

How To Get The Most Out Of Your Divorce Financially

Dividing The Pension

Chapter Seventeen

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Introduction

As explained earlier in this book each party to the separation, or divorce, lists all of his assets and liabilities in order to determine which party has the greater net value of property acquired during the marriage. Then the party with the higher net value must transfer one half of the excess to the party with the lower value in order to equalize their net family property. While this may sound like a simple process, sometimes it is impossible to accomplish. For example, if one party has no net assets, and the only asset the other party has is their pension, this cannot always be accomplished. In some cases it is possible to split the pension at source and create a pension for both parties. This is rarely fair to both but will be discussed in this chapter.

When it is impossible to effect a lump sum payment or a transfer of assets from the payor to the payee in order to satisfy the equalization payment, the Ontario Family Law Act makes provision for the possibility of payment in installments over a period of up to ten years. Of course this may not be acceptable in a situation where the payor cannot afford to make payments and the payee cannot afford to wait. This situation has brought about arrangements called "If & When Settlements" and the division of pension payments at source.

You and your spouse may find that it is impossible to equalize your assets by way of a lump-sum payment or by one party transferring assets to the other, even after you have agreed on the value of all assets. It may then be suggested that you enter into an agreement to split the pension payments when they are paid (if and when). Or it may be suggested that the pension be divided in two so that you each have a pension. There are many problems with both of these approaches. We will discuss these problems in this chapter.

If & When

Procedure

An "If and When Settlement" is an attempt to satisfy the equalization requirement by having the actual pension payments split between the two parties after the member retires as each payment is received. The arrangement may be by way of a separation agreement with the person receiving the payments being placed in a position of trust so that he is receiving the payments in total for both parties and is required to send on a portion of each payment to the other party. Or the agreement may require the pension administrator to send a separate cheque to each of the parties. If an agreement cannot be reached

between the parties, the Ontario Family Law Act makes provision for the courts being able to order the pension administrator to send two payments (one to each party), rather than one, when the pension is being paid. Both of these arrangements are fraught with possible problems. Both of these require careful consideration and careful drafting of documents by your lawyer.

It may seem easy and less costly to enter into a pension division or a separation agreement or court order to divide the pension and avoid the costs of a pension valuation and the ensuing arguments about the proper value but beware. This arrangement may be excellent for the payor as it avoids the need to make an immediate settlement. Some of the problems that must be considered for the non-member spouse are set out below:

Problems

1. The debtor of the equalization amount may have no security to give for the unpaid balance. How does one provide security to the non-member for the unpaid liability in the event that the member dies before full payment is made? It is often suggested that this can be avoided by the provision of life insurance. However, great care must be taken in this regard. Even if the member is insurable, this would require constant monitoring on the part of the non-member to ensure that there is adequate coverage and also ensure that all premiums are paid on time.
2. Under the Ontario Pension Benefits Act no payments can be made until such time as the member retires. This leaves the member controlling as to when the non-member will start to receive payments.
3. If the member receives the total pension payments, he must include them in his income for income tax purposes. How is this income tax liability to be shared by the two parties?
4. While at first it may seem simple to say that the pension payments must be split when they are paid, the actual wording of how to split them between the member and the non-member is very difficult to draft in order to ensure that each party is treated fairly and that the requirements of the Family Law Act regarding court orders are adhered to completely. This wording becomes even more difficult and complicated when the pension provides for indexing.
5. What if the member terminates employment before reaching retirement age? As explained earlier, such an employee may accept either a pension with payments starting at normal retirement age or they may transfer the funds from the pension plan to a locked-in RRSP or to the pension plan of a new employer. How is this to be covered in the separation agreement or court order?
6. What if the non-member dies before receiving the full amount owing to him? Should payments continue to their estate?

7. Once the parties have divorced, the former spouse has no right to any information about the member's pension.
8. There are certain elections that a member is allowed to make with regards to his pension. How do you ensure that the member will not make elections that are detrimental to the non-member?
9. What happens if either party declares bankruptcy before full payments have been made?
10. There is some suggestion that an "If & When" arrangement may not be enforceable under the Pension Benefits Act.

These, and other problems, must be considered carefully and dealt with by careful wording in the agreement or court order.

There are many pitfalls to be avoided in arranging an "if, as and when" settlement. Most of these are fully discussed in *Monger V. Monger*¹ before Cusinato J. However, the solutions offered in that case do not apply to all cases. I will attempt to set out the problems, with suggested solutions and comments.

Mr. Monger was a school principal and despite the fact that his annual salary was \$75,000, he could not make the equalization payment, even if allowed 10 years to pay it, because the liabilities of the couple (without the husband's pension) exceeded their assets. His pension was valued at \$340,000. The wife was awarded support payments of \$1,750 per month, thereby further reducing Mr. Monger's ability to pay the equalization payment.

Cusinato J. recognized the following problems and provided his solutions:

Problem:

Should the non-member's share of the pension payments be calculated using the *Rutherford* formula? It is:

$$50\% \times \frac{\text{Total number of years contributed to the plan up to the date of separation (during marriage)}}{\text{Total number of years contributed by the pension holder to retirement.}} \times \text{Actual pension payments payable on retirement}$$

¹ (1994), 8 R.F.L. (4th) 157, Ont. Ct. of Justice, Gen. Div.)

Solution:

Cusinato J. concluded (rightfully so) that to divide the payments on this basis would allow the non-member spouse to share in future salary increases and future pension plan enhancements. In order to avoid this he decided to use the following formula (developed in *Thompson v. Thompson*).²

1/2 times 2% times number of years of service (including any fraction thereof) to the valuation date, times the member's annual salary over the last 6 years (as provided in the contract) to the valuation date.

Comments:

The approach of Cusinato J. seems reasonable for use in all cases provided the formula developed follows the formula set out in the particular pension plan at the date of separation for calculating the pension benefit. Of course, an adjustment would be required for any service rendered prior to marriage or any refunds and paybacks of contributions. In addition, consideration must be given either to indexing the non-member's share of the benefit or requiring that annual interest be paid on the unpaid balance. An adjustment must also be made for any bridging benefit provided by the pension plan. This may mean using a different formula for before and after the member reaches age 65.

Problem:

Should the non-member's share of the pension payments be indexed for inflation? Would this contravene Section 52(2) of the Pension Benefits Act since it would cause the non-member spouse to "become entitled to more than 50 per cent of the pension benefits, calculated in the prescribed manner, accrued by a member or former member during the period when the party and the member or former member were spouses?"

² (1987) 62 O.R. (2d) 425, Ont. H.C.

Solution:

Cusinato J. concludes that providing for the same indexing of the non-member's payments as the plan provides for the member's payments would not contravene the Pension Benefits Act.

Comments:

What if the indexing provisions in the plan, or the historical ad hoc indexing, are different at the date of separation from what they are at the date of retirement? Which do you apply?

If the indexing provisions of the particular plan have improved in the period between separation and retirement, the use of the provisions as they are at retirement would again cause the non-member to share in post-separation improvements.

Cusinato J. in his order said that the benefit should be adjusted **by the annual indexing factor provided under the Teacher's Pension Plan** and these calculations shall be both before and after retirement. Actually, the Teachers' Pension Plan (and probably all other pension plans) does not make any provision for indexing before retirement unless the member terminates employment. Does this mean that the non-member's payments would not be indexed until after retirement?

While Cusinato J's approach to this particular problem may be a reasonable approach, a better approach (without any concern about contravening the Pension Benefits Act) might be to order the member spouse to make annual payments of the appropriate rate of annual interest on the unpaid amount.

Problem:

Since the non-member cannot collect any payments until the member decides to retire (even under a Section 52 court order for ages before normal retirement age), the member can affect the non-member's start of payments and the total amount received by not retiring on the assumed date of retirement.

Solution:

Cusinato J. ordered that should Mr. Monger not retire on the date it was assumed he would retire (in the calculations of the value of his pension for equalization purposes), he must pay compensation to the wife personally of her entitlement to the pension benefits payable. These payments must continue from the assumed date of retirement until actual retirement, at which time the administrator will be directed to divide the benefit at source.

Problem:

How to provide security to the non-member for the unpaid liability in the event that the member dies before retiring.

Solution:

Cusinato J. ordered that Mr. Monger, so long as he is employed by the London Board of Education (query - but not if he changed school boards or transferred his pension to a new employer?) must designate Mrs. Monger as beneficiary of his group life insurance (through the school board) to the full extent of the proceeds of insurance.

Comments:

What if the amount of insurance becomes more than the amount owing to the non-member spouse?

Would this order be effective if the group life insurance provided that only a spouse (not a previous spouse) may be a beneficiary?

At any rate, the group term life insurance might cease on termination of employment.

The case of *Britton Estate v. Britton*³ illustrates the importance of wording very carefully the provisions in a separation agreement or court order that would require the plan member to name the spouse as a beneficiary of death or survivor benefits under a pension plan or life insurance benefits. In that case an order made in matrimonial proceedings provided that the husband was to "...maintain the (wife) as beneficiary of any insurance and/or other benefits to which she would be entitled under his company plan". The parties subsequently divorced. The husband later named his common-law spouse (who later became his legal spouse) as the beneficiary under his pension plan and under a group term life insurance policy he had through his employment. At his death, the pension plan administrator paid the survivor benefits to the new spouse in accordance with the terms of the Pension Benefits Act, the company pension plan, and the designated beneficiary form filed by the husband. Callon, J. concluded that the employer was obliged to pay the survivor benefits to the second spouse and the life insurance company was obliged to pay the life insurance proceeds to her as well. On appeal it was ruled that only the life insurance would be paid to the first wife.

Some agreements or orders provide that the member must maintain life insurance with the non-member named as the beneficiary. While this may seem adequate security, this would require constant monitoring on the part of the non-member to ensure adequate

³ (1993) O.J. No. 2814 (Gen. Div.)

coverage and also ensure that all premiums were paid on time. It may occur that the member is not insurable.

