

Questions and Answers About Pension Division on the Breakdown of a Relationship in British Columbia

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Introductory Note

Questions and Answers About Pension Division on the Breakdown of a Relationship in British Columbia

In March, 1996, the first edition of this book was published to provide materials about the operation of the British Columbia *Family Relations Act*, and the *Pension Benefits Standards Act* as these statutes apply when a marriage breaks down and the assets to be divided include benefits in a pension plan. The Q&A was viewed as a helpful resource for family lawyers, plan administrators and their advisors, and former spouses. A revised edition was prepared by the British Columbia Law Institute in 2001.

This third edition is being prepared in anticipation of the *Family Law Act*, S.B.C., 2011, c. 25 coming into force on March 18th, 2013. Although the Q&A was prepared before that date, for ease of reference the questions and answers assume the *FLA* is already in force.

The *Family Law Act* is an important development. It is a major modern restatement of family law that will have far-reaching repercussions for decades to come.

Although much about the new *Family Law Act* and its pension division rules will be familiar, it will also introduce some fundamental innovations. In contrast to the *FRA*, Part 6 of the *FLA* applies equally to married and unmarried spouses. And the pension rules have been modified to provide more nuanced provisions for the division of a wider range of pension benefits, such as benefits under supplementary plans, and benefits in individual pension plans, while at the same time providing more flexibility to former spouses for securing income in retirement. Table 6 in the appendices is a section by section comparison of the *FLA* and the *FRA* to highlight what has been changed, and what remains the same.

While the *Family Law Act* is the product of exhaustive and expert work of the Ministry of the Attorney General, it is with great pleasure that the Institute notes that many of the pension division refinements are based on recommendations made by the British Columbia Law Institute in *Report on Pension Division on Marriage Breakdown, A Ten Year Review of Part 6 of the Family Relations Act* (Report No. 44, May, 2006).

The materials are in the form of Questions and Answers. The Questions and Answers are intended to be a reference to help resolve questions that might arise. Some of the questions raise very obscure points that are relevant for only a few plans. For the most part, most people should find the introductory portions of the Chapters in this book, as well as the Checklists in the Appendices, sufficient guides for applying the B.C. legislation. But if more difficult issues arise, this Q&A attempts to provide guidance on how to deal with them.

The materials address questions raised by members and their spouses, plan administrators, plan advisors, and lawyers. Not all of the information will be of interest to people in all of these groups. Plan administrators, for example, will see a great deal of information concerning how to determine reasonable shares between member and spouse on the breakdown of a relationship, but issues like these will be resolved long before the administrator is asked to assist in actually dividing the pension entitlement. The information has been sorted into Chapters based on whether the member's pension has commenced at the time of the breakdown of a relationship, the kind of plan, and other categories, but to divide the information so that it would be useful to specific groups, such as just plan administrators or just lawyers or just former spouses, would have led to a great deal of duplication.

In most cases, there is no doubt about the position under the legislation, but some questions raise very complicated points. Basically, the legislation speaks for itself and the final position will be answered by the courts.

The Institute would like to express its thanks to Thomas G. Anderson, Q.C. a British Columbia lawyer who specializes in pension matters, who assisted in the development of this revision, and who also assisted in preparing the first and the second editions of the *Q&A*.

The Institute would also like to acknowledge the valuable contributions of the following people who, although not responsible for the final form of this document, reviewed earlier drafts of the *Q&A* and offered comments, criticism and advice that helped immeasurably with developing this resource:

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Special thanks to Janet Karp for proof reading and catching so many typing and grammatical errors.

The Institute intends to keep these materials up to date, particularly with respect to court decisions on British Columbia legislation relating to pension division issues. Users of the Q&A should consult the Institute's website (www.bcli.org) periodically for updated information.

**These materials are not offered as either legal advice
or formal rulings on the operation of the legislation.**

These materials have been prepared on the assumption that users will exercise their professional judgment regarding the correctness and applicability of the material, and that persons who are not expert in this area will consult qualified advisors. These materials should be regarded as a secondary reference. For definitive answers refer to applicable statutes, regulations, decided cases, and practice notes.

A handwritten signature in black ink, consisting of a stylized 'N' followed by a horizontal line and a small flourish.

Chair,
British Columbia Law Institute

March 2013

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CHAPTER I. INTRODUCTION, GENERAL INFORMATION AND BASIC CONCEPTS

The British Columbia Family Relations Act ("FRA") was enacted in 1979 and provided that pensions were family assets that were divisible between spouses when their relationship ended. British Columbia first enacted Part 6 of the FRA in 1995. It provided for the assistance of plan administrators in dividing pension entitlement on the breakdown of a relationship. Although many parts of that legislation have been restated, and revised, in the Family Law Act ("FLA"), the outlines of pension division will remain very familiar to those having experience under the FRA.

PLANS SUBJECT TO B.C. LEGISLATION

As did the FRA, the FLA applies to "local plans." The general rule of thumb is that any private occupational plan, including one that is federally regulated, qualifies as a local plan to the extent that it has members that accrue pension entitlement while working in British Columbia. B.C. public sector plans are also expressly included [See Table 1 in this Chapter. For the rules that apply to plans that do not come within the definition of "local plans" (called "extraprovincial plans") see Chapter 7.]

OVERVIEW OF B.C.'S PENSION DIVISION RULES

The rules for pension division make distinctions for dividing benefits depending upon whether or not the pension has commenced by the time of the breakdown of a relationship, and the kind of plan. (The rules are set out in a convenient table--see Table 2 below in this Chapter.)

TYPES OF PLANS

Pension plans take one of two basic forms. If benefits are determined by a formula (such as 1.5% x pensionable service x highest average earnings), the plan is referred to as a "defined benefit plan". If benefits are determined by contributions and investment returns, the plan is referred to as a "defined contribution plan".

DIVIDING BENEFITS IN A DEFINED BENEFIT PLAN

If the benefits are determined by a defined benefit provision and the pension has not commenced by the time of the breakdown of the relationship, division is deferred until the member is eligible to have the pension commence. The spouse is designated a limited member of the plan. After the member is eligible under the terms of the plan to have the pension commence (usually at age 55), the limited

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member may choose between receiving a specified share of the benefits by either (a) a separate pension payable for the limited member's lifetime, or (b) a transfer of the commuted value of the limited member's share, using the plan's average retirement age, to a prescribed plan, such as an RRSP. [See Chapter 2]

DIVIDING BENEFITS IN A DEFINED CONTRIBUTION PLAN

If the benefits are in a defined contribution account, division takes place immediately. The administrator transfers half of the portion of the benefits acquired during the relationship (plus net investment returns on that portion) to a prescribed plan (such as an RRSP for the spouse). [See Chapter 3] These rules apply equally to benefits in a pooled registered retirement plan, which are also plans in which benefits are determined by a defined contribution provision.

IF THE PENSION HAS COMMENCED

If the member's pension has commenced by the time of the breakdown of a relationship, the pension is said to be "matured." The pension division rules change once the pension has commenced. Instead of giving the former spouse a separate share of the pension entitlement, the only option available is to divide the income stream between the parties. [See Chapter 5] The former spouse must become a limited member of the plan, and the administrator will be required to divide each monthly payment, make separate tax withholdings for member and spouse, and pay each of them separately. The limited member will receive a share of the pension until the limited member dies or the pension terminates.

FORMS

Part 6 sets out Forms to be used in communications between the member, the former spouse and the plan administrator. The administrator will take the appropriate steps to divide the benefits once it receives the correct Forms, together with the order or agreement that provides that the spouse is entitled to a share of the benefits. [See Chapters 13 and 15]

The B.C. legislation is set out in Appendix A. The Division of Pensions Regulation is in Appendix B. Checklists of information for plan administrators are in Appendix C. Checklists for lawyers are in Appendix D.

For more information about B.C. pension division legislation, consult:

- *The Family Law Act Transition Guide (a publication of Continuing Legal Education of British Columbia)*
- *Family Law Agreements - Annotated Precedents (a publication of Continuing Legal Education of British Columbia)*

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- *Family Law Sourcebook (a publication of Continuing Legal Education of British Columbia)*
- *Report on Pension Division on Marriage Breakdown, A Ten Year Review of Part 6 of the Family Relations Act (British Columbia Law Institute Report No. 44, May, 2006).*

- 1.1 Does “spouse” in Part 6 of the FLA include unmarried persons in marriage-like relationships (of the same or opposite sex)?

*Spouse
defined*

Commentary: yes. [FLA, s. 3] Family property, including benefits under pension plans, are divisible between legally married spouses and spouses who have lived in a marriage-like relationship of at least 2 years. (This was not the case under the FRA. Under the FRA, unmarried spouses were entitled to a share of pension benefits if the parties agreed, or based on principles of unjust enrichment: see para. 1.1 of the 2001 Q&A). See para. 13.22-3 and 13.26.

For the definition of “spouse” in the B.C. FLA, see Appendix A.

- 1.2 If the pension is being provided through an annuity purchased from an insurance company, does Part 6 apply?

*When is
an annuity
divisible as
a pension?*

Commentary: yes, an immediate or a deferred annuity purchased by a plan administrator from an insurance company to cover its obligations to the member would be divisible under Part 6 (FLA, s. 117), as would an annuity purchased by the member. [FLA, s. 118] The insurance company would be considered to be the administrator. [FLA, s. 110, definition of “administrator”] See Chapter 5 and para. 5.17.

- 1.3 Do my spouse and I need to consult a lawyer, actuary, or other professional, to divide the benefits?

*Need for
professional*

advice?

Commentary: all that is really needed is a very simple agreement made between former spouses, which provides

- (a) that Part 6 applies to the division of the benefits,**
- (b) sufficient information to identify the plan or respecting the employment under which the member accrued the benefits, and**
- (c) sets out the dates for determining the spouse's share of the benefits.**

[See paras. 2.22 and 11.3] This agreement would be sent to the administrator of the plan with prescribed Forms. Form P9 in the Regulation is an agreement that can be used if the parties choose.

However, this is a complicated area of the law and the financial consequences of your decisions may be considerable. As with any complicated area of the law, if you do not consult an expert you may not be completely aware of your rights. A member may give up too much, or a former spouse receive too little.

A lawyer can make sure that the arrangements for dividing the benefits are effective. An actuary can tell you how much the benefits are worth (which is information that would be needed if you are taking the benefits into account in dividing other assets, such as where the member keeps the pension benefits, and the former spouse keeps the family residence). A financial planner can assist you in determining how best to use your retirement assets to produce life-time income.

- 1.4 Is a plan amendment required for an administrator to be able to divide pension entitlement?

