

Deferred Settlement Method

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It is sometimes impossible to equalize property on marriage breakdown when one of the parties has a pension and there is little other property.

In an effort to solve this problem, the Canadian Institute of Actuaries developed a system called the Deferred Settlement Method (DSM). This system proposes that the pension will actually be divided into two pensions, one for each party, when the member retires. However, this system would allow the non-member spouse to share in the value of the pension accrued after the date of separation.

Consider the following example. The member joined the plan and started to earn pension the day of his marriage. At the date of his separation he has accrued 10 years of service and of course he has been married for 10 years. Therefore, his spouse's share of his pension (if it is being divided at source) is 50%. Assuming that the pension earned during the period is \$1,000 per month, then the spouse's share is \$500 per month (5/10 of \$1,000). But the pension is not to be divided into two pensions until the member retires.

Now assume that same member continues to work for 10 more years and then retires. At the date of retirement the member has accrued 20 years of service. Also assume that the actual pension is now

\$5,000 per month. Therefore, the spouse's share on retirement is \$1,250 per month (5/20 of \$5,000).

The spouse's pension has grown from \$500 per month to \$1,250 per month simply because they waited until the member retired before dividing the pension. It is obvious from this example that the non-member spouse has shared in the value of the pension that was earned **after** the marriage breakdown.

To the extent that it represents improvement in the pension plan or merit increases in the member's salary, the increase in the non-member spouse's share of the pension is due to an increase in the value of the pension that happened **after** the date of marriage breakdown. As you know, it is the intention of the Family Law Act to only share property acquired **during** the marriage. Therefore, it appears to me that the Deferred Settlement Method (DSM) system does not coincide with the intentions of the Act.

This is what is being suggested by the Deferred Settlement Method. I do not think that it represents sharing the pension fairly.

Another example

Tom and Jerry (who are twins) both start work the day they get married. They both work for the same company and earn the same salary (\$50,000). The company pension plan provides a retirement benefit of 2% of salary for each year of service. 10 years later Tom and Jerry each separate from their wives. At this point they have each earned an annual pension of \$10,000 (2% x \$50,000 x 10 years of service). Therefore, their wives have earned a right to a pension of \$5,000 per year.

Both continue to work for the same company for 10 more years and then they each retire.

Tom continued to be a plodder and didn't earn any salary increases. Therefore, his pension on retirement is \$20,000 (2% x \$50,000 salary x 20 years of service). Since he was married for 10 or his 20 years, his ex-wife will receive an annual pension of 1/2 of 10/20 x \$20,000 = \$5,000.

On the other hand, Jerry remarried a woman who inspired him to work hard and he went on to

become CEO of the company. He was provided with a special pension of 4% of his salary (which was now \$250,000 annually). Therefore, his pension was \$200,000 annually (4% of \$250,000 salary x 20 years of service). Since Jerry was also married for 10 of his 20 years, his ex-wife will receive an annual pension of 1/2 of 10/20 x \$200,000 = \$50,000.

The reason that Jerry's ex-wife will get more pension than Tom's ex-wife is because Jerry's pension increased after the date of separation. This is not fair and is contrary to the intention of the Family Law Act.

Major Changes to Division of Pensions

From recent discussion with some pension administrators, it seems that they are devising a system to divide the pension into two separate pensions on marriage breakdown: a procedure not available to pension holders in Ontario before. This could avoid the need for "If and When" agreements and the DSM system that is being promoted by the Canadian Institute of Actuaries (a system to divide the pension on retirement only). An effort is being made by pension administrators to make provision for the non-member to have a separate pension with all of the same rights as the member. This could possibly allow the non-member, on marriage breakdown, to transfer a lump sum from the plan to his or her own retirement vehicle or have a separate pension that is not affected by the death of the member.

All of this has been brought about by the Court of Appeal case of *The Ontario Teachers' Pension Plan Board and Superintendent of Financial Services v. Anne Stairs*

(To receive a complete copy of this case, please contact us.)

It will still be necessary to have the pension valued in order to ensure that each party receives their fair share. The pension administrator will not do this. It will also require careful drafting of the separation agreement or court order. The non-member will not be able to receive more than 50% of the pension accumulated during the marriage and the application for the splitting of the pension will need to be sent in early because the division will not be retroactive. Therefore, any pension actually paid out between the date of separation and the date of settlement must be dealt with separately.

We will keep you advised of pension plans that make this provision as we become aware of them. Watch future issues of this bulletin, and contact us for further information.

Petition

We are submitting a petition to the Attorney General imploring him not to pass the DSM into law. We need your support in this. If you agree with us please fax us with your name, and comments, we will add them to our petition. We will forward this petition to all Members of Provincial Parliament and the Attorney General.

Published Opinions

The DSM has been endorsed by the Family Law Section of the Canadian Bar (see *Family Law Section Submissions on Pension Reform* in the February 2005 issue of *Matrimonial Affairs*). We have explained in an article titled *Pension Reform - Watch Out* in the July issue of *Money & Family Law* that in our opinion the DSM is not fair as it allows the non-member to share in post separation increases in value. We have also sent an extensive submission to

the Attorney General and made our thoughts available to the committee of lawyers who are advising the Attorney General. If you would like a copy of any of these, please contact us.

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