Problem:

How to provide security for the non-member if the member dies after retirement, but before any payments are made to the non-member or before sufficient payments are made to the non-member to repay the full amount of the liability. Mr. Monger's group term insurance ceased on his retirement.

Should the non-member continue to collect payments if the retired member dies before the full amount of the calculated liability is paid?

Should the non-member's estate continue to collect payments if the non-member dies before the full amount of the calculated liability is paid?

Solution:

Cusinato J. charged Mr. Monger's estate with the continuation of the benefit payment, to the extent of the available assets, until Mrs. Monger dies.

Comments:

Such a charge could cause the member's estate to be tied up for an inordinate length of time. It could also be ineffective should the member die having no assets other than his pension plan and the death benefit is payable to his new spouse (as is required by law).

Problem:

A former spouse has no right to any information about the member's pension plan and cannot obtain any information without written authorization from the member.

Solution:

Cusinato J. (and many judges before him) ordered Mr. Monger to deliver to Mrs. Monger, copies of all communications between himself and the pension plan administrator.

Comments:

In addition, the plan member should provide an irrevocable direction to the administrator to provide the non-member any information the non-member requests about the member's pension plan and direct the administrator to send copies to the non-member of all communications between the plan and the member, until such time as the non-member acknowledges that they have been paid in full.

The member should also sign a release to the plan, in the form required by the plan, to allow the plan administration to communicate with the non-member as to any communication between the non-member and the plan and any information the non-member requests about the plan.

Problem:

Is there still a need to value the member's pension plan entitlements at the date of separation when it is obvious that payment of the equalization amount will be by way of an "If and When" settlement?

Solution:

Definitely.

Comment:

How else can you ensure that the non-member receives no more nor no less than the amount to which he is entitled under the law? How else can you ensure that there is adequate security in the event of the premature death of the member?

Problem:

The member may make elections in connection with his pension that are detrimental to the non-member. (E.g. a higher survivor benefit for his new spouse that reduces his benefit to below the amount to be paid to the non-member previous spouse).

Solution:

Cusinato J. ordered that Mr. Monger was a trustee for Mrs. Monger of her interest in the pension plan benefits as to her entitled pension payments. He further ordered Mr. Monger to make no election, designation, nomination or other direction under the pension plan that would in any way affect Mrs. Monger's share of the pension benefits without obtaining her approval.

Comment:

This could allow Mrs. Monger control whether or not Mr. Monger terminates employment.

Problem:

The member's employment may be terminated, and he may be left with a deferred pension with no indexing or he may transfer his pension to a new plan.

Solution:

The agreement should provide that on termination of the member from his current employment, the non-member should have the right to deal with her share of the termination payment by electing to have her share paid according to any one of the options allowed on termination by the plan and applicable legislation.

Problem:

Any refunds that are repaid (or service that is bought back) during the marriage period will fall into the value attributed to the husband even if the service was rendered prior to the marriage.

Solution:

Ensure that refunds, repayments, and buy backs are considered carefully in valuation of the pension.

Problem:

What if the member becomes bankrupt before the non-member has received the full amount due to him?

Solution:

The agreement, or order, should provide that in the event the member becomes bankrupt, the non-member shall be deemed to have been entitled to a judgment against the member for lump sum spousal support equal to the amount owing to her, together with interest. The agreement should further provide that the non-member's entitlement should not be discharged by the bankruptcy.

General Comments

"If and When" agreements and orders are difficult to draw so that the non-member is spouse adequately protected.

As Professor McLeod says in his comments on the Monger case:

The problems are sufficiently great that an "if, as and when" division may be a lawsuit waiting to happen. In many cases it may be possible to provide the same benefits to the payee through support orders. Before counsel rush to force an "if, as and when" settlement, they should consider an order for periodic support or lump sum support payable in installments, which may be easier to enforce against a plan administrator and is more susceptible to change if the circumstances warrant it.

Generally speaking, divisions by way of agreement, court order, and under the Pension Benefits Division Act will be calculated based on the pro rata on service method. This may mean that the non-member spouse will receive less than the amount to which he is entitled to by law since it is not always appropriate to value the pension by the pro rata method. It then becomes important to have a proper valuation prepared and make arrangements for the shortfall.

If and When Agreements Checklist

1. Has the pension been valued?
2. How are the payments to be split?
3. What about indexing?
4. What happens if there are major changes in the pension plan before retirement (e.g. indexing)?
5. When do split payments start?
6. When do split payments end?
7. How is income tax to be dealt with? If the parties will be in different tax brackets, has this been considered?
8. Is there to be interest on the unpaid balance?
9. What happens if the member declares bankruptcy?
10. What happens if the non-member declares bankruptcy?
11. What happens if the member dies first?
12. Has security been provided in the event of the member's early death?
13. What happens if the non-member dies first?
14. What happens if the member dies before retirement?
15. What happens if the member lives beyond normal life expectancy?
16. What if the member terminates employment before retirement?
17. How will the member's age of retirement be determined?
18. What happens if the member retires earlier than anticipated?
19. What happens if the member retires later than anticipated?
20. What happens if the member becomes disabled before retirement?
21. Has provision been made for splitting the pension into two pensions, if the law allows this sometime in the future?

22. Who is to control any elections?
23. Will the non-member be supplied with copies of any correspondence between the member and the pension plan administrator?
24. Is the member to be allowed to “buy back” the pension from the non-member, and on what terms?
25. Has the agreement been approved by the pension administrator in order to ensure that they will abide by it?
26. What happens if the pension administrator will not pay to the non-member the full amount agreed on?
27. What happens if this agreement is declared null and void?

Suggested Wording for an If and When Agreement involving a Teacher's Pension

(This is not to be construed as legal advice or a form to use in any particular case. It is merely a sample. A lawyer should draft any agreement.)

1. Non-Plan Member's Entitlement

The Plaintiff, _____, (hereinafter called "the Wife") shall be entitled to receive 50% of the value of the Defendant's, _____ (hereinafter called "the Husband") interest in the Teachers' Pension Plan (hereinafter referred to as "the Plan") accrued after the date of marriage _____ (Date) to the valuation date _____ (Date) and she has an interest in the Plan to the extent of her entitlement. The Husband's interest in the Plan is valued at as shown in the valuation report of _____ dated _____.

2. Payment of the Wife's Interest

The Wife shall receive her interest in the Plan in the following ways:

- (A) By the Wife receiving each month a portion of the Husband's pension benefits once those benefits are in pay, the quantum of the monthly payments to be calculated pursuant to paragraphs 3 and 4 of the Appendix.
- (B) By the Husband's interest in the Plan being severed into two shares, one for himself and one for the Wife pursuant to paragraph 7 of the Appendix.

3. Calculation of the Wife's Pension Entitlement

- (A) Commencing on the first anniversary date of (Date of Separation), the Wife's share of the pension shall be adjusted annually by the annual indexing factor provided under the Teachers' Pension Plan. The annual indexation shall be made before and after retirement.
- (B) Commencing on the first anniversary date of (Date of Separation), and each year thereafter until payment in full has been made, interest at the rate of 4 ½ percent per annum will accumulate on the balance owing to the Wife.

4. Calculation of the Wife's Monthly Payments

The amount of the monthly payments to the Plaintiff are to be based upon the formulas set out immediately below and, for greater certainty, the amounts of these monthly payments shall be adjusted annually both before and after retirement:

- (i) Before the Husband reaches the age of 65, the amount of the monthly payment is to be based on the following formula: $2\% \times (\text{years of service during marriage}) \times (\text{Average Salary}) \times 50\%$. The monthly payments will be ____ before indexation and interest.
- (ii) After the Husband reaches the age of 65, the amounts of the monthly payments are to be reduced based on the following formula of $0.6\% \times (\text{Years of Service During Marriage}) \times (\text{Average Years Maximum Pensionable Earnings}) \times 50\%$, that is be ____ monthly. The monthly payments will be _____ before indexation and interest.

5. Method of Payment of Wife's Share of Pension

- (A) The Wife's share of the Husband's pension as calculated under paragraph > of the Judgment and under paragraphs 1, 3 and 4 of this Appendix shall be payable in part by the Husband and in part by the plan Administrators. Commencing on (Date), or upon the date the Husband starts to receive a pension benefit under the Plan, whichever occurs first, the Husband shall direct the Administrator to pay each month directly to the Wife 50% of the Husband's pension benefits accrued between the date of marriage and the valuation date as calculated by the Administrator as the maximum amount the Administrator is able to pay to the Wife under the requirements of the Plan and applicable pension legislation, such payment not to exceed the payment owing to the Wife as calculated under paragraph > of the Judgment and paragraphs 1,3 and 4 herein. These payments from the Administrator to the Wife shall cease upon the Husband's death or upon the Administrator being advised by the Wife or through a subsequent domestic contract or Court Order that all sums owing to the Wife in regard to the Husband's pension have been paid in full. Due to changes in legislation or otherwise, the Administrator from time to time may determine the maximum amount of the Husband's pension benefits payable to the Wife has changed. Whatever the case, the Administrator shall be authorized to pay the amount to which the wife is entitled under paragraph > of the Judgment and paragraphs 1,3 and 4 herein.
- (B) When the Husband starts to receive a pension benefit under the Plan, the Administrator shall first deduct the monthly payment owed to the Wife from the total pension payable, and then pay the remaining balance to the Husband.
- (C) In the event that in any given month the monthly payment payable to the Wife calculated under paragraphs 3 and 4 herein (i.e. after indexation and interest) exceeds the amount that the Administrator will pay to her, the Husband shall, within ten days, personally pay the difference to the Wife.
- (D) If the husband should postpone retirement beyond age ____ (Assumed Age of Retirement), immediately upon his attaining ____ (Assumed Age of Retirement), he

shall commence to pay the Wife and shall continue to pay her during each month thereafter until all sums owing to the wife from that date forward is the amount she would have received as her share of his pension benefits had he retired at age _____ (Assumed Age of Retirement). The monthly payments to be made by the husband shall include any indexing provisions under the Plan plus interest.