*Need for
a plan
amendment?*

Commentary: no. The required provisions for pension plans are defined in Part 3 of the *PBSA*. There is no requirement in the *PBSA* for a plan to contain provisions with respect to the division of pension benefits upon the breakdown of a relationship. But a plan must not contain anything in derogation of the provisions of the *PBSA* or the *FLA* with respect to division of pension benefits. The *PBSA* expressly provides that the rules preventing assignment of benefits do not prevent the division of those benefits between former spouses by agreement or court order (*PBSA*, s. 64).

[See, however, para. 5.13]

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- 1.5 The legislation seems to say that it operates whenever a spouse is entitled to a share of pension benefits under Part 5. Entitlement under Part 5 arises automatically on the separation of the parties. [FLA, s. 81(b)] Is it necessary to have an agreement or order that specifically says the benefits are to be divided?

*Must agreement
or order
specifically
say benefits
are being divided?*

Commentary: yes. FLA, s. 134 requires that.

- 1.6 If benefits are to be divided, does it have to be in accordance with Part 6?

*Will Part 6
apply in
every case?*

Commentary: no.

In every case, an option open to the member and spouse is for them to agree that the spouse will waive entitlement to benefits (usually in exchange for a compensation payment, the transfer of another asset, or the member waiving rights to an asset owned by the spouse). [FLA, s. 127(1)(b)] If so, Part 6 becomes irrelevant, except with respect to rules for valuing the compensation payment. [FLA, s. 128, Reg., s. 27]

Three situations where the spouse and member might consider satisfying the spouse's share by a compensation payment are:

- i. the spouse's share is very small (because of a short relationship or because the member has not earned very much entitlement),**
- ii. the member has other substantial assets and wants to retain the benefits or the spouse wants to receive other assets instead (such as the family residence), or**
- iii. the spouse has separate pension entitlement and the difference in value with the member's benefits can be equalized by a compensation payment.**

Also, the plan may offer additional methods of division. This is quite common with plans regulated under the federal PBSA, which frequently allow an immediate transfer of the spouse's share of benefits even where that is not available under Part 6.

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If documents and other forms have been sent to the administrator and the parties want to waive the division of benefits: see para. 15.40.

1.7 If Part 6 is to apply, does the order or agreement have to specifically refer to Part 6?

*Referring to
Part 6*

Commentary: no, but this would be the best practice. Provided the agreement or order clearly indicates the benefits are to be divided, Part 6 will apply. Where the benefits are to be divided, Part 6 applies unless the spouse and member otherwise agree, or a court makes a contrary order. [FLA, s. 111(1). See para. 11.3]

1.8 How do I find out if my spouse's benefits are in a plan that is subject to Part 6 of the FLA?

*Local plans:
does Part 6
of the FLA
apply?*

Commentary: the easiest step is to check with the plan administrator, who should be able to confirm this for you.

***As a general overview of the principles that apply:* Part 6 of the FLA provides rules for dividing benefits in any pension plan where the law of B.C. governs the division of family property on the breakdown of a relationship. The rules for plans that are subject to B.C. law ("local plans") are different from those for plans that are subject to the law of another jurisdiction, referred to as "extra-provincial plans." Extraprovincial plans are discussed at paras. 1.12, 1.14 and in Chapter 7.**

"Local plan" is a defined term. [FLA, s. 110] Basically, a "local plan" is (a) any B.C. public sector plan, and (b) any private sector plan registered in B.C. under the PBSA, or registered in another jurisdiction where the member earned pension entitlement while employed in B.C. [See, however, PBSA, s. 1(6), if the person is not required to work at the employer's establishment.]

"Local plan" would also include any plan with members employed in B.C. (para (b) of the definition). A plan is required to be registered in the province in which the majority of the plan members are employed. If the majority of a plan's members are employed in B.C., it must be registered under the B.C.

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PBSA. Even plans with a majority of members employed in another province “must,” if they have B.C. members, be registered under the B.C. *PBSA*. As a matter of agreement, however, plans registered in the province in which the majority of its members are employed are typically given an exemption from this requirement. [*PBSA*, s. 4] The exemption simplifies matters for a plan administrator, who is required to abide by only the regulatory standards of the province in which the plan is registered. The exemption does not apply to other legislation, such as legislation governing the division of family property on the breakdown of a relationship. Even if the member earned benefits while working outside B.C., and the plan is registered in another province, if B.C. family property legislation applies, and the plan has any B.C. members, it is a “local plan.”

“Local plan,” also includes (c) a private sector plan registered under the federal *Pension Benefits Standards Act*, [see para. 1.11] but does not include a federal public sector plan. A federal public sector plan would be divisible under the federal *Pension Benefits Division Act*. Public sector pension benefits under the following federal statutes are divisible under the federal *Pension Benefits Division Act*:

- *Canadian Forces Superannuation Act*
- *Defence Services Pension Continuation Act*
- *Diplomatic Service (Special) Superannuation Act*
- *Governor General Act*
- *Lieutenant Governors Superannuation Act*
- *Members of Parliament Retiring Allowances Act*
- *Public Service Superannuation Act*
- *Royal Canadian Mounted Police Pension Continuation Act*
- *Royal Canadian Mounted Police Superannuation Act*

- 1.9 The member earned pension entitlement under a single employer, but while working in a number of different provinces (as follows):

Alberta: 1975-1995
Saskatchewan: 1995-2000
B.C.: 2000-2012

What law governs the division of these benefits? Are these benefits in a “local plan?”

*Working in
different
provinces*

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Commentary: if a dispute arises, this fact pattern has the potential to produce very difficult legal questions, such as:

- which province's courts have jurisdiction to hear the matter?
- which province's laws determine entitlement to family property when a relationship ends?
- which province's laws determine how to divide the benefits?

The last of these questions is probably the easiest to answer because most of the provinces have adopted the same rule that applies under the B.C. *PBSA*. Even if the benefits have been earned in a number of different jurisdictions, the whole of the benefits are subject to the laws of the province where pension entitlement was last earned before the "event" (such as pension commencement, or the breakdown of a relationship) takes place.

In the example, if the "event" is the breakdown of a relationship, and this occurs while the member is earning pension entitlement in B.C., the whole of the benefits will be divided in accordance with B.C. law. If the last jurisdiction in which entitlement was earned at the time of the "event" was Alberta, it would be Alberta law that would apply (subject to the rules that determine whether the plan qualifies as a "local plan." See para 1.8.)

- 1.10 In addition to the pension benefits, the member is also entitled to other benefits on terminating employment, including substantial severance benefits paid by the employer. Are these divisible under Part 6?

*Employment
termination
benefits*

Commentary: no. The operation of Part 6 is confined to benefits in pension plans. Courts have held that various termination or severance benefits payable by an employer are divisible between the parties when the relationship ends [see, for example *Cameron v. Cameron*, (1994) 100 B.C.L.R. (2d) 104 (BCSC)] But assisting in their division is not the responsibility of the pension plan administrator. [See *Pensions and Benefits: Fundamentals of Pensions and Pension Division for Family Lawyers* (B.C. Continuing Legal Education Society, 2011) at XXI, "Other Employment Benefits"]

- 1.11 If a B.C. member has benefits in a plan that is registered under the federal *Pension Benefits Standards Act*, is it divisible under Part 6 of the *FLA*?

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*Federal
PBSA*

Commentary: yes. The federal *PBSA* incorporates provincial pension division legislation by reference. Sections 25(2) and (3) provide:

25.(2) Subject to subsections (4), (7) and (8), pension benefits, pension benefit credits and any other benefits under a pension plan are, on divorce, annulment, separation or breakdown of a common-law partnership, subject to the applicable provincial property law.

(3) A pension benefit, pension benefit credit or other benefit under a pension plan that is subject to provincial property law pursuant to this section is not subject to the provisions of this Act relating to the valuation or distribution of pension benefits, pension benefit credits or other benefits under a pension plan, as the case may be.

The reason the federal *PBSA* provides that provincial law applies is because of Canada's constitutional law, which carefully defines matters that are within federal jurisdiction and matters that are within provincial jurisdiction. Issues of “property and civil rights” (a category that includes family law), are exclusively a provincial matter. Section 25(2) of the federal *PBSA* merely stipulates what Canadian constitutional law requires. Any other position would render this aspect of the federal *PBSA* unenforceable because it would be unconstitutional. Some administrators of federally regulated plans take the position that they are free to ignore provincial law as it applies to pension division issues, but have lost every case in which this issue has been raised and are risking the possibility of incurring possibly substantial legal liability.

Federal public sector plans, in contrast, do not qualify as “local plans.” They are divisible instead under the federal *Pension Benefits Division Act*. [See para. 1.8 and Table 2]

Some plans subject to the federal *PBSA*, in the past, took the position that there was no legal obligation on them to assist in the division of a pension if the member's pension commenced before the current federal *PBSA* was enacted (in 1987) allowing for pension division. But in *Robertson v. C.N.R.*, (2000) 79 B.C.L.R. (3d) 168, 9 R.F.L. (5th) 368 (S.C.) it was held that even if

- (a) the member's pension commenced,
- (b) the relationship ended, and
- (c) the parties made a separation agreement requiring the member to pay a portion of each monthly pension received from the federally regulated pension to the former spouse

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before the current federal *PBSA* came into force, the terms of the pension division are enforceable against the plan administrator.

See also para. 7.5.

1.12 What is an example of an extraprovincial plan?

*Extraprovincial
Plans*

Commentary: a common mistake under Part 6 of the *FLA* is to assume that any plan located outside the province is an extraprovincial plan. Many, although not all, plans located outside the province, even those registered in other provinces, or subject to federal legislation, will, nevertheless, qualify as local plans.

The definition of “local plan” is structured to include any plan, wherever registered, that is subject to B.C. law, and may include plans that are located outside B.C. (see *FLA*, s. 110, definition of “local plan”, and para. 1.8).

“Extraprovincial plan” is defined as a pension plan that is not a local plan (*FLA*, s. 110). Consequently, the Part 6 rules apply comprehensively to all plans that provide pension benefits, although the division rules vary, depending on whether the plan is a local plan or an extraprovincial plan.

A plan registered outside the province, which has no B.C. members and where the member earned all pension entitlement in employment outside the province, is an “extraprovincial plan.”

Federal public plans, and the Canada Pension Plan, are also regarded as “extraprovincial plans.” [*Baker v. Baker*, (1998) 34 R.F.L. (4th) 364 (BCSC); *Coulter v. Coulter*, (1998) 60 B.C.L.R. (3d) 6 (C.A.)]

Most cases involving extraprovincial plans will involve a spouse and member who moved to B.C. after the member retired and the pension commenced. (But even in these cases, if the plan has any B.C. members, it will qualify as a “local plan”: see the commentary at para. 1.8)

[See further Chapter 7]

1.13 My spouse is working in B.C. and is earning a pension, but the plan is registered in Quebec. Is it a “local plan?”

*A plan
registered*

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*in another
province*

Commentary: yes.

