

Pensions on Marriage Breakdown in Ontario Current Issues and Pitfalls

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Carrigan v. Carrigan Estate

- Ontario court of appeal ruled that the existence of a married spouse who is living separate and apart (i.e. not divorced) removes the requirement that a pre-retirement death benefit be payable to the member's current common law spouse.
- This ruling suggests that if a member has an un-divorced prior spouse, they can choose the beneficiary of their pension (it will not automatically be their current common law spouse).
- Recently the Supreme Court denied leave to appeal, so this decision is final.
- The ruling also suggests that the existence of an un-divorced prior spouse removes the requirement of a member to have their pension paid as a joint and survivor pension at retirement if they have a current common law spouse.

Carrigan v. Carrigan Estate

- Due to illogical nature of this decision and FSCO's strong opposition to the decision, it seems very possible that there will be regulatory or legislative change to override this decision.
- In the mean time, this decision creates may concerns...

Pensions in Pay on Marriage Breakdown

- Under the law in Ontario, a pension in pay can only be divided at source – a lump sum transfer to the spouse is not possible.
- By default, after the pension division of a pension in pay:
 - the portion of the member's lifetime pension payable to the spouse will not continue after the member's death.
 - however, any survivor pension will still be payable after the member's death.
 - The survivor pension cannot be divided.
 - The family law value of any survivor pension needs to be included on the net family property statement in the spouse's assets (less a deduction for contingent income tax) and needs to be equalized using other assets.

Pensions in Pay on Marriage Breakdown

- If the spouse predeceases the member, most likely the spouse's share of the member's pension will revert back to the member unless the separation agreement specifies otherwise.
- The pension plan may offer the “combination option” in which they convert the spouse's share of the member's pension and the spouse's survivor pension to a lifetime pension payable for the spouse's lifetime:
 - If this option is offered, it will be indicated on Family Law Form 4E.
 - Most pension plans are not offering this option.

Pensions in Pay on Marriage Breakdown

- Appendix E of Family Law Form 4E is poorly drafted and can be confusing.

Information about the Retired Member's Preliminary Value as of the Family Law Valuation Date

Preliminary Value of lifetime pension		
The commuted value of the lifetime pension as of the Family Law Valuation Date	\$	
Less, the commuted value of the spouse's/former spouse's survivor benefit as of the Family Law Valuation Date is [or <input type="checkbox"/> N/A]	\$	(enter 0 if not applicable)
Preliminary Value (lifetime pension)	\$	= G(lifetime)
Preliminary Value of bridging/supplemental benefit <input type="checkbox"/> N/A (If N/A, do not complete this part)		
The commuted value of bridging/supplemental benefit as of the Family Law Valuation Date = Preliminary Value (bridging/supplemental)	\$	= G (bridging/supplemental)

- The family law value of the member's lifetime pension does not include the family law value of the survivor pension – the reference to the commuted value of lifetime pension above includes both the value of the lifetime pension and the survivor pension.

Pension Payments in Arrears

- Under the law in Ontario, if a pension in pay is divided, the plan administrator will 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.
- The actual percentage or pension amount paid to the spouse will always be higher than the amount specified in the separation agreement/Form 6 as a result of the adjustment for the payments in arrears.
- If there has been a long period of time between the date of separation and the date of division, the spouse could receive substantially more of the pension than is specified in the agreement.
- Based on the wording of the regulations and Form 6, it does not appear possible to have the pension divided going forward only (i.e. no adjustment for the payments in arrears).

Division of Pension in Pay

- If the intent is to divide the pension going forward only, a lower percentage or pension amount would need to be specified in the separation agreement to take into consideration the arrears adjustment that will be made by the pension plan administrator.
- For example, if the intent is to provide the spouse with 50% of the pension going forward, it will be necessary to specify a lower percentage be paid to the spouse in the separation agreement (i.e. 45%) to reflect the arrears adjustment that will be made by the plan administrator.
- This arrears adjustment would need to be determined by an independent actuary and could not be determined exactly due to uncertainty regarding the actual future date of division and the exact methodology used by the plan administrator.

Federally Regulated Pension Plans

- In November of 2012, OSFI, the regulator for federally regulated pension plans (i.e. banks, airlines, Canada Post, etc.) released a statement on Ontario's new pension law. OSFI's statement indicated that federally regulated pension plans:
 - do have to provide the Ontario family law value if requested,
 - don't need to use the Ontario family law forms
 - are not bound by the maximum fees specified in the Ontario law.
- In my opinion, a very odd and conflicting opinion.
- It appears that most pension plans are making their own judgement of the law (i.e. independent legal advice) and are ignoring the OSFI statement – it continues to be the case that some federally regulated pension plans are providing the family law value and some are not.

Termination of membership after separation

- I recently was involved in the case of a member who terminated their membership in a defined benefit pension plan after separation and transferred the value of their pension out of the plan prior to a property settlement.
- The pension plan administrator would not provide the family law value.
- The regulations state that a transfer is not available to the spouse in this situation, but are silent on whether the plan administrator has to provide the family law value, if requested.
- The *Family Law Act* clearly specifies that the family law value of this pension still needs to be determined – I performed an independent valuation in this case.

US Social Security

- If either spouse works in the US and has a US social security pension, technically it is required to be valued using the Ontario valuation rules in accordance with the Ontario *Family Law Act*.
- I have preformed a valuation of a US social security pension under the Ontario law.
- US social security has very unusual and generous spousal benefits, with former spouses who were married to the member for at least 10 years and do not remarry prior to age 60 receiving a pension equal to 50% of the members pension at retirement (not 50% of the pension earned during marriage). This amount can be paid to any number of former spouses.
- US social security cannot be divided at source – the generous spousal benefits are intended to protect former spouses.

US Social Security

- Certainly in cases of marriages less than 10 years, the spouse should insist on a valuation of the member's social security pension if they member has worked in the US for a number of years – the US Social Security pension can be valuable (\$100K or more).
- In the case of marriages longer than 10 years, the spousal benefits under US social security will result in an asset for the former spouse as well.
- There is the issue of the poor financial status of the US social security system and the possibility of future benefit reductions, however, this doesn't negate the potential value of this asset.

Disability Pension

- I was recently involved in a case where one spouse was a member of HOOPP and had become permanently disabled prior to separation.
- Prior to the date of separation the member elected to start an immediate unreduced pension at age 50 (i.e. disability retirement).
- The member received her first pension payment 9 days after the date of separation – HOOPP valued her pension assuming that she would retire at age 60/65, based on the regular retirement provisions of the plan since she was not retired on the date of separation (even though her retirement paper work had been processed and her first pension payment was made 9 days later).

Disability Pension

- The family law value provided by HOOPP was \$300,000, however, the value of her pension had the date of separation occurred nine days later would have been \$475,000 (i.e. based on her actual immediate unreduced retirement).
- The law does not address this situation.
- Is there anything that can be done in this case? It is unclear how the courts would deal with a situation like this. Perhaps, there could be an unequal division of assets or the unequalized value of the pension could be taken into consideration of spousal support.
- It would most likely be advisable that the member buy-out the non-member spouse if possible (i.e. do not divide the pension), since the fair actuarial value of the pension is higher than the family law value (assuming the member does not have significant impaired mortality).

Questions?

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