6. Taxation

- (A) Each party will receive his respective share of the Husband's pension benefits and pay tax at their individual income tax rates thereof. The Administrator shall make such source deductions, issue T4 forms for each of the parties based upon their respective receipts of pension benefits pursuant to the Judgment and this Appendix.
- (B) If the Administrator is unable or unwilling to issue separate T4 forms for each party, then the Wife shall indemnify the Husband and save him harmless from any tax liability attributable to her share of the Husband's pension and the benefits thereunder or payment under compensation equivalent to her share of the pension as provided herein and there shall be an accounting annually to determine the amount of tax paid by the Husband, with respect to the Wife's share of the pension or equivalent compensation payments which amount shall be payable by the Wife to the Husband forthwith upon determination and notice to the Wife.

7. Severing Pension

- (A) Whenever able to do so under the terms of the Plan and applicable pension legislation, the Husband shall sever his interest in the Plan into two parts, one for himself and one for the Wife, with the Wife's share being _____calculated_____in accordance with her interest as set out in paragraph > of the Judgment herein and in accordance with paragraphs 1, 3 and 4 of this Appendix.
- (B) Subject to the terms of the Plan and the relevant pension legislation, the Wife may, upon any such severance direct the Administrator to transfer the commuted value of her pension into a Registered Retirement Savings Plan or other appropriate vehicle.
- (C) If the law at the time of the severance does not accord with the Parties' intentions or the intention of this Judgment and this Appendix, either of the parties may apply to the Court for a severance or Judgment in his or her favour in accordance with the intentions of the parties as set out in this Appendix and Judgment, namely to allow the Wife's share in the Husband's pension in accordance with the amount set out in paragraph > of the Judgment and paragraph 6 of this Appendix.

(D) Direction to the Administrator of the Plan

This paragraph constitutes an irrevocable direction from the Husband to the Administrator of the _____ Pension Plan to carry out all the applicable terms of this Judgment and Appendix. The Husband hereby authorizes the Wife to deliver to the Administrator a notarial copy of this Judgment and attached Appendix or a certified copy of any Order made in accordance with it.

8. Trust Provisions

(I) Pension Elections, Designs by the Husband

- (A) The Husband shall be a trustee for the Wife's interest in the Plan benefits and shall not do or omit to perform any act that would prejudice her interest. The Husband shall not make any election, designation, nomination or transfer under the Plan that would in any way affect the Wife's interest in the Plan, without first obtaining her written approval. Such approval not to be unreasonably withheld.

(II) Communications and Information with Respect to Pension Plan

(A) Between the Husband and the Wife

The Husband shall deliver to the Wife copies of all communications between himself and the Administrator of the Plan with regard to the Husband's pension rights or any employment benefits derived for the Plan within 10 days after such communication.

(B) Between the Husband and the Pension Plan

The Husband shall forthwith forward to the Administrator of the Plan a certified copy of this Judgment and Appendix and draw to the Administrator's attention the provisions of the Judgment and the Appendix with the Plan. The Husband will provide an irrevocable direction to the Administrator to:

- (I) Provide the Wife with any information the Wife requests about the Husband's pension and;
- (II) Send copies to the Wife of all communications between the Plan and the Husband;
- (III) Pay directly to the Wife that portion of the Husband's pension plan as defined in the Judgment;
- (IV) Carry out all of the applicable terms of this Judgment and Appendix. The Husband shall sign a release to the Plan in the form required by the Plan to allow the Plan to communicate with the Wife as to any communication between the Husband and the Plan and any information the Wife requests about the Plan.

(C) Between the Wife and the Pension Plan

The Administrator of the Plan shall upon request send directly to the Wife, copies of all communications sent to or by the Husband in connection with the Plan. The Administrator shall provide the Wife with any information she requests concerning the Plan. The Husband undertakes to provide the Administrator with his current mailing address from time to time for the purposes of this paragraph. The Wife shall supply to the Administrator such information as is required by him or her in order to allow the Administrator to deal with the Wife directly, including providing her date of birth, social insurance number, bank account and address.

9. Payment of Funds to Husband Subject to Notice

The Husband shall not accept funds from the Administrator other than monthly payments without first giving the Wife 45 days notice of the proposed payment. Further, the Husband shall not transfer funds from the Plan to an RRSP without first giving the wife 45 days notice of the proposed transfer or to another Pension Plan.

10. Protection by Administrator

Subject to the requirements of the Plan and applicable law, the Husband directs the Administrator to take all necessary steps to recognize and protect the Wife's interest in and claims to that portion of the Husband's pension under the Plan as provided herein.

11. Early Retirement

If the Husband should retire before he attains the age of ___(assumed retirement age) and receive a reduced pension under the Plan, he shall immediately pay the Wife a lump sum equal to the capitalized amount of the difference in benefits under the pension plan that the Wife will receive after the early retirement and the benefits under the Plan that she would have received had the Husband not taken retirement at a reduced pension.

12. Termination of Husband's Employment

In the event the Husband changes employment or his employment with the _____ is terminated, the Wife shall have the right to deal with her share of the termination payment by electing to have her share paid according to any one of the options allowed on termination by the Plan and applicable legislation.

13. In the Event of Wife Predeceasing Husband

If the Wife dies before she receives her interest in the Plan, her estate is entitled to her interest in the Husband's Plan. The Husband and/or the Administrator, as the case may be, will pay the Wife's interest in the Husband's Plan to the Wife's estate in accordance with this Judgment and Appendix.

14. Life Insurance

Until such time as the Husband's Plan can be severed into two shares, one for the Husband and one for the Wife as set out herein or until such time as all sums owing to the Wife in regard to the Husband's pension have been paid in full, and notwithstanding an assignment in bankruptcy by the Husband, the following life insurance provisions will apply:

- (A) The Husband shall maintain in effect a policy of insurance on his life with a face amount of at least _____.
- (B) The Husband shall designate the Wife as the sole beneficiary of this life insurance policy and shall file the said designation with the principal office of the insurer in accordance with the provisions of the Insurance Act. The Husband shall give to the Wife a true copy of the said designation within 14 days of this Judgment.
- (C) The Husband shall deliver to the Wife on or before January 10th of each year proof that the said policy remains in effect and that he has not transferred the said policy or borrowed against it or pledged it as security.
- (D) The Husband shall deliver to the Wife within 14 days from the date when it is demanded proof that the policy is in good standing, the Wife having the right to demand this proof at reasonable times and from time to time.
- (E) If the Husband defaults in payment of any premium, the Wife may pay the premium and recover from the Husband the amount of the payment, together with all costs including solicitor and client costs together with any expenses that may be incurred in restoring the policy to good standing.
- (F) The Husband shall execute an authorization allowing the Wife to receive information directly from the Husband's insurer during such time as the Husband is obliged to maintain this life insurance coverage.
- (G) If the Husband is unable to maintain or obtain life insurance coverage on his life with a face amount of at least _____ then he shall be obliged to provide the Wife with comparable security of an equal amount in a form satisfactory to the Wife and failing agreement, as the Court orders. For greater certainty, such security

may include the Husband irrevocably designating the Wife as beneficiary of the following:

- (I) The supplementary death benefit under the Plan;
 - (II) If at the time of the Husband's death, there are no survivors who are eligible for continuing benefits, the greater of the return of the Plan contributions with interest or 5 years worth of pension payments;
 - (III) The death benefit payable under the Canada Pension Plan;
 - (IV) A return of the supplementary retirement benefits contributions if there are no eligible survivors following the Husband's death;
 - (V) Any other benefits under the Plan or the Canada Pension Plan for which the Husband may designate a beneficiary.
- (A) If the Husband dies without having in effect the required amount of insurance coverage under this paragraph, and without having provided the Wife with alternate security satisfactory to the Wife, there shall be a first charge against the Husband's estate in favour of the Wife for the sum total owing to the wife.
- (I) The life insurance provisions under this Judgment and Appendix are intended to survive an assignment in bankruptcy by the Husband or subsequent discharge. Accordingly, in the event of an assignment in bankruptcy by the Husband or subsequent discharge, these provisions shall be deemed valid and enforceable until such time as the Husband obtains a declaration that they are void and null. The Husband shall be responsible for the Wife's solicitor and client costs in litigating this matter in any event of the cause.

15. Bankruptcy

If the Husband becomes bankrupt prior to the severance of the Plan or prior to all sums owing to the Wife in regard to the Husband's pension have been paid in full, this Judgment and Appendix shall be deemed an assignment in favour of the Wife on an interest in moneys payable under a pension plan pursuant to s. 65 of the Pension Benefits Act. In the event that the Wife, notwithstanding the aforesaid assignment, is not a secured creditor pursuant to the Bankruptcy Act, as amended from time to time, the Wife shall be deemed to have been entitled as of the date of the Judgment to a lump sum maintenance payment from the Husband equal to one-half of the after-tax value of the Husband's pension as of the valuation date as calculated under paragraph > of the Judgment and paragraphs 1, 3 and 4 of this Appendix less any necessary adjustments required as a result of any partial payments made to the Wife herein. This entitlement to a further Judgment for lump sum support shall be in lieu of the Wife's entitlement to an interest in the Husband's pension.

The Wife shall be entitled to a further Judgment as of the date of this Judgment for the lump sum support payment referred to in this paragraph. The entitlement of the Wife to the lump sum support payment under this paragraph shall not be discharged by the Husband's bankruptcy or subsequent discharge but shall be an obligation of the Husband that survives the bankruptcy and discharge. The lump sum support obligation shall not be subject to variation for any reason whatsoever, regardless of any material change in circumstances of either of the parties following the date of this Judgment.