- 1.14 My spouse earned pension benefits in a plan registered in the United States. Is it a “local plan?”

*A plan
registered
in the U.S.*

Commentary: if the member's benefits accrued from employment in B.C., yes it is. However, U.S. federal legislation provides methods of dividing U.S. pension benefits which must be taken into account when dividing those benefits.

- 1.15 What about plans registered in B.C. that have members employed outside B.C.? Does the legislation apply to them?

*B.C. plan
with non-B.C.
members*

Commentary: it depends on where the member and spouse live and where the member worked while accruing pension entitlement.

For example, member and spouse live in B.C., but the member works in Alberta and accrues pension entitlement in Alberta, although the plan is registered in B.C. Because the parties live in B.C., B.C.’s family law would govern how to divide their family property (including the pension benefits). Because the plan is registered in B.C., it qualifies as a local plan, and the benefits would be subject to division under Part 6.

If the example is changed so that the member and spouse live in Alberta, Alberta family law will determine how to divide their assets, including the pension benefits.

- 1.16 Does the *FLA* apply to an agreement or court order made before the *FLA* comes into force?

*Pre-March 18, 2013
arrangements*

Commentary: [See Chapter 14]

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1.17 What are the income tax consequences of dividing benefits under Part 6?

*Income tax
and pension
division*

Commentary: it is not possible to provide any tax advice in this publication and if tax issues arise, qualified professionals should be consulted. However, as a general principle, the *Income Tax Act* provides that where a transfer of pension entitlement from a member to the credit of a spouse takes place on the breakdown of a relationship, there is a roll-over of the tax consequences. See, for example, IT-499R, para. 11, and *Emond v. The Queen*, 2012 DTC 1252.

1.18 Do the Part 6 rules regarding the division of benefits apply to RRSP's. Does it make any difference if the RRSP was funded by a transfer from a pension plan and the benefits are locked-in?

*Locked-in
RRSP funds*

Commentary: Part 6 does not apply to RRSPs, whether or not the benefits were transferred from a pension plan.

Although Part 6 doesn't apply to RRSP's, this presents no practical problem. RRSPs are family property under Part 5 of the *FLA* (s. 84(2)(e)). The *Income Tax Act* accommodates transfers from RRSP's and RRIF's on the breakdown of a relationship. [See *ITA* Form 2220(e), *ITA* ss. 146(16)(b) and 146.3(14)] B.C. pension division rules do not replace or otherwise affect those options for dividing the account balance between former spouses.

If the RRSP is locked-in (see para. 10.4), however, the transferred funds would be subject to the same locking-in rules.

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- 1.19 What rules apply to the division of a Registered Retirement Income Fund (RRIF) or a Life Income Fund (LIF)?

*RRIFs and
LIFs*

Commentary: both are family property under Part 5 of the *FLA* (s. 84(2)(e)). The *Income Tax Act* allows a transfer from an RRSP or a RRIF to another RRSP or RRIF on the breakdown of a relationship and the RRIF rules also apply to LIFs. [See *ITA* Form T2220(e)]. It is the locking-in rules that transform a RRIF into a LIF. Locking in rules are not defined by the *ITA*. So far as the *ITA* is concerned, for the purposes of transferring benefits between former spouses when their relationship ends, a LIF is a RRIF.

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Table 1 - Is the Plan a Local Plan? (S. 110, definition of “local plan”)

Is the plan established by the province of B.C.?----->	Yes: Plan is a local plan
 No. V	
Is the plan registered under the B.C. PBSA?----->	Yes: Plan is a local plan
 No. V	
Is the plan registered in another province and the member acquired pension entitlement while working in B.C.?----->	Yes: Plan is a local plan
 No. V	
Is the plan subject to the federal <i>Pension Benefit Standards Act</i> and the member acquired pension entitlement while working in B.C.?----->	Yes: Plan is a local plan
 No. V	
Is the plan otherwise subject to Part 6 of the FLA (by the terms of the plan, legislation, or agreement)?----->	Yes: Plan is a local plan
 No. V	
Plan is an extraprovincial plan	

If any question is answered “Yes,” the plan is a “local plan.”
If every question is answered “No,” the plan is an “extraprovincial plan.”

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Table 2 - Summary of Canadian Pension Division Legislation

Kind of Plan	Governing Legislation	Method of Division
Pension in a federal public sector plan, <i>for example</i> a plan under the <ul style="list-style-type: none"> • <i>Canadian Forces Superannuation Act</i> • <i>Defence Services Pension Continuation Act</i> • <i>Diplomatic Service (Special) Superannuation Act</i> • <i>Governor General's Act</i> • <i>Lieutenant Governors Superannuation Act</i> • <i>Members of Parliament Retiring Allowances Act</i> • <i>Public Service Superannuation Act</i> • <i>Royal Canadian Mounted Police Pension Continuation Act</i> • <i>Royal Canadian Mounted Police Superannuation Act</i> • <i>Special Retirement Arrangements Act</i> 	<i>Pension Benefits Division Act</i> (Can.), S.C. 1992, c. 46	The spouse is entitled to a share of the commuted value of the benefits that accrued during cohabitation. This would be transferred to the spouse's credit to a prescribed pension vehicle (such as an RRSP).
Benefits in a provincially regulated occupational plan (that is, subject to the B.C. <i>Pension Benefit Standards Act</i> , or the equivalent Act in another Canadian province or territory).	<i>Family Law Act</i> (B.C.) (if B.C. law applies, otherwise, the equivalent legislation in the province whose laws govern the disposition of family property when a relationship ends)	See Table 1 - Is the Plan a Local Plan
Benefits under the Canada Pension Plan	<i>Canada Pension Plan Act</i>	Unadjusted pensionable earnings accruing during cohabitation are equalized.
Old Age Security	<i>Old Age Security Act</i>	No pension division mechanism.

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TABLE 3 - B.C. PENSION DIVISION METHODS

KIND OF PLAN	METHOD OF DIVISION IF BENEFITS NOT YET BEING PAID	METHOD OF DIVISION IF BENEFITS ARE BEING PAID
BENEFITS DETERMINED BY DEFINED BENEFIT PROVISION	<p>The spouse becomes a “limited member” of the plan, who is entitled, after the member is eligible for the pension to commence, to choose between</p> <p>(a) having the commuted value of the spouse’s share transferred to a prescribed financial vehicle (<i>for example</i>, an RRSP), or</p> <p>(b) receiving the share in the form of a separate pension payable for the limited member's lifetime.</p> <p>(<i>see Chapter 2</i>)</p>	<p>The spouse becomes a “limited member” of the plan and receives a share of each monthly payment from the plan.</p> <p>(<i>see Chapter 5</i>)</p>
BENEFITS IN DEFINED CONTRIBUTION ACCOUNT	<p>The spouse is entitled to half of the defined contribution account earned during the relationship (plus net investment returns on that portion).</p> <p>The spouse’s share is transferred to a prescribed financial vehicle (<i>for example</i>, an RRSP) or, if the administrator consents, to another account in the plan. If the funds are kept in the plan, the spouse must become a limited member of the plan.</p> <p>(<i>see Chapter 3</i>)</p>	<p>If the benefits remain in the defined contribution account, the spouse receives a share of the account by the same rules that apply before pension commencement.</p> <p>If the funds in the account have been used to purchase an annuity for the member, the spouse becomes a “limited member” and receives a share of each monthly payment from the administrator.</p> <p>(<i>see Chapter 5</i>)</p>
BENEFITS IN SUPPLEMENTAL PENSION PLAN	<p>The spouse becomes a “limited member” of the plan, who is entitled, when the member's pension commences, to receive a separate pension payable for the limited member's lifetime.</p> <p>Other options are available with administrator consent.</p> <p>(<i>see Chapter 6</i>)</p>	<p>The spouse becomes a “limited member” of the plan and receives a share of each monthly payment from the plan.</p> <p>(<i>see Chapters 5 and 6</i>)</p>

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BENEFITS IN INDIVIDUAL PENSION PLAN	<p>The spouse becomes a “limited member” of the plan, who is entitled, when the member's pension commences, to receive a separate pension payable for the limited member's lifetime.</p> <p>Other options are available with administrator consent.</p> <p>(see Chapter 6)</p>	<p>The spouse becomes a “limited member” of the plan and receives a share of each monthly payment from the plan.</p> <p>(see Chapter 5 and 6)</p>
DISABILITY BENEFITS		<p>The spouse becomes a “limited member” of the plan and receives a share of each monthly payment from the plan.</p> <p>(see Chapter 9)</p>
ANNUITY		<p>The spouse becomes a “limited member” of the plan and receives a share of each monthly payment from the plan.</p> <p>(see Chapter 5)</p>
BENEFITS IN EXTRAPROVINCIAL PLAN	<p>Divided by methods applied in the plan's jurisdiction (unless that would produce an unfair result under B.C. law).</p> <p>Otherwise, the spouse waits until the member 's pension commences and receives a share of each monthly pension cheque from the plan administrator.</p> <p>(see Chapter 7)</p>	<p>Divided by methods applied in the plan's jurisdiction (unless that would produce an unfair result under B.C. law).</p> <p>Otherwise, the spouse waits until the member's pension commences and receives a share of each monthly pension cheque from the plan administrator. (see Chapter 7)</p>

CHAPTER II. DIVIDING UNMATURED BENEFITS IN A DEFINED BENEFIT PLAN (FLA, s. 115)

Different rules apply depending on the type of plan.

If the benefits are determined by the contributions made to the plan, the plan is called a “defined contribution plan”. Rules that apply to DC plans are discussed in Chapter 3.

Other types of plans set out a formula for determining the benefits that will eventually be paid. These are called “defined benefit plans” and are discussed in this Chapter.

If the member belongs to a defined benefit plan, and the member's pension has not commenced at the time of the breakdown of a relationship, the benefits are divided by designating the spouse to be a limited member of the plan.

The spouse would send to the plan the agreement or court order dividing the benefits, together with a Form P2. [FLA, Reg., s. 4(1)(b)] The limited member is entitled at any time after the member becomes eligible to have a pension commence to have either (a) a share of the benefits (a “proportionate share” of the “commuted value” of the benefits) transferred to the credit of the spouse, or (b) receive a separate pension from the plan payable for the former spouse's lifetime.

(Under the FRA, the separate pension option was available only if the former spouse waited until the member's pension commenced).

The FLA permits the separate pension to be elected at any time after the member is eligible to have the pension commence. But the former spouse's separate pension is based on the value of the benefits assuming the member elected the pension to commence at the average age of retirement for the plan [FLA, Reg., s. 24].

Both the lump sum transfer option and the separate pension option are deferred methods of dividing the benefits (in contrast with the method used to divide benefits in a defined contribution account, which is an immediate division of the account – see Chapter 3 – and with the method used to divide a matured pension, which is a division of the income stream under the plan when and as it is paid – see Chapter 5).

