

# Pensions on Marriage Breakdown Current Issues

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Jamie Jocsak, FSA, FCIA

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## New Mortality Table for Ontario Pension Family Law Value

- The Canadian Institute of Actuaries adopted a new mortality table effective October 1, 2015.
- The new mortality table is based on Canadian mortality experience, versus the prior table which was based on US mortality experience.
- The new table has increased pension values by approx. 5%-10% due to the better Canadian mortality experience.
- Ontario only changed the pension family law value regulations to adopt the new mortality table on December 10, 2015.
- Uncertainty of application of new mortality table for dates of separation between October 1, 2015 and December 10, 2015.

## New Mortality Table for Ontario Pension Family Law Value

- Should the mortality table only be used for dates of separation from December 10, 2015?
- If the calculation is performed after December 10, 2015, should the new mortality table be used for any date of separation after October 1, 2015?
- I have reviewed several Statements of Family Law Value with dates of separation in November 2015 and have seen both approaches used.
- There is a fairness issue if both spouses have pensions and different mortality tables are used.
- Waiting on FSCO to provide guidance on issue.

## Heringer v. Heringer

- Ruling dealing with the issue of adding interest to the lump sum payment from a pension plan to a former spouse from the date of separation to the date of payment.
- When a court order or separation agreement provides for a lump sum payment from a pension plan to a former spouse under the Ontario rules:
  - If a lump sum amount to be paid to the former spouse is specified, the wording must specifically state that interest be added otherwise it will not be added.
  - If a percentage of the family law value is specified in the agreement, interest will automatically be added.

## Heringer v. Heringer

- When the pension plan divides a member's pension, interest is automatically added to the family law value from the date of separation to the date of payment and is paid by the pension plan not by the member.
- If interest is not added to the lump sum paid to the former spouse, the member is credited with the interest by way of a lower reduction to their pension benefit.
- If the intention is to divide the pension 50/50 at source, interest must be added in order for a 50/50 division to occur (otherwise the member will keep more than 50% of their pension earned during marriage).

## Pre-Retirement Death of Member Prior to Settlement

- If the settlement agreement or court order had been completed at the time of death, payment to the former spouse must occur first.
- After the former spouse's share is paid, the remaining death benefit can be paid to a current spouse or beneficiary.
- If the former spouse is also the beneficiary and there is no current spouse, they will receive 100% of the pre-retirement death benefit.
- If there was no settlement agreement or court order at the time of death, FSCO's view is that the Statement of Family Law Value can still be requested.
- An issue arises if the pre-retirement death benefit is paid out to the beneficiaries or current spouse prior to the request for the Statement of Family Law Value.

## Carrigan v. Carrigan

- In 2012 the Ontario Court of Appeal denied payment of the pre-retirement death benefit to a current common law spouse since there existed a separated married spouse.
- In response, the Ontario government amended the Ontario *Pension Benefits Act* to clearly state that:
  - a separated married spouse is not entitled to pre-retirement death benefits (i.e. unless there is a separation agreement or court order providing them with a share)
- This law change only applies where a member dies after July 24, 2014 - the Carrigan decision still applies to pre-retirement deaths prior to this date.

## Waiver of Joint and Survivor Pension

- Where a separation occurs after the date of retirement for an Ontario-regulated pension, the former spouse is vested in the survivor pension (i.e. unless they waived their entitlement at the time of pension commencement).
- As a result, the family law value of this survivor pension will be provided on the Statement of Family Law Value for the member's pension and is an asset of the former spouse.
- If the separation agreement or court order specifies, this survivor pension can be cancelled.
- For many pension plans (i.e. OMERS) the survivor pension is free to the plan member:
  - cancelling the survivor pension does not increase the plan member's pension.
  - Effectively this results in the loss of a valuable benefit.



## Waiver of Joint and Survivor Pension

- Since the survivor pension can be a very valuable asset, sometimes the former spouse wants to cancel the benefit to eliminate the asset from the NFP.
- If the member's pension will not increase, the plan member is unlikely to agree to this in a separation agreement.
- Since the purpose of the joint and survivor pension under the law is to protect the spouse, it may difficult to convince a judge to order the survivor pension be cancelled.
- Hence, although it is technically possible to cancel the survivor pension, in practice it is likely not a viable option in many cases.

## Contingent (Ad Hoc) Indexation

- Some pension plans provide ad hoc pension indexation to members in retirement – these increases are not guaranteed.
- Non-guaranteed indexation is becoming more common in recent years.
- Most plans which provide non-guaranteed indexation do not include their value when determining the family law value.
- However, some plans are including non-guaranteed indexation, creating inconsistency between plans.

## Contingent (Ad Hoc) Indexation

- For example, both HOOPP and CAAT provide non-guaranteed inflation protection:
  - HOOPP is now including full indexation in family law values.
  - CAAT is assuming no indexation in family law values.
  - HOOPP could determine a family law value 50% higher or more than CAAT for the same pension.
- This issue has attracted the attention of the Canadian Institute of Actuaries due to the large discrepancy in methodology between pension plans.
- From a family law perspective, should the non-guaranteed indexation for plans like CAAT be independently valued and included as a contingent asset of the member?

## Arrears Adjustment

- Under the law in Ontario, if a pension in pay is divided, the plan administrator must automatically increase the spouse's share of the pension and decrease the member's share to reflect the present value of missed pension payments since the date of separation.
- However, some pension plans will ignore the arrears adjustment and divide on a "go-forward" basis if specified in the separation agreement or court order.
- It appears that slowly more plans are taking this position.
- If the plan will not divide on a "go-forward" basis, the arrears adjustment can be mitigated by specifying a lower percentage be assigned to the former spouse. The lower percentage needs to be actuarially determined.

Questions?

[jamie.jocsak@bchactuarial.ca](mailto:jamie.jocsak@bchactuarial.ca)

[www.bchactuarial.ca](http://www.bchactuarial.ca)

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