16. Alteration

- (A) If the Administrator of the Plan requires any minor alterations to this Judgment or Appendix dealing with the Plan in order to effect the division as intended by this Judgment, the Parties shall consent to any necessary changes thereto.
- (B) If the Administrator requires that any division of the pension be pursuant to a Court Order or Judgment the Husband agrees to take all necessary steps to obtain the Court Order or Judgment and the Husband agrees that he shall be solely responsible for the legal costs in obtaining such a Court Order or Judgment.
- (C) This Judgment is intended to conform to those provisions of the Plan, which might affect the perceived ability of the Plan Administrator to divide the pension at source each month during the Husband's lifetime, and particularly Section 51 and Regulation 56 of the Ontario Pension Benefits Act. In the event that a minor change in the amounts or procedures defined in this Judgment is requested by the Plan Administrator, then approval of that change will be given forthwith in the form required by the Administrator.
- (D) If for any reason the method of equalizing the pension benefits as set out herein is held to be ineffective due to any legal or other prohibition, then notwithstanding any limitation period, the division of the pension shall be renegotiated based on the principles as set out in this Judgment and Appendix.

17. Pension Paragraph Void/Dispute Resolution

- (A) The power to make further orders as to the pension and any benefits thereunder shall be reserved to the Court. If for any reason, the Parties' are unable to satisfy the Wife's entitlement under the Judgment and Appendix herein, that entitlement shall be satisfied in such other manner as agreed to between them, ordered by the Court or, failing jurisdiction in any Court, by arbitration. This clause shall constitute an agreement to arbitrate pursuant to the Arbitration Act, as amended from time to time.
- (B) This method of payment is called the "if and when" division of the pension. There may be questions concerning the validity and enforceability of the "if and when" pension provisions in this Judgment and Appendix. Consequently if at some time in the future, the "if and when" provisions in this Judgment and Appendix are found

to be unenforceable or void, the Wife shall be entitled to a Judgment against the Husband at that time for an equalization payment equal to one-half of the after-tax value of the Husband's pension as of the valuation date as calculated herein plus interest until the date of payment. The Court shall have the jurisdiction to determine: (1) the appropriate deduction from the capitalization amount for any payments already made by the Husband to the Wife on account of his pension entitlement; (2) the amount of pre-judgment and post-judgment interest from the valuation date to the date of payment; and (3) the method by which the said equalization payment will be satisfied. Both parties shall be entitled to present evidence to the Court on these issues.

18. Waiving of the Time Limit

In the event that either party brings an application pursuant to paragraph (A) or (B) above, the parties shall be deemed to have waived the application of any limitation period under the Family Law Act and the Divorce Act or any other legislation.

19. Court Jurisdiction

The power to make further orders as to the pension and any benefits thereunder, including security, shall be reserved to the Ontario Court (General Division) in _____(City) or to the jurisdiction in which the Wife resides at that time.

20. Pension Valuator/Accountant

Should a valuation of the Husband's pension or of the Wife's interest in his pension be required at any time in the future, the parties shall jointly choose and retain a qualified pension valuator to do the calculations. Similarly, should it become appropriate for the parties to retain an accountant to resolve matters arising out of the Judgment and this Appendix, the parties shall jointly choose and retain an accountant to perform the necessary calculations. Failing agreement by the parties, the dispute resolution provisions hereafter set out shall apply.

21. Pension Benefits

For greater certainty, the words "pension benefits", "pension", "pension rights" when used in this Judgment and Appendix shall include but not be limited to the monthly pension benefits payable, any lump sum payable, and any other amount or amounts payable as a result of the Husband's membership in the Plan.

Valuation

Even if arrangements are made to split the pension payments as they are paid, still it will be necessary to have the pension valued at the date of separation in order to ensure that each party will receive the proper amount.

Dividing Public Sector Pensions

The spouse who has the pension often will attempt to avoid the cost of obtaining a valuation report and also avoid the ensuing arguments over the value that could delay the divorce and increase legal fees. Sometimes an “If and When” arrangement is suggested. This matter is discussed above. At other times the pension member or his lawyer will suggest that the pension be divided under the provisions of applicable pension legislation when the circumstances allow it.

The Ontario Pension Benefits Act, the Federal Pension Benefits Standards Act and the Pension Benefits Division Act all provide for splitting the member’s pension rights and transferring a part of such rights under the pension plan to the spouse on marriage breakdown. These acts then provide for the transfer of the commuted value of the spouse’s rights to an RRSP or other retirement vehicle for the spouse. Under the Ontario Pension Benefits Act such a transfer cannot take place until the member terminates employment, and therefore, it has limited applicability. Most lump sum transfers to an RRSP from a pension plan involve plans regulated by the Pension Benefits Standards Act and the Pension Benefits Division Act, both of which allow immediate transfer at any time after the valuation date. In this section we will deal with transfers under the Pension Benefits Division Act.

The Pension Benefits Division Act applies only to certain pensions created under the following federal statutes: Public Service Superannuation Act, Canadian Forces Superannuation Act, Defense Services Pension Continuation Act, Royal Canadian Mounted Police Superannuation Act, Royal Canadian Mounted Police Pension Continuation Act, Diplomatic Service (Special) Superannuation Act, Lieutenant Governor’s Superannuation Act, Governor’s General Act, Members of Parliament Retirement Allowance Act and the Special Retirement Arrangements Act. It has no effect whatsoever on any other pensions. It does not apply to provincially regulated pension plans.

The Pension Benefits Division Act allows for the division of pension benefits between a pension member and a spouse or former spouse. The purpose of the act is to assist in the division of the value of certain federal pensions but only to the extent that the Federal Government is prepared to do so. An application for division of the pension must be made in writing and must be accompanied by a copy of any court order or separation agreement that provides for the division of the pension benefits. The pension benefits to be divided are those that have accrued to the member during “the period subject to division”. This period can be determined either by a court order or a spousal agreement specifying the period. In the absence of a court order or spousal agreement the Minister will determine

the period, although normally “the period subject to division” will be the period between the date of marriage and the date of separation. Often it will be possible for the period established by the Minister to be greater or less than the proper period. This creates one of the problems.

The division will be accomplished by transferring 50% of the termination value of the pension benefits accrued during the “period subject to division” either to the spouse’s pension or to a locked in RRSP for the spouse or to a financial institution to purchase a life annuity for the spouse. The plan administrator will determine what 50% of the value of the pension benefit is, based on the guidelines included in the Regulations. There is further provision allowing the court or the individuals involved to determine the lump sum amount to be transferred, as long as the amount stipulated in the court order or agreement is less than the amount that would otherwise be transferred as calculated by the plan administrator.

There are three separate steps in the Pension Benefits Division process. These are explained in an information guide and an information kit that is available from Public Works and Government Services Canada. The three steps are as follows:

1. Submit a request for information on pension benefits division. On filing this you will receive information of the approximate allowable amount of the division and an explanation of what went into the calculations.
2. The actual application for the pension benefits division. At this point the member has the opportunity to object to the division.
3. Once the division is approved, the value of benefits allowable for the period subject to division is transferred into the applicant’s chosen retirement vehicle. The member’s pension benefits are then reduced accordingly.

The Pension Benefits Division Act may be useful in a situation such as the following.

Mr. & Mrs. Brown have separated and now wish to equalize the value of their assets acquired during the marriage. They have no liabilities. Mr. Brown is a member of the Canadian Forces. Their house is registered in Mrs. Brown’s name and Mr. Brown has his pension. They have no other assets. The equalization amount is calculated as follows:

Assets	-	Mr. Brown	
		Pension	\$200,000.00
	-	Mrs. Brown	
		Matrimonial Residence	<u>\$100,000.00</u>
Difference			<u>\$100,000.00</u>

Mr. Brown's assets acquired during the marriage are worth \$100,000.00 more than the assets acquired by Mrs. Brown during the marriage. Therefore Mr. Brown must transfer \$50,000.00 worth of assets to Mrs. Brown so that they both end up with assets worth \$150,000.00.

Mr. Brown transfers \$50,000.00 worth of his pension to an RRSP for Mrs. Brown. This equalizes their property. Mr. Brown's pension is reduced accordingly.

It is extremely important to realize that the amount calculated by the pension plan administrator as being available for transfer under the Pension Benefits Division Act will rarely be the proper value for equalization on marriage breakdown. There are a number of reasons for this:

1. The value calculated under the Pension Benefits Division Act is based on the Canadian Institute of Actuaries' recommendations for the **computation of transfer values** from registered pension plans. These recommendations were not intended to be used to divide the value of a pension equally and fairly between two parties. The purpose of these recommendations is to provide a minimum value of a plan member's pension rights for transfer purposes on termination of employment. The goal is to protect the pension fund as well as the member whose pension rights are being transferred out. On the other hand, the standard of practice for marriage breakdown computations has an entirely different focus, and therefore, normally will produce a different, and sometimes higher, value.
2. The economic assumptions stipulated in the recommendation for the computation of transfer values are different from those stipulated in the Standard of Practice for marriage breakdown computations.
3. Under the Standard of Practice for marriage breakdown computations, in Ontario at least, the portion of the value of the pension that was earned during the marriage might be determined properly by use of the value added method. By contrast, the pro rata methodology is stipulated in the regulations under the Pension Benefits Division Act. These two methods can produce vastly different results when there is a significant period of plan membership before marriage as explained elsewhere in this book.
4. Under the Ontario Family Law Act, pension benefits are valued at the date of marriage and again at the date of separation in order to determine the value for marriage breakdown purposes. Under the Pension Benefits Division Act Regulations, pension rights are valued as of the day that the calculations are being performed, (not the valuation or separation date) with the value earned during the marriage being determined by the Pro-Rata method. This may pro-rate part of the post-separation value to the marriage period.
5. The mortality tables used under the Pension Benefits Division Act are those determined by experience with the specific plan membership plus a projection for

improvements in mortality. Under the Standard of Practice on marriage breakdown the 1983 Group Annuity Mortality Tables are used, which are general mortality tables for the working population, and there is no projection for improvements. As well, under the Standard of Practice and case law the impaired health of a plan member can result in different mortality assumptions being applied. This is specifically prohibited in the regulations to the Pension Benefits Division Act.