Administrator Checklist 2 and Lawyer Checklist 3 (see the appendices) cover the steps for dividing unmatured benefits determined by a defined benefit provision.

2.1 What rights does a limited member have?

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*Rights of
a limited
member*

Commentary: a limited member has the rights of a member, unless they are expressly excluded. [FLA, s. 113(3)] Specifically:

(1) to receive from the administrator direct payment of a separate pension or a proportionate share of benefits paid under the pension, as the case may be as determined under Part 6 of the *FLA*.

(2) to enforce rights against the administrator and recover damages for losses suffered as a result of a breach of a duty owed by the administrator to the limited member.

(3) except as modified by Part 6 of the *FLA*, all of the rights of a member under the *PBSA*.

(4) to receive directly from the administrator information about the member's benefits and the spouse's share in it. [FLA, s. 133; Reg., Part 3, *Administrator's Duty to Provide Information*]

See also para 10.6.

- 2.2 Would a limited member who has chosen to receive a separate pension continue to have the same rights as other members? For example, if a member is entitled to receive ad hoc pension increases, would the limited member who has elected a separate pension also be entitled to the increases?

*Sharing in
benefit
upgrades*

Commentary: yes. A limited member has the rights that a member has. [FLA, s. 113] A limited member, consequently, would be entitled to the same ad hoc postretirement enhancements available to other pensioners.

- 2.3 What rights doesn't a limited member have?

*Rights a
Limited
member
doesn't
have*

Commentary: A limited member would not, for example, be entitled to group

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benefits members have because they are employees, such as to participate in a group life insurance plan or enjoy extended medical and dental benefits.

The rights granted the limited member represent quite a change over the law that applied before pension division legislation was enacted in B.C. (in 1995). Under the old law, the plan administrator could not provide information to the spouse without the consent of the member. And the plan administrator was not compelled to recognize either (a) the former spouse or (b) the former spouse's interest in the member's pension benefits.

- 2.4 The member has remarried but is not yet receiving a pension. The member's former spouse is a limited member of the plan and entitled to a share of the benefits. How does this affect elections the member is entitled to make? The member wants to protect the new family.

*The member's
elections*

Commentary: the member is free to make elections (and beneficiary designations) that protect the new family with respect to the member's share of the benefits. [FLA, s. 125]

[See further Chapter 8]

- 2.5 Before the breakdown of a relationship, the member designated spouse1 to be beneficiary of any preretirement survivor benefit under the pension plan. But the benefit exceeds the share of the pension benefits to which spouse1 is entitled. Can the member take any steps to make sure that the portion of the preretirement survivor benefit that exceeds spouse1's share goes to spouse2?

*Changing the
beneficiary
designation*

Commentary: there were some questions about this under the FRA (see 2.5 of the 2001 Q&A) which have been addressed in the FLA. [FLA, s. 125] Under the FLA the parties have separate shares of the benefits in the defined benefit plan. If the member dies before the benefits are divided, the former spouse's proportionate share would be determined at that time and the former spouse would receive the share by a separate pension or a lump sum transfer. After the former spouse's share is determined, the administrator must adjust the member's remaining entitlement. Survivor benefits under the member's share would be paid to the member's surviving spouse, designated beneficiary or es-

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tate. [FLA, ss. 124(2), 125. Reg., s. 22. See para. 2.4]

(There may be situations where there is an agreement or order requiring the member to provide the former spouse with additional security through, for example, a beneficiary designation. But information on that point cannot be provided without knowing more about the obligation imposed under the agreement or order.)

[See Chapter 8]

- 2.6 Why is the method for dividing a defined contribution account not used for unmatured benefits determined by a defined benefit provision?

*Why are DB plans
treated
differently
from DC plans*

Commentary: benefits in a defined contribution account are determined by contributions made by the employer (and, perhaps, the member) plus earnings made from investing those contributions. The value of a defined contribution account is its current balance. The value of benefits in a defined benefit plan, on the other hand, because they depend on a formula, may differ from the total of contributions and investment returns.

It is more difficult to value a defined benefit plan because assumptions must be made about a number of future events. And the contributions made to the plan up to the time of the breakdown of a relationship may not be enough to satisfy the estimate of the benefit's current value. Even if there is enough money, it may not be fair to one or more of the member, spouse, plan or other plan members in the circumstances to base the spouse's share on the particular assumptions that are made. That is because the valuation will necessarily be based on predictions about the average experiences of a group. No approach to valuation based on average experiences can possibly be fair in every *individual* situation that can arise.

For example, say the pension benefits are valued taking into account the prospect that the member will stay in the plan until an unreduced pension becomes payable. This would place a fairly high value on the benefits and the spouse's share. After the spouse's share is transferred, however, the member might immediately terminate employment.

To deal with the special problems presented by defined benefit plans, de-

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ferred methods of pension division are employed. The former spouse becomes a limited member of the plan. A limited member can choose between either the separate pension option (*FLA*, s. 115(2)(a)), or the lump sum transfer option, (*FLA*, s. 115(2)(b)) but not until, at the earliest, the member is eligible to have the pension commence. When the limited member chooses to receive the share, it is valued at that date, using specified assumptions about future events.

- 2.7 Why are these optional methods of dividing an unmatured pension in a defined benefit plan better than a *Rutherford* split (where, after pension commencement, the member gives part of each monthly pension payment to the spouse)? [*Rutherford v. Rutherford*, (1981) 23 R.F.L. (2d) 337 (BCCA) *add'l reasons* 44 B.C.L.R. 279]

Why not
use a
Rutherford
split?

Commentary: the legislation is more effective than a *Rutherford* order in separating the financial interests of the spouse and member. Spouse and member can make separate elections that meet their individual requirements. Suppose the member has remarried. Under the *Rutherford* order, it would usually not be possible for the member to make elections that would provide both the former spouse and the current spouse with security for payments after the death of the member. In contrast, the lump sum transfer and separate pension options under the *FLA* provide a former spouse with security for the share of the benefits.

- 2.8 How does the proportionate share work when the rates of accrual on benefits differ for different periods (*for example*, flat benefit plans)?

Dividing
a pension
in a flat
benefit
plan

Commentary: the same approach is used whether the plan is a flat benefit plan, a career average plan or a final average plan.

The approach under the legislation is to give the spouse a share of the whole of the benefits as at the date the spouse actually receives the share (in the form

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of a transfer of a lump sum, or as a separate pension). The spouse's proportionate share is applied to the value the benefits have at that time, assuming the member elects to have the pension commence at the average age of retirement for the plan. [See para. 2.55 concerning average age of retirement and para. 15.31 concerning adjusting the member's benefits after division]

- 2.9 Is the limited member protected if the member dies before the limited member receives a share of the benefits?

*The member
dies before
the spouse
receives
a share*

Commentary: yes. The limited member receives the share of the benefits calculated the day before the member's death: see para. 8.2. [*FLA*, s. 124(2), Reg., s. 23(3)(c)). Under the *FRA*, there were some cases when a member died where the former spouse's share was greater than, or less than, the share of the benefits that would have been received had they been divided during the member's lifetime (see para. 2.9 of the 2001 Q&A). An issue also formerly arose with respect to survivor benefits payable under non-contributory plans regulated under the federal *PBSA*. [See para. 8.13] But this has also been addressed by the *FLA* rules (and also changes to the federal *PBSA*).

[See further para. 2.5, 2.41 and Chapter 8]

For the position that applies if the limited member dies before the member, and before the benefits are otherwise divided, see para. 8.1.

- 2.10 If a member who has terminated employment directs a plan administrator to transfer the commuted value to another plan, does the limited member get a share?

*The member
terminates
employment (1)*

Commentary: yes. If the limited member has not yet received the limited member's proportionate share of the benefits, the member's direction to transfer the benefits ends the deferral of the division. [*FLA*, s. 115(6)] The limited member's share must be transferred from the plan to a prescribed pension vehicle (such as an RRSP) unless the administrator consents to keeping the share in the plan, or the limited member is already receiving a separate

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pension.

If a plan administrator receives a request from a member to transfer the commuted value of pension entitlement, it must give the limited member 30 days advance notice. [Reg., s. 9(1)] The plan should hold the limited member's share, however, until the limited member directs where it is to be transferred. [See paras. 15.25 and 15.28]

If the member is eligible for pension commencement at the date of the transfer, the limited member would also be entitled, within the 30 day notice period, to elect to receive the share by a separate pension. [FLA, s. 115(2)(a)]

The value of the limited member's share would be calculated in accordance with Reg., s. 23, assuming pension commencement at the average age of retirement. [Reg., s. 23(3)(b)]

- 2.11 If the member leaves employment, and decides not to request a transfer of commuted value to another plan (but instead elects to take a deferred pension), what rights does the limited member have?

*The member
terminates
employment (2)*

Commentary: in addition to the options permitted under Part 6, if the member is eligible on employment termination to request a transfer of the commuted value of the benefits to another plan, the limited member can also make that choice. [FLA, s. 113(3)(c)] A limited member has all of the rights of a member, except as modified under the FLA. This would not be under FLA, s. 115. It's an issue about the rights limited members enjoy in general.

- 2.12 If a member who has terminated employment directs the administrator to transfer the commuted value from the plan (plan1) to another plan (plan2), can the limited member require plan1 to retain the limited member's share?

*Member
transfers
entitlement
to another
plan*

Commentary: only if the limited member's separate pension has already commenced, or the member is eligible for pension commencement and the limited

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member elects the separate pension in the 30 day window provided by the obligation on the administrator to give advance notice of any direction received with respect to the benefits. [Reg., s. 9(1). See para. 15.28] Otherwise, the limited member's share would be transferred at the same time, unless the administrator consented to continue to administer the benefits in the plan. [FLA, s. 115(6)(a)]

- 2.13 What happens to the limited member's entitlement when the plan is terminated or partially terminated?

*The plan is
terminated or
partially
terminated*

Commentary: The limited member would be subject to the same conditions that apply to the member on plan termination or partial termination. The method of dividing unmatured benefits in a defined benefit plan requires the limited member to wait to receive the share. The limited member's share is a proportionate share of the value at the deferred date (adjusted to take into account specified assumptions about when the benefits commence). If, while waiting, events occur that enhance or diminish the member's benefits, the limited member's share is proportionately enhanced or diminished. The limited member would be subject to the same conditions that apply to the member on plan termination or partial termination.

- 2.14 Is a limited member entitled to share in a surplus declared by the plan?

Plan surplus

Commentary: yes, to the extent that any portion of the surplus is paid out to members or taken into account in calculating the benefits for members. [FLA, s. 113, 115]]

- 2.15 If the plan is teetering on insolvency, or becomes insolvent, does that affect the limited member's entitlement?

