of divorce and nullity. Its aim is to favour the weaker spouse, who has not worked for a wage because she has been dedicated to looking after the children or running the home, or has done so only partially. The right to receive compensation and its amount is determined by a judge in the light of various factors such as the duration of the marriage, the time spent living together, the health of the husband, the social security position or the

Number of Marriages and Annulments



possibilities of access to the labour market. The compensation may be agreed by the parties; however, if one of the spouses is to blame for the divorce, the judge may deny compensation or reduce it.

Social security effects

The new legislation sought to settle family matters, while attempting to protect the best interests of the children and the weaker spouse, but did not include any modification of the social security legislation, which does not provide for the new marital status of divorced.

For the AFP System, the beneficiaries of survivorship pensions are as follows: the surviving widow, the disabled widower, the mother of children of the originator born out of wedlock, and in some cases the parents of the deceased member. Each of these must fulfil certain requirements in order to qualify for this type of pension.

DL N° 3,500 requires the spouse (f) to have married the originator at least six months before his death, or three years before if the marriage took place when the member was receiving an old-age or disability pension. These conditions do not apply if the spouse is pregnant or there are children of the marriage when the death occurs. A disabled spouse (m) has to fulfil the same conditions as a spouse (f) in order to obtain a pension.

The mother of children born out of wedlock is entitled to a survivorship pension, provided that her marital status at the time of the originator's death is single or widowed and that she is also living at the member's expense. Children must have been recognised by the originator.

As may be seen, the social security law does not cover the situations of nullity or divorce introduced by the new civil marriage law. In view of this situation, the Superintendency of AFPs has had to interpret the legal provisions by means of "decisions".

Until recently, the Superintendency of AFPs, using administrative case-law dating from 1991, ruled that the former wife whose marriage was declared null and void by legal verdict was considered to be a beneficiary of a survivorship pension, based on the application of the civil marriage law of 10th January 1884, as long as there were children belonging to the originator; likening her situation of nullity to that of the mother of children born out of wedlock. The disabled spouse had no entitlement.

New Interpretations from the Superintendency

- **Note N° 16008 – September 2004**

As a result of the coming into force of the new civil marriage law, a new pronouncement from the Superintendency of AFPs in September 2004 stated that the ex-wife whose marriage has been annulled retains her position as beneficiary of a widow's pension, if the annulment took place under the civil marriage law of January 1884 (the old law) and provided that she fulfils the requirements described in DL N° 3,500.

The same decision concludes that the wife who is "divorced or whose marriage is annulled" according to the provisions of Law N° 19,947 shall be beneficiary of a widow's pension if she fulfils the requirements and provided that she has not obtained economic compensation in the annulment or divorce case concerned. At the same time it states that the divorced ex-wife, whose divorce was decreed under article 54 with the judge denying her the right to compensation, shall not be a pension beneficiary either. Article 54 of the civil marriage law refers to the divorce suit brought by one of the spouses for an offence attributable to the other, presenting evidence of serious non-fulfilment of matrimonial obligations.

- **Note N° 21025 – November 2005**

In November 2005 a new pronouncement by the administrative authority partially repealed the decision issued in 2004, with regard to the ex-wife who is divorced or whose marriage is annulled, arguing that the law states that once a "divorce" decree has become final and has been noted in the marriage register, the spouses acquire the marital status of divorcees. As a result of this new interpretation, both divorced ex-wives and those whose marriages have been annulled, will have no right to a survivorship pension, regardless of whether or not they have received economic compensation.

The doubt that arises with this interpretation is that women who annul their marriage and do not receive compensation have no right to a widow's survivorship pension, whereas in the earlier marriage law, they had.

The matter is even more complicated when one considers that the new civil marriage law states in article 50 that once the nullity becomes final, the spouses "revert" to the situation that they were in at the time of

their marriage. Added to this is the fact that the marital status of “divorced” is not envisaged in DL N° 3,500.

The foundation for this resolution is that the Superintendency considers that, since one of the conditions for acquiring the benefit is that the ex-spouse be single or widowed, and this is not true in the case of divorce or nullity, it is not legal to create categories of beneficiaries that the legislator did not envisage.

As a result, at this point in time, ex-wives who are divorced or whose marriages have been annulled have no right to obtain a widow’s pension, even though they have children by the originator and have lived at his expense up to the moment of his death.

The problem therefore lies in the failure to update DL N° 3,500, which does not recognise the existence of divorce as a marital status and the fact that the civil marriage law did not include a modification of the social security regulations.

The AFP Association considers that a review and modification of the law need to be made, to introduce the figure of divorce and clarify the pension rights of women whose marriages have been annulled. It would also seem appropriate to review the situation of disabled widowers in the same position, in such a way that it is the legislator who lays down the conditions and requirements for obtaining benefits.

REQUIREMENTS FOR BENEFICIARIES OF SURVIVORSHIP PENSIONS IN THE AFP SYSTEM

Potential beneficiaries are entitled to a survivorship pension if they fulfil the following requirements:

- **The spouse (f)** must have married the member at least six months before his death, or three years before, if the marriage took place when the member was in receipt of an old-age or disability pension. If at the time of death there are children of the marriage or the spouse is pregnant, the aforementioned restrictions do not apply.
- **The spouse (m)** must be disabled, this situation to be accredited by the corresponding Regional Medical Board. He must also fulfil the same requirements as the spouse (f), except where there are children of the marriage.
- **Children** must be single and under 18 years of age, or under 24 years of age if they are studying. Their status as students must be established as of the date of death of the originator or on the 18th birthday. In addition, disabled children of any age shall be entitled to a life-long pension, provided that the disablement occurred before the 18th birthday, or 24th if studying. The disability must be accredited by the Regional Medical Board.
- **The mother of children born out of wedlock provided that**, at the date of the member’s death, she is single or widowed and also lives at the member’s expense. The children must be recognised by the originator.
- **The parents** of the member are only eligible in the absence of the beneficiaries listed above, and provided that they are recognised dependents as of the date of the originator’s death.

The information contained in this Bulletin may be reproduced in its entirety by the communications media.

Inquiries: Research Department, The Chilean Pension Fund Administrators’ Association.

Address: Avenida 11 de Septiembre 2155, Torre B, piso 14, Providencia. Santiago – Chile.

Telephone: (56 – 2) 3811717 Fax: (56 – 2) 3811721

E-mail: estudios@afp-ag.cl Web Site: www.afp-ag.cl