6. Cases under the Ontario Family Law Act have established that the assumption of which date a pension plan member will commence to receive a pension (the assumed retirement date) is a question of fact in every case. Under the Pension Benefits Division Act, plan experience determines the assumed retirement date based on the age, sex and years of service of the member. Assuming a different retirement date can mean an entirely different value for the pension.
7. The maximum transferable amount under the Pension Benefits Division Act is given in before tax dollars. Normal valuations of pensions provide the values in after tax dollars so that they can be compared with the after tax value of other assets and included in the required Net Family Property Statement.

In the case of *Schaeffer v. Schaeffer*⁴ before Justice Metivier, with regards to the value determined under the Pension Benefits Division Act Justice Metivier had this to say:

There was some evidence led on the value, which is determined by the Pension Benefits Division Act. Mr. Woods stated, and I agree, that the Pension Benefit Division Act value is one, which is generally totally unreliable as an accurate valuation for specific individuals for purposes of the Family Law Act. Appealing though it may be to rely on a quick and easy solution to these difficulties of valuation, the Act remains merely a mechanism for transferring monies out of the plan. While the Pension Benefits Division Act provides for its own method of valuing pensions it does so for the Federal Government's own specific purposes. These include maintaining the integrity of the plan, benefiting the members as a whole and again only with a view to a mechanism for transferring out certain monies. These methods however, have nothing to do with provincial laws relating to property rights and the disposition of those as between former spouses. In the Canada Gazette Part 2, Volume 128 Number 21 the regulations to the Pension Benefits Division Act are followed by a regulatory impact analysis statement. Of interest is the following paragraph. 'It should be noted that the purpose of the Act and the Regulations is to provide a mechanism for making payments out of the pension funds, not to fix the value of the pension as between spouses and property settlements made upon the breakdown of their relationship'.

⁴ (1996) Court File No.: 47942/94

With the difference between transfer value and marriage breakdown value, different discount rates used in the calculations, value added method versus pro rata method, a different period for the earnings of the pension benefit, different mortality tables, a different assumed retirement date and either a proper allowance for income taxes or no allowance, it is not surprising that the value determined under the Pension Benefits Division Act normally will be different than the proper value for marriage breakdown purposes. These differences can result in the Pension Benefits Division Act valuation being significantly greater or lesser than the proper value for marriage breakdown purposes. The following actual cases give some idea of how these values can differ.

Mr. David was born in April 1952. He enrolled in the Canadian Forces in May 1972. He was married in September 1987 and separated in November 1995. He obtained a letter from National Defense headquarters stating “the amount that would be paid to your former spouse, as a result of the division of your pension entitlement under the Canadian Forces Superannuation Act for the cohabitation period is \$40,440.63”. On acting for Mrs. David we calculated that the proper value of Mr. David’s pension for the portion earned during the marriage was \$119,300.00 thereby establishing that the proper amount for her share of Mr. David’s pension was \$59,650.00, and gaining almost \$20,000.00 for our client.

In another case Pension Valuers of Canada were involved in, the proper value for marriage breakdown purposes was considerably less than the value determined under the Pension Benefits Division Act. In this case we were acting for the member and were able to save him about \$65,000.00. In this case, Mr. Philip was born in 1944, joined the Canadian Forces in 1962, married in 1968, separated in 1992 and retired in 1996 although he had already qualified for retirement on an unreduced pension at the date of separation. Counsel for the spouse had a normal valuation report prepared which produced after-tax values ranging from about \$145,000 to almost \$292,000 with no indication of which was the proper value for marriage breakdown purposes. They also had a letter from the actuary stating that, based on the Pension Benefits Division Act, “The capitalized value of pension entitlements accrued during the member’s whole service is \$307,922 (before tax allowance).” The solicitor for the spouse included this last figure in the financial statement for the member and insisted that it must be the proper value since it was the value established by the Pension Benefits Division Act and was the amount available for transfer. We were acting for the member and were able to prove a proper value of \$170,650.00 thereby reducing his assets by over \$130,000.00.

For the above reasons, whether you are the member or the spouse, you should always obtain a proper valuation of the pension even when the benefits are being divided under the Pension Benefits Division Act.

MISUNDERSTANDINGS AND MISUSE OF THE PENSION BENEFITS DIVISION ACT

When a federal government pension is being considered on marriage breakdown, some people are saying,

“ I don’t need to get this pension valued because the Pension Benefits Division Act will do it for me for no charge.”

We have also heard,

“The Pension Benefits Division Act will allow for the immediate cash release of up to 50% of the value accrued during the period subject to division, so support is not an issue in this case.”

“I don’t need to get a pension valued because the Pension Benefits Division Act will do it at no charge.”

The point that some are missing here is that the PBDA allows for **a mechanism to divide at source**, pensions created under a specific group of federal statutes, between spouses or former spouses following marriage breakdown. This Act **is not an attempt to deal with the issue of entitlement to share** the value of pensions following separation, because that is a matter under provincial jurisdiction and is dealt with under The Family Law Act of Ontario.

Public Works and Government Services Canada issues two reports indicating the value of the member’s pension. The “Pension Calculation” report shows a value based on the full service pension from enrolment date to separation date. The “Pension Benefit Report” shows values based on the Period Subject to Division only. If you are presented with a “Pension Calculation” report only and there is a pre-marriage period in your case, keep in mind that this is the value of the pension for the full service not just for the period of cohabitation.

Regulations under the PBDA establish the **maximum** amount only that the federal government is prepared to transfer out of its pension fund for the benefit of the spouse of the plan member. This amount is known as the “MTA”, the Maximum Transferable Amount. This is the amount that some people are suggesting is the value of the pension for marriage breakdown purposes. According to the PBDA, the MTA is the maximum amount that **could be** transferred to the spouse’s retirement savings vehicle. When a member is non-vested, the MTA is 50% of the amount contributed by the member during the period subject to division plus interest. If the member is vested, the MTA is 50% of the value of the member’s pension entitlement for the period subject to division.

But, the federal government is not saying that the MTA is the value that should be assigned to a spouse's portion of the member's pension for purposes of provincial matrimonial property laws. It is saying merely that for the purpose of managing its pension funds and protecting the interest of its plan members, it is setting its own limits as to what can be transferred out to a spouse's retirement vehicle.

Another important point to understand is that the valuation guidelines are set out in the Regulations of the PBDA, and they are different in several ways from those guidelines set out in the Canadian Institute of Actuaries' "Standard of Practice For the Computation of the Capitalized Value of Pension Entitlements on Marriage Breakdown for Purposes of Lump-Sum Equalization Payments".

In cases where the proper value, calculated using guidelines set forth in the Standards, produces values greater than 50% of the MTA, the allowable amount under the PBDA can be used to satisfy a portion of the equalization amount with the remainder being satisfied through other means.

Recently, when valuing a Canadian Forces pension, we were given two different quotes, calculated a year and a half apart by Canadian Forces, indicating the MTA in each case. The date of separation in each case was the same. The MTA calculated on the later date was \$6,000 higher than the former date. The increase from one date to another is attributable in part to the fact that Canadian Forces adds interest for the period from the date of valuation to the date of calculation. Furthermore, the value we calculated for marriage breakdown purposes was almost \$10,000 lower than the higher of these amounts.

Our experience in valuing federal public servants' pensions shows that the values that should be used for family law purposes are normally **lower** than those calculated by the federal government for PBDA purposes, for all of the above reasons. Here are some examples of differences we have found:

Family Law Value	P.B.D.A.
\$ 137,513	\$ 182,868
\$ 209,596	\$ 267,442
\$ 17,377	\$ 18,797
\$ 104,496	\$ 106,605
\$ 114,137	\$ 120,257
\$ 50,236	\$ 75,842
\$ 75,000	\$ 95,970

There are several cases dealing with this very issue of accepting PBDA values or marriage breakdown values.

In *Woodley v. Woodley*⁵ the judge accepted the evidence of an actuary as to the capitalized value of the husband's Canadian Forces pension as of the valuation date. He ordered an equalization payment to be made by the husband to the wife in gross, before-tax dollars based on the actuarial valuation but stipulated that the payment would be satisfied in whole or in part through a transfer under the PBDA. If the MTA under the PBDA was less than the equalization payment ordered, the husband had to make up the shortfall, less a deduction of 26 per cent for income taxes.

All of the above show clearly that a proper pension valuation prepared by a qualified pension valuator is required in ALL instances for family law purposes. There is no easy way out. Relying on the value calculated under the PBDA may cost the member thousands of dollars.

"The Pension Benefits Division Act will allow for the immediate cash release of up to 50% of the value accrued during the period subject to division so, support is not an issue in my client's case." This is not true.

Now that we have established that the PBDA allows merely for a mechanism to divide the pension, not the extent to which the value of the pension is to be shared following separation or death, the method of division must be addressed.

As Sheryl Smolkin, Director Canadian Research and Information Centre, Watson Wyatt Worldwide (Toronto) stated at the Pensions, Benefits And Family Law Conference, November 20, 1998, "the only method of settlement provided for under the PBDA is the transfer of a lump sum amount not exceeding 50 per cent of the value of the pension benefits that have accrued to the member during the period subject to division, as determined under the PBDA Regulations, to:

- Another pension plan selected by the non-member spouse, if the pension plan so permits,
- A locked-in RRSP, or
- A financial institution for the purchase of an immediate or deferred life annuity. If an immediate annuity is chosen, the periodic payments must commence within one year of its purchase."