*The plan is
insolvent*

Commentary: the plan's potential insolvency does not affect the limited member's ability to make an election. If the plan has not become insolvent before

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the limited member directs the plan to transfer the limited member's share, the plan has no right to object to the transfer.

However, to the extent that restrictions apply to the plan and its ability to transfer assets, they will apply to the limited member's entitlement. [*Jordison v. Jordison*, [1996] B.C.J. No. 2694 (S.C.)] In the case of a plan in deficit, the unfunded portion of the limited member's proportionate share would be held back and paid later, over a five year period.

2.16 How is the limited member's share of benefits in a defined benefit plan determined?

*Proportionate
share (Reg., s. 17)*

Commentary: the share is determined as a fraction of the benefits determined at the date they are to be divided. The fraction is called the "proportionate share."

2.17 How is the limited member's proportionate share determined?

*Determining the
proportionate
share*

Commentary: Reg., s. 17 sets out the formula for determining the proportionate share of benefits determined by a defined benefit provision. This formula applies unless the spouse and member agree upon, or the court orders, another approach. [See *FLA*, s. 110, definition of "proportionate share", Reg., s. 17(2)]

Basically, the limited member's share is half of

(pensionable service during entitlement period)

divided by

(total pensionable service)

The "entitlement period" is determined by dates specified in the agreement or court order, usually determined by the date the relationship began and the date of separation, but other dates can be used. [Reg., s. 1(1) definition of "entitlement period", Reg., s. 17(2)]

Pensionable service is measured in months or parts of months (or other units of time used by the plan for determining entitlement to benefits). [Reg., s. 1(1), definition of "pensionable service"] See paras. 2.32 and 2.33.

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“Total pensionable service” is the service that accrued from the date the member joined the plan to the date the limited member's share is determined. There are four situations when the limited member's share would be determined:

- (a) the date the limited member's share is transferred from the plan (in which case, that would be the end date for determining total pensionable service),**
- (b) the date the limited member begins receiving a separate pension (in which case, the end date would be the beginning of the month in which the separate pension commences),**
- (c) for a matured pension, the end date would be the date the limited member begins receiving a share of the income stream (however, in these cases, pensionable service would ordinarily have stopped accruing when the pension commenced), and**
- (d) if the benefits have not been divided and the member dies before pension commencement, the end date would be the day immediately proceeding the day of the member's death. [Reg., s. 17(3)]**

If the agreement or court order does not specify the proportionate share, the Regulation defines the “proportionate share.” If there is an agreement between the spouse and member setting out a different formula, that would be the proportionate share. If there is a court order setting out the formula, that would be the proportionate share. [Reg., s. 17(2)].

- 2.18 Regulation, s. 17 provides the formula for the proportionate share. For a matured pension it provides that the numerator is determined by pensionable service accruing up to the spouse's “entitlement date” (Reg., s. 1(1), definition of “entitlement period”). In this case, the entitlement date is January, 1998. The member's pension commenced in 1995. How do we calculate the proportionate share?

*Proportionate share
of a matured
pension*

Commentary: since the member would have earned no more pensionable service after pension commencement (subject to phased retirement considerations – see *FLA*, s. 115(5), Reg., s. 19, and para. 15.15), the proportionate share stops changing at the date of pension commencement. In these situations, as a practical matter, it is the pension commencement date that would be used to determine the limited member's share.

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- 2.19 What is meant under Reg., s. 18 which excludes any pensionable service purchased by or on behalf of the member before or after the entitlement period?

*Proportionate
share and
purchased
service*

Commentary: the reason Reg., s. 18 excludes purchased service from the entitlement period is to clear up an ambiguity. Generally, pension entitlement purchased after the entitlement date will be credited exclusively to the member (through the formula for the proportionate share in Reg., s. 17). What happens, however, if service is purchased after the relationship ends, but is referable to the period during the relationship?

The policy adopted is that service purchased *during the relationship* increases the former spouse's share of the pension benefits (see, for example, *Sutherland v. Sutherland*, 2008 BCSC 1283). Service purchased *after the end of the relationship*, even if it is referable to the relationship, does not increase the spouse's share of the benefits. Since property acquired before the relationship is excluded property under the *FLA* (s. 85), the same policy applies to service purchased *before* the entitlement period.

For example: a member who withdraws some pension entitlement is later given an opportunity to buy it back.

For example: the administrator gives members an opportunity to purchase additional pension entitlement.

In each case, if the member takes the opportunity, the additional service would be "pensionable service...purchased by...the member." If the purchase takes place after the entitlement date, all of the purchased pension entitlement is allocated to the member. It is allocated through the formula for the proportionate share. The purchased service would not be included in the numerator, but would be included in the denominator, of the proportionate share.

For example,

Jan. 1, 1975	member joins plan
July 1, 1975	member begins cohabiting with spouse ¹
Dec. 31, 1978	member terminates employment and withdraws the benefits (the equivalent of 4 years of service)

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Jan. 1, 1980	member resumes employment and rejoins the plan
July 1, 1995	member and spouse1 separate
Dec. 1, 1999	member buys back part of the pensionable service withdrawn in 1978 (the equivalent of 2 years service)
Jan. 1, 2005	member's pension commences and spouse1 receives a share of the pension in the form of a separate annuity.

(Note: for simplicity, the example measures service in years, but under the Regulation pensionable service is measured in months or parts of months, or other relevant units).

Had the member not withdrawn any service, the spouse's proportionate share of the benefits would be determined as

$$\left(\frac{1}{2}\right) * (19/29)$$

However, during the relationship some of the benefits were withdrawn, so some pensionable service was lost. The numerator of the spouse's proportionate share is based only on pensionable service accumulated during the relationship. Regulation, s. 18 says that service purchased after the entitlement period is not included in the numerator, so the service bought back by the member in the example is not included. The numerator in the example is determined by pensionable service accumulated between Jan. 1, 1980 and July 1, 1995, or 15.5 years.

Had the member not bought back any service, the denominator would be 25 years. However, the member did buy back some service. The portion bought (2 years) is included in the denominator. The denominator is 27 years.

The spouse's proportionate share of the benefits, consequently, would be determined as:

$$\left(\frac{1}{2}\right) * (15.5/27)$$

These are the rules that apply if the agreement or order does not otherwise address the issue. Service accruing before or after the entitlement period can be included by agreement or court order. [FLA, ss. 127, 129]

[See paras. 2.27-2.29]

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- 2.20 Our plan is part of a flexible benefits employment package. A member may elect to forego other employment benefits in exchange for an enhanced pension. But the member does not purchase “service.” In our case, the enhanced value takes the form of indexing. If the member elects, after the entitlement date, to enhance the pension, is the limited member entitled to any share of that?

*Flexible benefits
and enhanced
pension entitlement
upgrades*

Commentary: the policy under Part 6 is to exclude from division additional pension entitlement purchased after the former spouse’s entitlement date.

Although the Regulation speaks of purchasing “service”, the policy applies equally to any form of enhanced value purchased by the member after the entitlement date. See, however, para. 2.32. In many cases, this type of arrangement will constitute a hybrid plan, and the spouse will be entitled to use the spouse’s share of the different components of the plan in the same way as plan member’s (depending on plan design, and in some cases the consent of the administrator). See Chapter 4.

- 2.21 Would benefit upgrades that are credited after the entitlement period be included in determining the proportionate share? Does it matter whether these benefit upgrades are paid for by the member or the plan sponsor?

*Proportionate
share and
benefit
upgrades*

Commentary: benefit upgrades credited after the entitlement period are included in the spouse’s share of the benefits.

The spouse’s proportionate share is applied to the whole of the benefits at the date the spouse’s share is determined. If the spouse elects a lump sum transfer of commuted value (under s. 115(2)(b)), the spouse’s proportionate share is determined on the whole of the value the benefits have at the date of the transfer. If the spouse chooses to take a separate pension (s. 115(2)(a)), the separate pension is based on the pension payable to the member at that date (although adjusted assuming pension commencement at the average age of retirement for the plan – see para. 2.55). Consequently, changes in the value of the benefits following the entitlement period attributable to benefit upgrades are divided between the spouse and member. (The contributions required by

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the plan text that members must make would not constitute purchase by the member.) [See, paras. 2.20, 2.32, 2.66 and 2.67]

- 2.22 Some of the Forms require information about the spouse's "entitlement date." What is the entitlement date?

*What is the
entitlement
date?*

Commentary: "entitlement date" is defined in Reg., s. 1 to mean the date specified in an agreement or order on which the spouse becomes entitled to an interest in the member's benefits. The entitlement date is used both to confirm that the former spouse is entitled to a share of the benefits and to determine the end date of the portion of the pension benefits that is subject to division.

Section 81(b) of the *FLA* provides that spouses each become entitled to a half interest in family property (including pension benefits each of them may have) when the parties separate.

The parties, or the court, may select the separation date, or another appropriate date, as the spouse's entitlement date.

The *FRA* provided rules for determining the entitlement date, if this was not specified in the agreement or court order. However, under the *FLA*, in order to divide the benefits, the administrator must be advised of the entitlement date in the court order, or the parties' agreement. If the order or agreement is silent, this can usually be addressed by the parties signing a further agreement in the form of joint directions, providing the missing information. [Reg., s. 1, definition of "entitlement date", *FLA*, s. 137]

The parties must provide the administrator with information about the entitlement date in writing before the benefits can be divided (the reference in the *FLA* and the Regulation to a single order or agreement does not mean that these issues cannot be addressed in a combination of agreements or court orders).

The entitlement date is used to determine the spouse's proportionate share of the pension benefits. But the proportionate share may be changed by the agreement of the spouse and member, or by a court order, and one way of changing the proportionate share would be to select another entitlement date. [Reg., s. 1, definition of "entitlement date". See *further* Chapter 11]

Another way would be for the agreement or order to set out a different for-

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mula or fraction.

- 2.23 The legislation provides that, unless the spouse and member otherwise agree, or a court orders, only pension entitlement earned during the relationship is divided. But won't a court have to take pre-relationship entitlement into account because of the decision of the B.C. Court of Appeal in *Mailhot v. Mailhot*, (1988) 18 R.F.L. (3d) 1 (BCCA)?

*Pre-relationship
accruals*

Commentary: no.

***Mailhot* held that all of the pension benefits accruing up to the breakdown of a relationship, including pre-relationship accruals, constitute a family asset to be divided equally between the spouses. After the *Mailhot* decision was made, however, B.C. pension division legislation was revised to divide only benefits earned during the relationship, and this policy has been carried forward in the *FLA* rules about excluded property. [FLA, s. 85] The result is that the effect of the *Mailhot* case has been reversed by legislation (as explained in *Park v. Park*, (2000) 73 B.C.L.R. (3d) 153 (C.A.)). *Mailhot*, however, would still apply to agreements or orders made before July 1, 1995, the date B.C. pension division legislation was first revised to exclude pre-relationship benefits from automatic division. [See para. 14.2]**

Pre-relationship accruals can be divided between the member and spouse, however, if they agree to do so, or if a court holds that it would be unfair to exclude that portion of the pension benefits from being divided [FLA, s. 95(1)(b)] or if to do so would avoid having to award support [FLA, s. 129].