This indicates clearly that funds cannot be released as cash in most instances. It does indicate however, that if funds are transferred from the pension fund to an immediate life annuity, the income from the life annuity would be considered to be income to the spouse thereby reducing the amount of support required.

If you are the member and are settling the equalization payment by way of a transfer under the PBDA, you may wish to reduce any support claim. Then you should suggest a transfer to a financial institution for the purchase of an immediate annuity to the spouse.

⁵ (1994) (Ont. Gen. Div.)

If you are the non-member spouse, you might argue that the transfer should be to a locked-in RRSP so that you can collect a pension some day in the future. This would not reduce your need for support.

In order to determine the pre-tax amount that must be transferred from the member's pension to a financial institution to purchase the annuity for the spouse, a qualified pension valuator must first value the pension.

To conclude, all pensions must be valued by a qualified pension valuator for marriage breakdown purposes. The PBDA is not able to authorize the release of cash funds to the non-member spouse.

These two areas of concern need to be reviewed when working with those holding pension assets that fall under the jurisdiction of the PBDA who are facing property issues due to separation or death.

Why Not the Pension Benefits Division Act Value?

A few years ago, the Pension Benefits Division Act (PBDA) was passed into law. This Act permits the division of pension benefits between a member of a Federal Public Sector pension plan and his spouse or former spouse when a marriage or common-law relationship breaks down. It applies only to Federal Public Sector pension plans governed by certain acts.

On request from the member or the spouse, the Federal Government will produce a report setting out the "Maximum Transferable Amount" (MTA). This represents the maximum amount the Federal Government is prepared to transfer from the member's pension to a retirement vehicle for the non-member spouse.

Frequently we are asked if the MTA should be used in calculating the equalization amount. Our answer to this question is that it depends on three things:

1. Do you care whether you are using the proper value for marriage breakdown purposes?
2. Are you concerned that you may be sued for negligence or later have the separation agreement declared null and void because you have used the wrong value for the pension?
3. How will you determine the proper income tax allowance when it could range from 0% to as high as 45%?

Many judges now recognize that the MTA as calculated by the Federal Government may not be the proper value for marriage breakdown purposes. There have been several cases

where the judge ruled that the MTA was not the proper value for marriage breakdown purposes, in a particular case.⁶

The MTA may be either lower or higher than the proper value. The reasons for this are as follows:

- The sex of the particular individual is ignored and the calculations are based on a combination of male and female life expectancies.
- The discount rate used in the present value calculation is appropriate for the date the calculations are being performed and may be either too high or too low to be the appropriate rate for the date of separation.
- It assumes an arbitrary date of retirement.
- The purpose of the PBDA is to provide a mechanism for splitting the pension, not to fix the value of the pension as between spouses in property settlements made upon the breakdown of their relationship. This is a Federal Act and it cannot possibly consider all of the legal provisions of each Provincial Act. The equalization of property on marriage breakdown is a provincial matter.
- There have been several court cases where it was decided that the MTA was not the proper value for marriage breakdown purposes (including an Ontario Court of Appeal case). The only reported cases that ruled in favour of the MTA were early cases that were decided before the Act was understood.
- The calculations are based on the Recommendations for the Computation of Transfer Values from Registered Pension Plans established by the Canadian Institute of Actuaries (CIA) and not the “Standards” established by CIA for valuing pensions on marriage breakdown.
- The principal of paramountcy does not apply⁷.
- The Minister determines the “period subject to division” which may be different than the “marriage period” determined by the parties involved. Therefore, it may be based on the wrong amount of accumulated service.
- It may ignore the value of early retirement provisions.
- The reasoning behind the calculations is to minimize the amount that is transferred out of the pension fund.

⁶ See, for example *McNutt v. McNutt* (2000), 5. R.F.L. (5th) 90 (Ont. S.C.J.) and *Shafer v. Shafer* (1996) 25 R.F.L. (4th) 410 (O.T.C.) affirmed (1998), 37 R.F.L. (4th) 104 (Ont. C.A.) and *Lockyer v. Lockyer* (2000) 10 R.F.L. (5th) 318 (Ont. S.C.J.).

⁷ *Ibid.*

- If the member has already retired, the MTA will have been reduced by pension payments already paid.
 - No income tax allowance has been deducted. Unless both parties will be in the same tax bracket after retirement, income tax cannot be ignored for family law purposes.
 - It usually includes interest from the date of separation to the date the calculations are completed.
 - The value of the post separation improvements in the pension plan may have been included.
 - Reduced life expectancy is ignored regardless of the facts of the particular case.

The MTA as calculated by the Federal Government very rarely will be the proper value for marriage breakdown purposes.

The following is a list of valuations in which we have been involved where we compared the MTA to the proper value. The range of error in the MTA value was from overstating the value by \$77,360.44 to understating the value by \$29,156.56. The percentage of error ranged from understating the value at a 4.83% of error to overstating the value at 103% of error. As you will note, in almost all cases, the MTA value was greater than the family law value.

NRA	Midpoint	Earliest	MTA	% Error NRA	% Error Midpoint	% Error Earliest
54,822.00	68,398.50	84,404.00	80,329.99	-46.53%	-17.44%	4.83%
28,489.50	33,888.50	40,898.00	51,702.89	-81.48%	-52.57%	-26.42%
30,142.00	18,343.00	22,373.00	37,234.51	-23.53%	-102.99%	-66.43%
36,196.00	44,296.00	53,877.50	67,471.06	-86.40%	-52.32%	-25.23%
32,741.50	35,190.00	37,864.50	40,480.80	-23.64%	-15.03%	-6.91%
205,961.00			211,993.95	-2.93%		
54,385.00	67,287.50	82,186.50	72,377.07	-33.08%	-7.56%	11.94%
18,941.50	23,102.50	28,616.00	30,374.99	-60.36%	-31.48%	-6.15%
107,598.50	136,077.00	214,115.50	184,958.94	-71.90%	-35.92%	13.62%
64,786.00	76,012.50	92,572.00	105,478.74	-62.81%	-38.76%	-13.94%
63,695.00	78,036.50	97,668.00	111,835.49	-75.58%	-43.31%	-14.51%
51,267.00	61,689.00	76,621.50	93,133.63	-81.66%	-50.97%	-21.55%

41,909.50	47,702.50	55,942.00	57,590.56	-37.42%	-20.73%	-2.95%
24,909.50	27,409.00	30,959.00	37,327.28	-53.42%	-36.19%	-20.57%
38,554.00	45,048.00	54,090.50	61,427.96	-59.33%	-36.36%	-13.57%

In summary, the purpose of the Pension Benefits Division Act is to allow a means of settling the equalization payment. It was not intended to be a means of valuing the pension for purposes of completing the Net Family Property statement.

Settling the equalization of property on marriage breakdown using the value calculated according to the Pension Benefits Division Act probably will cost one of the people thousands of dollars to which they had a right.

Dividing Certain Private Sector Pensions

The Pension Benefits Standards Act is a Federal Act that applies to private sector pension plans in industries such as banks, airlines, the CNR and CBC. Groups excluded from the Pension Benefits Standards Act (and covered under Public Service Plans) include the Federal Civil Service, the Armed Forces, the R.C.M.P., most Federal Boards and Commissions and some Federal Crown Corporations such as Canada Post. For a complete list see the Appendix.

Pursuant to a court order or the request of a member, a pension plan covered by the Pension Benefits Standards Act may assign all or part of the pension benefit, benefit credit or other benefit under the plan to his spouse effective on divorce, annulment or separation. On such a division, the spouse is deemed to have been a member of that pension plan for the purposes of the Pension Benefits Standards Act. The Act provides that the plan administrator must divide and administer the pension benefit in a prescribed manner in accordance with the court order or agreement once all appeals have been exhausted. For the purposes of the division, the non-member spouse is treated like a member who has terminated employment. The non-member spouse has the option of transferring the credits into another pension plan or into a locked-in RRSP, or to a life insurance company for the purchase of an immediate or deferred life annuity. The legislation gives both the member and the spouse a right to information about the plan.

As stated previously the non-member spouse also has the option of a deferred pension in the same plan. In this case the division results in a complete separation of the interest of the spouse as of the effective date of the division. Where the non-member spouse elects a deferred pension, the non-member spouse is treated like a former member and is entitled to a pension based on the member's period of employment and salary at the time of division, once the non-member spouse reaches the pensionable age under the plan. The Act also provides for the division of a pension that is already being paid.

There have been some unusual decisions in court cases dealing with divisions under the Pension Benefits Standards Act especially involving areas where it has been difficult to determine whether the Federal Act or the applicable Provincial Pension Act applies.

Air Canada has a document called “Administrative Policy On The Distribution of Benefits under The Air Canada Pension Plan Upon Separation, Divorce or Annulment of Marriage”. This document explains their policies and restrictions very well. Most companies will have a similar document explaining their policies. If your spouse is suggesting dividing the pension you must be sure to read and understand this document. Your lawyer will find it important information to have, before advising you on this matter.

The Bank of Nova Scotia issued the following memo in 1998:

The Scotiabank Pension Plan is governed by the Pension Benefit Standards Act 1985.

This Act requires the Plan Administrator to be responsible for valuing assigned pension benefits disbursed from the Plan, and for calculating the residual pension benefits due to members, subsequent to any partial assignment of pensions, as mandated by marriage breakdown agreements or court orders.

Under the legislation, these value determinations must be made as of the effective date of the assignment of, or agreement on, the division of pension benefits, and these determinations are required only if pension benefits under the Plan are to be divided, i.e., not when alternative settlements are made in respect of pension assets.

There is no specified basis, under either provincial property law or in the Pension Benefit Standards Act 1985, as to how pension benefit values may be determined for purposes of valuing family property. Nor does the Bank have any legal responsibility, under pension benefits legislation, to determine a value for this purpose.

We are able, however, to provide a calculation of the amount of pension benefit earned during the period of the marriage, to plan members who are working out a division of family property. For purposes of these determinations, we assume termination at the date of marriage breakdown, and we quote the monthly pension earned to that date and payable at Normal Retirement Date.

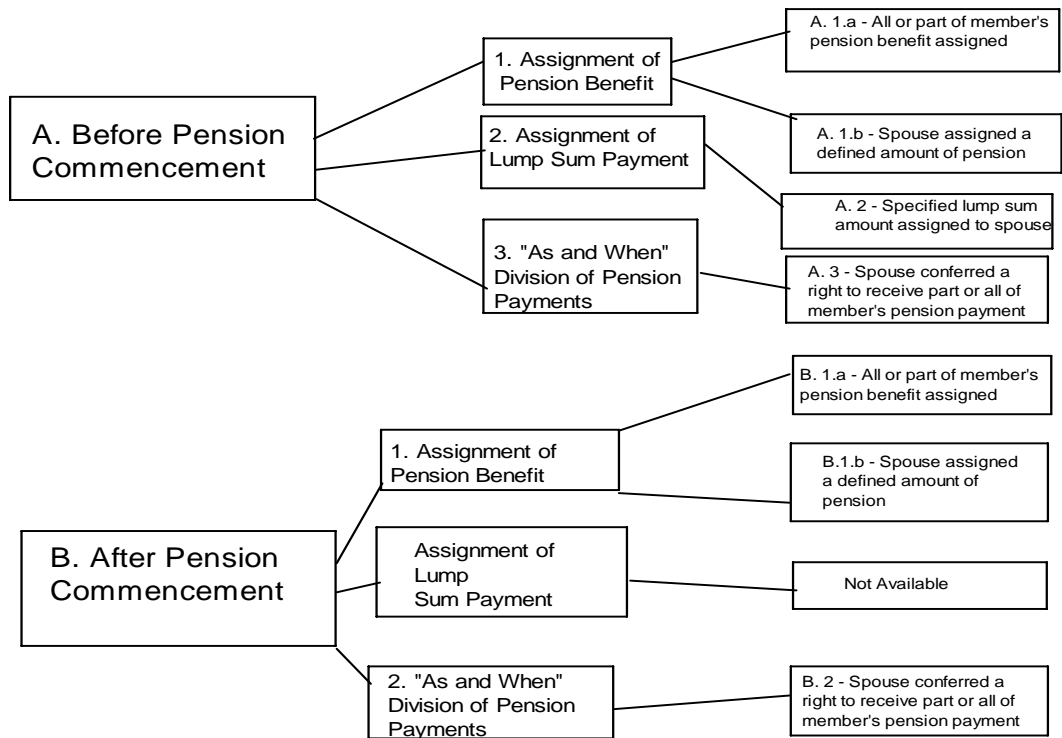
In addition, we are able to provide a commuted value of the quoted monthly pension. However, this value will be calculated based on the interest and mortality assumptions used in determining minimum transfer values on termination of employment. This amount represents the maximum amount that can be assigned to a spouse, under any agreement.

To minimize the complexity of the agreement wording that would otherwise be required, we would urge members and their spouses to ultimately describe the

agreed upon split of the Scotiabank Pension in terms relative to the commuted value of the member's pension. If the agreement is described in terms of amount of pension to be assigned, complete details of such pension must also be given including: the amount of pension, the pension commencement date/age and what, if any, benefits are payable on death before or after pension commencement. Also, if the pension assignment is contingent on certain future events, each event, and the disposition of the assigned benefits on the occurrence of each event, must be defined in detail, in order to ensure that all parties, including the Plan Administrator, will be able to understand what has been agreed to.

Note that a member's spouse, in a marriage breakdown situation, cannot revoke an entitlement to the death benefit payable as a result on any residual pension benefit to the member, if a member is still legally married at the time of death and was not, in an eligible common-law relationship, at the time.

We have enclosed the Commuted Value Release form for your signature.



SCOTIABANK PENSION PLAN
COMMUTED VALUE REQUEST

I, _____ am requesting Scotiabank to provide me with the commuted value of my pension entitlement in the Scotiabank Pension Plan accrued as at _____.

I understand that:

1. This value is strictly a calculation of the amount that would have been transferable to my RRSP had I terminated employment on the date indicated above. I understand that this value is not necessarily an appropriate value to attach to the pension asset for purposes of marriage breakdown.
2. I have been advised the merit of seeking advice from an independent actuary. Because of the many assumptions employed in the calculation of this value, it is most likely that an independent actuary would arrive at a different value than the one being provided to me. The value that will be provided by Scotiabank could be higher or lower, than the value that an independent actuary might produce.
3. The value provided to me will reflect the pension accrued during the period of marriage only and will not address the impact of taxation on amounts payable.
4. Scotiabank cannot provide an opinion about the fairness of the figure, nor attest to the appropriateness of the value for marriage breakdown purposes in any court action relating to the marriage breakdown, should one arise.

Employee Name & # _____

Signature _____

Date _____

Division of Other Private Sector Pensions

The Ontario Pension Benefits Act provides that pension payments may be divided at source pursuant to an agreement or a court order. Such an arrangement is valid only if it is clear that the non-member may not, under any circumstances, receive more than 50% of the value accrued during the marriage. This Act does not make any provision for payments to be made to the non-member before the member retires or after the member dies.

The following provinces actually provide for dividing a pension into two separate pensions (one for each party) on marriage breakdown and/or payment out of a lump sum before the member retires:

- Alberta
- British Columbia
- Manitoba
- Newfoundland
- Nova Scotia
- Saskatchewan

Teachers' Pensions and Marriage Breakdown

Stephanie Wood issued the following explanation about Ontario Teachers' pensions and marriage breakdown. She was legal council to the Ontario Teachers' Pension Plan Board at the time.

1. Introduction

The following information will be of interest to family law practitioners acting on behalf of members of the Ontario Teachers' Pension Plan or their spouses or former spouses with respect to negotiation of a separation agreement or proceedings under the *Family Law Act*⁸ or the *Divorce Act*⁹. I will outline briefly the statutory framework governing the division of pension payments at source upon marriage breakdown as well as provide a general description of spousal survivor benefits under the Ontario Teachers' Pension Plan.

My comments herein are general comments only, intended to raise awareness of these issues among family law practitioners and should not be relied upon as legal advice or as binding on the Ontario Teachers' Pension Plan Board. Counsel acting in these matters should contact the Board with any specific questions they may have and should obtain confirmation from the Board with respect to their clients' entitlements under the pension plan. Entitlement to spousal survivor benefits in particular can vary according to several

⁸ R.S.O. 1990.c.F.3.

⁹ R.S.C. 1985 (2nd Supp.) c.3.

factors, including the exact date on which the member of the pension plan ceased employment in education, which in turn determines the applicable version of the plan terms. Furthermore, under a defined benefit pension plan such as the Ontario Teachers' Pension Plan, members of the plan have little scope for designating a beneficiary of survivor benefits under the plan and any lawyer acting for a member of the pension plan or his spouse should obtain information from the Board on the issue of entitlement to survivor benefits before finalizing any agreement or order that purports to deal with survivor benefits under the pension plan.

2. Background – The Ontario Teachers' Pension Plan

The Ontario Teachers' Pension Plan is the largest single invested pension plan in Canada with total assets exceeding \$35 billion. The plan's contributing membership consists of approximately 160,000 elementary and secondary school teachers and others employed in education in Ontario. The plan pays pensions to more than 49,000 retired teachers and their survivors. For many members of the pension plan, their pension benefit will be the most valuable single item of property to be included in the calculation of net family property in the event of marriage breakdown.

The Ontario Teachers' Pension Plan is a defined benefit pension plan administered by the Ontario Teachers' Pension Plan Board in accordance with the *Teachers' Pension Act*¹⁰, the *Pension Benefits Act*¹¹ and the *Income Tax Act*¹². The current text of the pension plan is set out in Schedule 1 to the *Teachers' Pension Act* as adopted by the plan sponsors. The language of particular provisions in Schedule 1 has been amended from time to time by the co-sponsors of the plan. Earlier versions of the plan text are set out in the *Teachers' Superannuation Act, 1986*¹³ and the *Teachers' Superannuation Act, 1980*¹⁴.

The Ontario government (through the Minister of Education and Training) and the Ontario Teachers' Federation (through its executive) are the joint sponsors of the pension plan. Together these two sponsoring partners are responsible for the design of the pension plan and the level of benefits. Under the terms of an agreement signed by the partners and effective January 1, 1992, a six-member partners' committee is responsible for changes in plan design such as benefit levels and contribution rates. The Board is responsible for administering the terms of the pension plan as set by the partners.

3. Pensions and Marriage Breakdown

¹⁰ R.S.O. 1990, c.T.1.

¹¹ R.S.O. 1990, c.P.8

¹² R.S.C. 1985 (5th Supp.), c.1.

¹³ S.O. 1983, c. 84

¹⁴ R.S.O. 1980. c. 494

(a) Equalization

Pensions are “property” as defined in Section 4 of the *Family Law Act* and therefore must be valued and taken into account when calculating a spouse’s net family property under the Act. The Board does not value the member’s pension benefits for the purpose of calculating net family property under the *Family Law Act*. An actuary should be consulted for this purpose.

In order to satisfy an equalization claim, some members will agree to split their pension payments with their spouse or former spouse when they begin to receive them. Under the *Pension Benefits Act*, the Board may divide pension payments in accordance with a domestic contract as defined in the *Family Law Act* or in accordance with a court order made under the *Family Law Act*.

Under Subsection 65 (1) of the *Pension Benefits Act*, “every transaction that purports to assign, charge, anticipate or give as security money payable under a pension plan is void.” Subsection 65 (3) then goes on to provide that this general prohibition on assignment does not apply to prevent the assignment of an interest in money payable under a pension plan by an order under the *Family Law Act* or by a domestic contract as defined in Part IV of the *Family Law Act*. It is this provision in the *Pension Benefits Act* that allows a member of the pension plan to assign to his or her spouse a share of the member’s pension payments.