It is worth noting that every other Canadian jurisdiction that deals with pension division when a relationship ends provides, at least as a starting point, for dividing only the portion earned during the relationship up to the date of separation. The revised *FLA* rules bring B.C. into step with the rest of Canada on this point. [See, however, para. 2.26]

- 2.24 If the spouse and member agree, or a court orders, that the spouse share in prerelationship accruals, how should the arrangement be recorded in the agreement or court order?

*Drafting
a clause
to divide
pre-relationship*

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accruals

Commentary: a reasonable approach would be to use the model employed in Reg., s. 17 but specify an earlier commencement date that includes the portion of pre-relationship service that will be shared with the former spouse.

2.25 When would it be appropriate to divide pre-relationship accruals?

*When to
divide
pre-relationship
accruals*

Commentary: the main factor identified under the *FLA* is where, after the relationship ends, it is appropriate for the parties to have similar standards of living but to provide for that requires either the member paying support, or the pension benefits being reapportioned. [*FLA*, s. 129]. This was also a factor under the *FRA*: *Parent v. Parent*, 2012 BCSC 723. Case law under the *FRA* suggests some other circumstances where benefits earned before the parties commenced living in a marriage-like relationship should be divided (although it remains to be seen whether these will continue to be considered relevant). Two examples:

- the case involves a long relationship during which most of the pension was earned [*Shirran v. Shirran*, (1999) 46 R.F.L. (4th) 371 (BCSC)]
- the spouse brings assets into the relationship that are used to benefit the family or end up being divided equally. [*Sangha v. Sangha*, [1998] B.C.J. No. 1087 (BCSC)]

2.26 The spouse and member lived together in a common law relationship before marrying and the member earned pension entitlement during that time. Should the accruals during cohabitation be divided between the spouse and the member?

*Pension
accruals and
cohabitation*

Commentary: this was a question under the *FRA* and the courts eventually decided that, in most cases, benefits earned during prior cohabitation should be divided. Under the *FLA*, the starting point is that benefits earned during cohabitation in a marriage-like relationship are divisible (but it is still necessary for the commencement date of the relationship to be specified by agreement

or court order, which means that it is not the administrator's responsibility to determine when a marriage-like relationship commences).

If the order or agreement was made before July 1, 1995, and is otherwise silent on this issue, *Mailhot* would apply to include all pre-relationship accruals: see para. 2.23. If the order or agreement was made under Part 6 of the *FRA*, and it does not specify the dates to be used, it is from the date of marriage to the triggering event. (Under the *FRA*, the triggering event was the first of the following to occur: the date the parties made a separation agreement or the date the court made a declaration of irreconcilability under *FRA*, s. 57, or an order of divorce, nullity or judicial separation: *FRA* Division of Pension Regulation, s. 1, definition of "entitlement date" and s. 6(1). For more information, see the 2001 Q&A).

See para. 14.25.

- 2.27 My plan allows me to purchase additional pension entitlement. I don't want to do this if it only means that my former spouse will get a share of it.

*Dividing
purchased
pension
entitlement*

Commentary: pension entitlement purchased before the relationship began, and after the breakdown of the relationship, won't ordinarily be divisible.

The Regulation to Part 6 of the *FLA* provides a formula for determining the former spouse's "proportionate share" for dividing the pension benefits. [Reg., s. 17] It is based on pensionable service accumulated (including purchased) by the member during the relationship. Any pensionable service accumulated after the former spouse's entitlement date, even pensionable service attributable to the relationship that was purchased by and credited to the member after the entitlement date, is excluded from the numerator. [*FLA*, Reg., 18. See para. 2.32 for examples]

A former spouse may be able to make a claim to pension entitlement purchased after the breakdown of a relationship if it can be established that it was purchased using family property. Similarly, the member may have committed to purchase service before the relationship began, but payments for the service are made during the relationship, and again it may be appropriate for the former spouse to share in the purchased service.

But these would not be questions that an administrator would have to deter-

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mine. It would be addressed in the agreement or court order dividing the benefits. [See also paras. 2.19 and 2.20]

A situation where the plan increased the required member contributions would not qualify as purchasing service. See para. 2.66 and 2.67.

- 2.28 The member purchased additional pension entitlement during the relationship, but it relates to a period before the relationship. Is that included in the division?

*Pension
entitlement
purchased
during the
relationship*

Commentary: yes, the purchased pensionable service would be included in the numerator and denominator of the proportionate share. The test set out in the Regulation is whether the pensionable service was purchased or accumulated in the entitlement period. The “entitlement period” is defined by the “commencement date” and the “entitlement date”, usually determined by the beginning and end dates of the relationship. [FLA, Reg., s. 1, 18] It doesn’t matter that the purchase relates to a period before the entitlement period. [See para. 2.19 and 2.21]

- 2.29 The member purchased additional pension entitlement during the relationship, but payment is on the instalment plan. It wasn’t all paid for by the time of the breakdown of the relationship.

*Pension
entitlement
purchased on
instalment
plan*

Commentary: the purchased pension entitlement would still form part of both the numerator and the denominator of the formula for determining the proportionate share because it was acquired during the entitlement period. [FLA, Reg., s.18]

As between member and spouse, their property division arrangements may address responsibility for the debt, but the administrator does not have to worry about that issue. Under the *FRA*, the approach adopted by courts is that a debt obligation associated with a family asset is taken into account when de-

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termining entitlement to the family asset, and this policy has been carried forward in the *FLA* [*FLA*, ss. 81, 86]. Typically, this would mean that the unpaid portion of the entitlement would be dealt with by reducing the spouse's share of other assets in recognition that the member is responsible for paying the debt.

Two other approaches adopted in cases dealing with debt obligations are to:

(a) make the spouse share responsibility for the debt (the spouse could be required to pay a share to the member immediately, or by instalment), or

(b) adjust entitlement to the pension benefits to reflect the debt. [See also paras. 2.19 and 15.8]

If the parties do not address the issue, and service purchased during the relationship is still not paid for at the date the former spouse's share is to be determined, the administrator should request the parties' directions concerning how to deal with the issue. (In deciding how to resolve this issue, it is important for the parties to understand that in many cases the cost of purchasing the service may be significantly less than the value of the service itself.)

- 2.30 In some cases, pension benefits might be enriched, not by increasing entitlement attributable to a particular period, but by crediting the member with additional pensionable service. This might take place, for example, where the member must be employed for a minimum period before becoming a member of the plan and the probationary period is eventually included. What rights does a spouse have where the plan credits the member with additional entitlement during the relationship that relates to a period before the relationship?

*Prior
service
credit*

Commentary: this would be pensionable service “accumulated by the member in the entitlement period”. [*FLA*, Reg., s. 18(3), definition of “pensionable service during entitlement period”] It would be included in the numerator of the proportionate share, as well as the denominator.

- 2.31 The member withdrew part of the pension benefits during the relationship. It is possible to restore the lost service. The court has ordered the member to do so, and

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also ordered that the spouse's share of the pension entitlement be based on the restored service. What is the plan's obligation?

*Court orders
member
to restore
service*

Commentary: once the member makes the purchase, the restored service would be included in the numerator and denominator of the formula for determining the proportionate share.

- 2.32 Some cases are not clearly addressed under the Regulation. What should the plan do if:
1. *the plan sets a cap on service* (for example, the plan provides that the maximum pension is earned by a member upon completing 35 years of service)? How does that affect the "proportionate share?" Does that cap the denominator for determining the spouse's share?
 2. *the member uses banked credits*, earned during the relationship, to acquire pension entitlement at a later date? Is service that is acquired with banked credits considered to be acquired during the relationship, or after the entitlement date?
 3. *as part of a flex benefits package*, the member gives up, for example, a dental plan for enhanced pension entitlement, or elects to reduce the pension in exchange for other benefits? How do the member's elections affect the limited member's interest in the benefits?
 4. *pensionable service is measured by the plan in terms of hours, or bands of hours, worked*, rather than months or parts of months? How is this accommodated by the formula for the proportionate share?

*Special cases:
Cap on service
Banked credits
Flex benefits
Service measured in hours*

Commentary: if special cases arise, it is always open to the plan administrator to seek instructions by writing the member and the spouse describing the ambiguity and either,

- (a) suggesting an approach in keeping with the spirit of the legislation for dealing with the issue, or
- (b) requesting the member and spouse to agree on an approach and

advise the plan administrator in writing. [Reg., s. 7(2)]

Option (a) will usually be the most efficient since the matter in question is likely to recur and therefore be familiar to the plan administrator.

Some suggestions of how the specific issues should be dealt with under the legislation:

1. cap on service: the cap must be applied to both the numerator and the denominator of the formula. If the cap is 35 years, then neither the numerator nor the denominator can exceed that amount. If the relationship continues after the cap is reached, the numerator would stop growing at that point. *See* para. 2.33, and *Rutherford v. Rutherford*, (1981) 23 R.F.L. (2d) 337 (BCCA) where the cap was applied to determining the former spouse's proportionate share. Typically, this is an issue that the parties expressly address and is often settled by choosing a midpoint, so that the member is compensated for some portion of the unused service. If the parties have a long relationship, and the cap is an issue, it is likely that the question of the former spouse's proportionate share will be determined having regard to support considerations (under *FLA*, s. 129) rather than by any consideration of the application of the cap.

2. banked credits: credits earned during the relationship qualify as family property. Courts will follow a family asset and recognize a claim to an asset substituted for the family asset. Where a member has banked credits earned during the entitlement period and uses them after the entitlement date to acquire pensionable service, the spouse would probably be entitled to a share of that pensionable service (*that is*, it should be included in the numerator of the formula for the proportionate share). As a practical matter, however, it may not be possible to trace the banked credits and determine whether they were in fact used.

3. flex benefits: the flex package will define a base pension. The spouse's rights before the breakdown of a relationship would be determined by past elections. The spouse's future rights should be determined by reference to the base pension: a flex election that enhances the pension should be regarded in the same way as purchasing additional pension entitlement, and not divided between spouse and member. Similarly, elections reducing enhancements would not affect the spouse, whose rights following the breakdown of a relationship would be determined by the base pension. But typically the spouse will be entitled to a separate share of the flex account, which can be used by the spouse in the same way as the member [*See* para. 2.20]

4. hours or bands of hours: the Regulation provides that the proportionate share is calculated using the units of time specified under the plan text [Reg., s.

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1, definition of “pensionable service”].

- 2.33 In some cases, pensionable service increases but there is no corresponding increase in the size of the pension (such as, for example, where there is a cap on service, a maximum pension is defined under the plan text, or the *ITA* ceiling on benefits payable under a registered plan applies). How is this dealt with?

*Pensionable
service
increases
without
increasing
pension value*

Commentary: the legislation and Regulation sets out a default formula for dividing benefits. The result it dictates will be fair in most cases. Where it produces an unfair result, as it might in the example, the court can order, or the spouse and member can agree upon, a different approach to dividing the benefits. [FLA, ss. 95, 127, 129. See further para. 2.32]

- 2.34 Suppose a spouse acquires a share of a member’s benefits on the breakdown of a relationship. If the spouse remarries, can the new spouse claim an interest in the pension entitlement on the break-up of the second relationship?

*Dividing a
divided
portion*

Commentary: nothing in the *FLA* permits a claim by a second spouse against a limited member's share of benefits administered by a plan. Even if the limited member's share is transferred from the plan, the *FLA* policy is not to divide property acquired before a relationship commences.

- 2.35 The spouse’s share of the pension entitlement is so small that the costs of administering the share really outweigh the benefits paid to the spouse. Can the administrator pay out the spouse’s share on a lump sum basis?

*The spouse’s
share is small*

Commentary: the administrator can pay out when the share is very small. [FLA, s. 139, Reg., s.26] The small amounts threshold is set out in the *Pension Bene-*

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fits Standards Act. [PBSA, s. 33(5) and s. 40(1) and Reg., s.33] However, since the value of the spouse's share cannot be determined until the spouse is eligible to receive the share, the administrator cannot require a transfer from the plan on this basis until that date (or until the member terminates membership in the plan).

- 2.36 If the limited member elects to take the share by a lump sum transfer, how is the transfer amount determined?

*Lump sum
Transfer Option
(S. 115(2)(b))*

Commentary: the limited member's portion would be determined as a proportionate share of the commuted value of the benefits calculated assuming the pension commences at the average age of retirement for the plan [Reg., 23(4)], and in accordance with accepted actuarial practice in Canada, consistent with the Canadian Institute of Actuaries commuted value Standard Of Practice. [FLA, s. 110, definition of "commuted value."] See also paras. 2.55, 3.11-12 and Chapter 10]

- 2.37 When the benefits are in a defined benefit plan, the division is deferred and the limited member receives either a lump sum transfer, or a separate pension, at some date after the member becomes entitled to have the pension commence. Who chooses between these options, the limited member or the plan?

*Who chooses?
Limited member
or plan?*

Commentary: the choice is exclusively that of the limited member. It is exercised by sending Form P4 to the plan. [FLA, s. 115(2).]

- 2.38 Why is the spouse given a choice between a lump sum transfer and a separate pension?

*Elections
by the spouse*

Commentary: under the FRA, the spouse was required to wait until the member's pension commenced before receiving a separate pension.

As a very general rule of thumb, usually the overall value of the pension benefits is greater the earlier the pension commencement date. Members don't

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usually wish to take early retirement, however, because the income they make more than compensates for any loss in value that results from deferring retirement. To deal with this situation, the *FRA* gave the spouse the option of accessing the pension benefits at an earlier date by a lump sum transfer option.

However, investing funds to provide for life income is challenging at any time, and particularly in times of low interest rates and market volatility. The *FLA*, therefore permits the former spouse to choose between a lump sum transfer and a separate pension at any date after the member becomes eligible for pension commencement. To avoid any prejudice to the plan, the spouse's share is valued and adjusting having regard to the plan's funding assumptions.

It is expected that the separate pension option will be the most common choice.

- 2.39 The limited member has applied for a transfer of the proportionate share of the commuted value of the member's benefits. The member has reached a retirement age but has not yet begun receiving a pension. The limited member has directed the plan to transfer the share to a separate account in the plan. What are the administrator's responsibilities?

*Transfer
to where?*

Commentary: the plan is not obligated to set up a separate account for the limited member.

If the limited member elects to have the share transferred once the member becomes eligible to have the pension commence, the share is transferred in accordance with *FLA*, s. 139, Reg., s.26, and s. 33(2) of the *PBSA*. A transfer to another pension plan, or to an account in the same plan, is only available if the administrator of the plan in question is willing to accept the transfer. [*PBSA*, s. 33(2)]

- 2.40 The member is eligible for pension commencement but hasn't made that election yet. The former spouse has asked for a transfer of pension entitlement (as is permitted under the legislation). Is it open to the plan administrator to offer to continue to administer the spouse's share instead?

*Transfer
Alternatives*

Commentary: yes. A spouse may select this option, if the administrator pro-

vides it. [FLA, Reg., s.26]

- 2.41 When would the spouse make the election to take the transfer of commuted value instead of the separate pension?

*Reasons for
taking the
transfer
of commuted
value*

Commentary: typically this decision is made when the spouse, perhaps with the assistance of a financial advisor, concludes that the spouse can invest the money more effectively and produce benefits that exceed those that will be provided in the form of a pension. Similarly, some people prefer to have control of the funds and make the request for that reason.

Taking the lump sum transfer may also place a higher value on the benefits in the hands of a person whose life expectancy is compromised by health issues.

In some cases, the former spouse is concerned about leaving financial resources available for a dependent, which could be realized through the lump sum transfer, and not the separate pension. The lump sum transfer option also offers more flexibility about the amount of income received than the separate pension option.

Concerns about plan solvency may also be a factor: *see* para. 2.15.

(Under the *FRA*, where the spouse received a share of preretirement survivor benefits if the member died before the pension was otherwise divided, the spouse would also often elect to take the transfer of the commuted value where the share of the preretirement survivor benefit payable under the plan on the death of the member is significantly less than the transfer value. This is no longer an issue under the *FLA*: *see* para. 8.11.)

- 2.42 When would the spouse elect to take a separate pension?

*Reasons for taking the
separate pension*

Commentary: it is expected that most spouses would choose a separate pension to avoid the responsibility of administering the investment of the funds to produce a life income. Even under the *FRA*, where the separate pension was available only when the member elected to have the pension commence, many

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former spouses chose to wait to receive the share for this reason.

- 2.43 Does a spouse need to know the value of the benefits in order to make an informed choice between the lump sum transfer and separate pension options?

*Need to
value before
making the
election?*

Commentary: the decision may be made without knowing the actual value of the benefits, but there are many reasons why a well-advised spouse would request a valuation.

For example, the administrator may adopt conservative assumptions and place a lower value on the lump sum transfer option than the application of normally accepted actuarial standards, so the plan may be prepared to transfer, for example, \$150,000, while the expected value of the separate pension is closer to \$170,000.

To take another instance, B.C. law requires unisex assumptions, so the lump sum value placed on the female spouse's share of the benefits may, again, be less than the expected value if paid as a separate pension.

(For a related area, where both parties have pensions, and it is advisable to have a professional advise on whether or not to divide them under Part 6 at all, see para. 11.14.)

Having the benefits valued independently allows for an informed decision.

- 2.44 Whether the spouse takes a lump sum transfer, or a separate pension, the spouse's entitlement is based on the "normal form" of the pension under the plan. Our plan has two normal forms, depending upon whether or not the member has a spouse. Do we determine the normal form to use by whether the member has a spouse or whether the limited member has a spouse?

*Spouse's share
based on the
"normal form"*

Commentary: Part 6 divides the benefits based on the member's entitlement. Where the normal form is dictated by spousal status, the selection of the normal form will depend upon whether or not the member has a spouse.

Regulation, s. 23(4)(a)(iii) makes this clear. It says that the former spouse's

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proportionate share is of the commuted value of the pension the member would have received had there been no division under the Act and had “the member elected a pension in the unadjusted normal form” provided under the plan. The member’s spousal status at the time the limited member receives the share is determinative.

- 2.45 In our plan, the value of an early retirement pension is subsidized, provided the trustees consent. For the purpose of determining the limited member’s share, should the commuted value of the benefits be calculated on the basis that consent has or has not been given?

*Subsidized
early retirement
and trustee
consent*

Commentary: in any case where consent is relevant, the question of the administrator’s consent must be determined by the administrator on the same basis as if the member made the application [Reg., s. 14] If the administrator would have consented, had the application been made by the member, the administrator must consent if the application is made by the limited member.

- 2.46 Why isn’t a transfer of a share of benefits in a defined benefit plan available as of the date of separation?

*Immediate
transfer
not available*

Commentary: most provinces that have pension division legislation provide for a transfer of the spouse’s share on separation. The value placed on the spouse’s share is frequently (particularly for private sector plans) much lower than the value the benefits will probably eventually have because it is based on the assumption that the member leaves employment on the date of separation. This approach to valuation often ends up allocating the lion’s share of the benefits earned during the relationship to the member.

An immediate transfer at a low value does not benefit a spouse, particularly when the transfer is locked-in until the spouse reaches a retirement age (that is, the spouse is going to have to wait a period of years to be able to use the money in any event). By deferring the transfer date, in most cases a significantly higher (and fairer) value will be placed on the spouse’s share of the

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benefits.

- 2.47 The plan would like to offer the spouse the option of accepting an immediate payment to a locked-in RRSP. Is that option available?

*If plan offers
immediate
transfer option*

Commentary: this option is not prohibited by the legislation, but unless a court orders otherwise, the payment would have to be calculated in accordance with Regulation, s. 27, and make reasonable provision for future changes to salary levels, or the benefit formula, that would increase the value of the pension [FLA, 128(2)].

The legislation does not stipulate how to adjust the member's benefits in this situation. Before agreeing to the option, a plan administrator should seek the member's consent.

[For the meaning of "locked-in" see para. 10.4]

- 2.48 The spouse has waited until the member's pension commences to claim a separate pension. The member objects to using the proportionate share set out in the agreement. In 1994, the spouse relied upon a "deemed retirement" clause in the agreement and required the member to pay the spouse's share based on an assumed retirement when the member was first eligible to retire. The member says that the spouse's separate pension should be determined as a proportionate share of the pension that would have been payable on the assumed retirement date, which was the standard used to calculate the payments the member has been making to the spouse.

*Proportionate
share and deemed
retirement*

Commentary: as between the parties, the member is correct. However, this can be a difficult arrangement for the administrator to implement, and nothing in Part 6 of the FLA requires the administrator to accept an agreement or order that sets out different formulas for dividing the benefits depending on the circumstances. So unless the administrator consents, the parties will have to make adjustments between themselves.

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- 2.49 The limited member has elected a “separate pension.” How is the separate pension determined?