In order to divide a member’s pension payments with a spouse or former spouse the Board requires a copy of the separation agreement or court order in which a share of the member’s pension benefits is assigned to the spouse. This agreement or order should be certified to be a true copy of the original agreement or order. The Board also requires the member’s direction to divide his or her pension payments and make the payments to his or her spouse or former spouse in accordance with the agreement or order. It is the Board’s usual practice if it has not already received this direction to ask the member for the direction at the time he applies for a pension. As well the Board will need the name, address and telephone number of the non-member spouse so that Board staff can contact the non-member spouse to arrange for payment of his share of the pension payments. The Board pays pension payments by direct deposit to the financial institution account designated by the recipient.

Subsection 51 (1) of the *Pension Benefits Act* provides that a domestic contract as defined in Part IV of the *Family Law Act* or an order under Part 1 of the *Family Law Act* is not effective to require payment of a pension benefit before the earlier of the date on which payment of the pension benefit commences or the normal retirement date of the relevant member or former member. Accordingly, the Board cannot divide pension payments between spouses until the member’s pension begins.

Section 51 (2) of the *Pension Benefits Act* limits the amount of a pension that the Board can pay to a non-member spouse:

A domestic contract or an order mentioned in subsection (1) is not effective to cause a party to the domestic contract or order to become entitled to more than 50 per cent of the pension benefits, calculated in the prescribed manner, accrued by a member or former member during the period when the party and the member or former member were spouses.

Under section 51 (2) a spouse cannot receive payment reflecting more than 50 per cent of the pension benefits accrued during the spousal period. Section 56 of the Regulations made under the *Pension Benefits Act* requires that the pension benefits be calculated as if the member had terminated membership in the pension plan on the valuation date:

For purposes of subsection 51 (2) of the Act, the pension benefits accrued during the period a member had a spouse shall be determined as if the member terminated employment at the valuation date in accordance with the terms of the plan at the date and without consideration of future benefits, salary or changes to the plan but with consideration for the possibility of future vesting.

The Board calculates this section 51 (2) limit amount based on the termination method and then compares this amount with the amount yielded by the formula or percentage agreed to by the parties in their agreement or court order. The Board will pay the lesser of these amounts to the non-member spouse each month. The Board will provide counsel for the member and/or counsel for the member's spouse with this section 51 (2) limit figure upon receipt of written consent from the member authorizing the Board to release his or her pension information to the party requesting it.

When making these divided pension payments, the Board automatically takes tax off of each spouse's pension payments after division in accordance with their individual rates. The monthly pension payments that both spouses receive from the Board will already have the appropriate income tax deducted.

Under the terms of the pension plan, members' pensions are automatically adjusted for inflation each year going forward in accordance with the inflation adjustment mechanism under the plan. If the agreement or court order so provides both the member's share of the pension *and* the spouse's share of the pension will be adjusted for inflation each year going forward in accordance with the inflation adjustment mechanism under the plan.

Under the terms of the pension plan, members' pensions are automatically reduced, using a formula set out in the pension plan, when the member reaches age 65 in order to reflect Canada Pension Plan integration. Accordingly, the member's share of the pension and

the spouse's share of the pension will both automatically be lowered when the member reaches age 65.

Unless the agreement or court order expressly states that the pension payment to the non-member spouse are to revert to the member upon the death of the spouse, the Board will have to continue to make the payments as assigned to the spouse's estate until the pension ends with the member's death. The member's pension, and accordingly the share of that pension being paid to the spouse, ends with the member's death.

(b) Options on Termination of Membership

A significant departure from the scheme for the division of pension benefits outlined above occurs where a member terminates employment in education, thereby ceasing to be a member of the pension plan, before his pension begins.

Subsection 51 (5) of the *Pension Benefits Act* provides as follows:

A spouse on whose behalf a certified copy of a domestic contract or order mentioned in subsection (1) is given to the administrator of a pension plan has the same entitlement, on termination of employment by the member or former member, to any option available in respect of the spouse's interest in the pension benefits as the member or former member named in the domestic contract has in respect to his or her pension benefits.

Lawyers acting on behalf of non-member spouses should realize that although the Board cannot begin to divide pension payments between the spouses until the member's pension begins, subsection 51 (5) addresses the possibility of the member terminating employment before his or her pension begins. Because of this possibility, there is an advantage to sending a copy of the domestic contract or court order to the Board as soon as it is executed. If a member of the plan terminates his employment in education, and thereby ceases to be a member of the pension plan he may be entitled to certain options on termination such as the transfer of a lump sum amount out of the pension fund and into an RRSP. If the administrator has not received a copy of the domestic contract or court order then it will not be able to consider the non-member spouse's interest in the pension benefits should the member terminate his membership in the plan.

(c) Support

Subsection 66 (1) of the *Pension Benefits Act* provides that money payable under a pension plan is exempt from execution, seizure or attachment. However, subsection 66 (4)

provides that deposits subsection (1), payments under a pension are subject to execution, seizure or attachment in satisfaction of an order to support enforceable in Ontario to a maximum of one-half the money payable.

In response to a notice of Support Deduction from the Family Support Plan in accordance with the provisions of the *Family Support Plan Act*, the Board will deduct and remit to the Family Support Plan an amount from each monthly amount payable to the member.

It is the Board's position that subsection 51(2) and subsection 66 (4) of the *Pensions Benefit Act* are not mutually exclusive. Division of the pension payments resulting from an assignment for the purposes of paying an equalization claim and attachment of the payments under the pension plan in satisfaction of an order for support have separate statutory bases in the *Pension Benefits Act* and separate statutory limits as to the amount that can be assigned or attached. Accordingly, it is possible for a non-member spouse to receive both divided pension payments under a separation agreement or court order up to the subsection 51 (2) limit of 50 per cent of the benefits accrued during the spousal period as well as an amount of monthly support taken from the member's pension under a Notice of Support Deduction.

(d) Spousal Survivor Benefits

(i) Members Who Cease Employment in Education After December 31, 1989

Under the current terms of the pension plan, applicable to members who cease employment in education after December 31, 1989, if a member of the pension plan dies *before beginning his or her pension*, the spouse of the member on the date of death is entitled to a pre-retirement spousal death benefit (which may be a lump sum and/or a survivor pension) provided the member and the spouse were not living separate and apart on the date of death. Separation before the date of death will disentitle a spouse from receiving pre-retirement spousal death benefits under the plan.

Under the current terms of the pension plan, applicable to members who cease employment in education after *December 31, 1989*, if a member of the pension plan dies *after beginning his or her pension*, the spouse of the member on the date the first installment of the pension was due is entitled to a survivor pension, provided the member and the spouse were not living separate and apart on the date the first installment of the pension was due. Note that under the current terms of the pension plan, separation before the first installment date will disentitle a spouse from receiving a spousal survivor pension under the plan but separation, or even divorce, after the first installment date does not.

The definition of "spouse" under the current terms of the pension plan is the definition of spouse set out in section 1 of the *Pension Benefits Act*. In that Act, spouse is defined as:

Either of a man and woman who

- (a) are married to each other, or
- (b) are not married to each other and are living together in a conjugal relationship.
 - (i) continuously for a period not less than three years, or
 - (ii) in a relationship of some permanence, if they are the natural or adoptive parents of a child.

The Ontario Teachers' Pension Plan is a defined benefit pension plan and accordingly there is little scope for designating a beneficiary of survivor benefits under the plan. In the pre-retirement period, it is possible for a member to designate a beneficiary of pre-retirement survivor benefits under the plan only where the member does not have a spouse or dependent children entitled to a benefit payable on his death. If a beneficiary has been so designated the benefit payable to that beneficiary is a lump sum payment equal to the commuted value or the deferred pension to which the member was entitled for credited service for employment on or after January 1, 1987.

For members who die after beginning a pension, a designated beneficiary is entitled to receive only a beneficiary's pension if the member does not have a spouse entitled to a survivor pension or a dependent child entitled to a child's pension and if the beneficiary is a dependent as defined under the survivor benefit provisions for registered pension plan prescribed under the *Income Tax Act* (This definition does not include a former spouse).

(i) Members Who Ceased Employment in Education on or Before December 31, 1989.

In very general terms, under earlier versions of the pension plan, spousal status and therefore entitlement to spousal survivor benefits is determined as of the date of death in both the pre and post-retirement scenarios. The spouse of the member on the date of death is entitled to a survivor benefit as long as the member and the spouse were spouses before the member's last day of employment in education. The spouse will be entitled even if the member and the spouse were separated on the date of death. The spouse will not be entitled if the member and the spouse were divorced before the date of death. In addition, survivor benefits for those members who ceased employment in education between December 31, 1987 and December 31, 1989 are governed by both the *Teachers' Superannuation Act, 1983* and the *Pension Benefits Act*. The *Pension Benefits Act* provisions are similar to the current pension plan as described above.

Again, lawyers drafting agreements that purport to deal with survivor benefits under the plan should obtain information from the Board on the issue of entitlement to survivor benefits in each individual case. This entitlement can vary according to several factors.

4. Conclusion

It is hoped that the above information will serve as a helpful starting point for family law practitioners acting on behalf of members of the Ontario Teachers' Pension Plan or their spouses of former spouses. Further and more specific information should be obtained by contacting the Board directly.

Summary

None of these possible approaches to effect a division of the pension may be attractive to the non-member and great care must be taken regardless of which method is used. Also it is still necessary to obtain a proper valuation of the pension in each and every case in order to ensure that each party is treated fairly. Failure to obtain a proper valuation and ensure proper treatment could cause you to lose many thousands of dollars that are rightfully yours.