*Separate Pension
(S. 115(2)(a)):
Determining
the separate
pension*

Commentary: *see FLA, Reg., s.23 and 24.* The commuted value of the benefits is determined under Reg., s.23, based on the pension payable to the member assuming pension commencement at the average age of retirement for the plan: see para. 2.55. The limited member's proportionate share of the commuted value is used to determine the separate pension payable to the limited member for the limited member's lifetime. The limited member can choose a single life pension or any other form of pension that plan members may elect to receive.

The former spouse's annual pension would be the same as the member's if (a) they are the same age, (b) the member has reached the average age of retirement (or is older than that), and (c) the normal form of pension does not involve a survivor option to a possible new spouse.

The point is that the same conversion factor in this case must be used when determining the lump sum value of the member's benefits and the separate pension payable to the limited member (based on the limited member's proportionate share of the commuted value of the benefits).

- 2.50 The legislation says the administrator must make available to the spouse the options for the separate pension it offers members of the plan. Who gets to choose the option, the spouse or the administrator?

*Form of
pension*

Commentary: the spouse. The policy is that the limited member enjoys this right in common with members. [FLA, s. 113] The plan is protected since whatever option the spouse selects is adjusted on an actuarial basis. [FLA, Reg., s.24(1)] Although the general policy is that the spouse should be entitled to select from among the full range of options available to plan members, the structure of Part 6 places some limits on that. (For example, a plan member who retires before unreduced retirement age is offered the option of taking a deferred pension, but under Part 6, the spouse's separate pension option is to commence immediately.)

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- 2.51 The legislation allows a spouse to select among options available to members of the plan, including a joint annuity. But doesn't this conflict with Regulations under the *Income Tax Act* (particularly Reg., s.8503(3)(l))?

*Income Tax Act
and spouse's
election*

Commentary: no. This position existed under the *FRA* and CRA indicated that the provincial legislation was consistent with the *Income Tax Act*. The *ITA* Regulations recognize family property division arrangements authorized by provincial legislation. [*ITA* Reg., s.8501(5)(d)]

- 2.52 Members of our plan are entitled to supplementary benefits financed from company revenue. The additional benefits are based on the member's average earnings and regular pensionable service that exceed the maximum amounts CRA will allow to be paid under registered pension plans. Are these divisible?

*Supplementary Pension
Plans ("SPP")*

Commentary: yes. Benefits in a supplemental pension plan are divisible under Part 6 [*FLA*, ss. 119, and 110, definition of "supplemental pension plan"], but the rules that apply are different from those that apply to benefits in a registered local plan. See Chapter 6.

- 2.53 The member has decided to take early retirement. May the limited member transfer the proportionate share of the pension to an RRSP, or does the limited member now have to receive a separate pension?

*When the
member
takes early
retirement*

Commentary: both options are still available to the limited member. Once the administrator is advised that the member intends to have the pension commence, the administrator is under an obligation to give the limited member 30 days advance notice [*FLA*, Reg., s.9]. This would allow the spouse to choose between the options.

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2.54 When determining the spouse's separate pension under Reg., s. 24, how are differences in ages between the member and the spouse taken into account?

*Age
adjustment*

Commentary: the former spouse's share of the member's benefits is based on the commuted value of those benefits and determined on an actuarial basis [Reg., s. 23]. One factor for calculating the commuted value will be assumptions about how long the pension would be paid to a person of the same age as the member at the date assumed for pension commencement. The member's pension is assumed to commence at the average age of retirement under the plan (for the meaning of average age of retirement, see para. 2.55).

Once the former spouse's share of the commuted value is determined, this is then expressed as a separate life time pension for the former spouse, this time having regard to how long the pension would be paid to a person of the same age as the spouse at the date the pension commences [Reg., s.24] See further para. 2.49.

Part 6, however does not set out how the age adjustment is to be made. The adjustment must be made using accepted actuarial methods [*FLA*, s. 110, and *PBSA*, s. 1, definition of "commuted value"]. B.C. legislation also requires that the adjustment be made on a sex neutral basis. [*PBSA*, s. 24(2)(b)]

2.55 Regulation, s. 23 sets out rules for determining the commuted value of a member's benefits. One assumption is that the member's pension commences at the date the member reaches the "average age of retirement" for the plan. What does this mean?

*"Average age
of retirement"*

Commentary: an administrator of a plan is required to file an funding actuarial valuation report with the superintendent. The report will specify an assumed age of retirement for plan members [Regs, s. 1, definition of "average age of retirement"]

(The report will also include a solvency valuation that may use a different average age of retirement. For the purposes of the *FLA*, It is the average age of retirement used in the funding actuarial valuation, which is the "going concern" valuation, that determines the average age of retirement, not the one used in the solvency valuation, which is driven by special government requirements.)

The plan may have established average age of retirement assumptions that are based on age and service of members. If so, the average age of retirement

would be determined by the age and service referable to the member.

Some plans will specify an average age of retirement for female members and a different average age of retirement for male members. However, under B.C. law, an administrator cannot discriminate based on differences of sex. [See, for example, B.C. *PBSA*, s. 24]. In these cases the average age of retirement should be determined on a uni-sex basis (just as mortality is determined on this basis, and it would be appropriate to use the same uni-sex weighting that the administrator applies to mortality).

The legislation recognizes that it may be more convenient for a plan with many members to specify a different average age of retirement for the purposes of the *FLA*. For example, it may simplify things, where the plan determines the average age of retirement by some kind of formula, to use a single average age of retirement, or adopt a different formula, and an administrator may choose to do this, provided the age that is selected is younger than the average age of retirement for the plan. [Reg., s. 23(5)]

Some plan administrators have indicated that they would prefer to continue using the optimal age for these calculations and this would also be permitted under s. 23(5). See para. 2.65.

The reason for valuing benefits using the average age of retirement is to attempt to place a value on the former spouse's share that is consistent with the plan's funding assumptions.

- 2.56 The benefits have not yet been divided and the member has elected to have the pension commence. The limited member has chosen to receive a separate pension. The member has not yet reached the average age of retirement for the plan. Is the limited member's share based on the average age of retirement or the member's actual age?

*Average age of
retirement or
actual age*

Commentary: the average age of retirement. The member's actual age is used only if the member is older than the average age of retirement at the date the limited member's separate pension is determined. [Reg, s. 23(4)(a)(iii)] This policy has been adopted under the *FLA* to protect the plan funding arrangements. Where the member elects to have the pension commence before reaching the average age of retirement, and benefits before that date are subsidized by the plan, the plan is required to administer the pension in accordance with the plan text. But the former spouse is not entitled to the subsidization.

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2.57 Is a limited member entitled to a share of bridging benefits?

*Bridging
benefits*

Commentary: yes. The *FLA* defines “benefit” as “a pension or any other benefit under a pension plan, and includes a return of contributions” [*FLA*, s. 110].

A limited member is entitled to a proportionate share of any benefit paid under the plan to the member. [*FLA*, s. 113, 115(2)]

Bridging benefits are a temporary monthly supplement designed to provide members with level income over the course of retirement. Probably the most common example is the CPP bridge benefit. This is an additional monthly payment that ceases at 65, when the member becomes entitled to CPP. The principle is that the total of the pension plus the CPP will produce an income adequate to meet the needs of the retired member. When a member retires before CPP is payable, these pensions provide a “bridging benefit”--the additional amount needed to bring the pension up to an adequate level until CPP becomes payable.

Some plans offer similar arrangements for OAS benefits.

Some plans are structured to provide the bridging benefit automatically. Others allow the member to elect the option. Where the benefit is optional, what essentially is taking place is that the member elects to front load the pension payments (so that the increase in the pension in the early years is offset by a reduction over the balance of the member's lifetime).

Although these are not referred to expressly in Part 6, bridging benefits are divisible as family property. [*Vestrup v. Vestrup*, [1999] B.C.J. No. 1057 (BCSC)]

These adjustments are addressed in s. 37 of the *PBSA*.

In calculating the commuted value of the member's benefits, the commuted value of any bridge benefits must be included in determining the limited member's entitlement to a lump sum transfer or separate pension.

2.58 What happens if the plan administrator cannot locate the limited member (for whatever reason) when the member retires? What happens to the limited member's pension entitlement?

*Can't locate
limited
member*

Commentary: the limited member's share is treated the same way a member's

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pension would be handled if the member could not be located. The plan is required to hold the share, subject to the special rules that apply to funds held in trust and the *Income Tax Act* requirements.

- 2.59 Does the PBSA requirement—that a member who has a spouse must take pension entitlement in the form of a joint annuity—apply to a limited member who has a spouse?

Elections:

*Limited member
remarries*

Commentary: no. The *PBSA* does not require a limited member who has a spouse to elect a survivor benefit for the spouse on retirement or the starting of a life income using locked-in funds. The *PBSA* places this requirement on members and former members. [*PBSA*, s. 35] A limited member is not a member or former member.

For the meaning of “locked-in” see para. 10.4.

- 2.60 If the spouse elects a separate pension when the member reaches age 55, but the plan does not provide for indexing of pensions until age 60, does the former spouse’s separate pension begin indexing when the spouse reaches age 60, or when the member does?

Indexing

Commentary: the commuted value of the member’s benefit is determined based on the member’s age and average age of retirement, which will determine when indexing is deemed to begin. If the member and the former spouse are the same age, there is no issue: all reasonable approaches lead to the same answer. If the former spouse is a different age, the administrator should defer the actual indexing of benefits to the date the former spouse reaches the age at which indexing applies (in this case, at age 60), so that the former spouse is treated like other members. Calculation of the former spouse’s initial separate pension should reflect this.

- 2.61 If the member has made voluntary contributions to the plan, how are these taken into account?

*Voluntary
Contributions*

Commentary: plan members are sometimes entitled to make additional, voluntary contributions to their plans. These are sometimes overlooked when

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pension benefits are divided. Voluntary contributions should be divided in the same fashion as defined contribution plans or RRSPs, and not by a pro rata, *Rutherford*-type formula, because their value depends upon contributions made to date (plus investment returns) and not on some formula based on future events.

If, however, the agreement or order sets out a pro rata approach for dividing the pension benefits, and does not expressly address how voluntary contributions are to be divided, the formula will apply to both the pension benefits and the voluntary contributions equally. [*See Srivastava v. Srivastava* (1997), 40 B.C.L.R. (3d) 358 (C.A.)]

- 2.62 Even if the member is eligible for pension commencement, can the limited member choose a separate pension if the limited member has not yet reached the required age under the plan text?

*How old must
limited member be
to receive separate
pension?*

Commentary: yes. If the earliest that a pension may commence under the plan is 55, and the member has reached that age, the limited member may choose to receive a separate pension even if years younger. The monthly amount payable to the limited member, however, will be adjusted having regard to the limited member's age.

- 2.63 If the pension payable to the member at the date the limited member chooses to receive the separate pension is reduced for early retirement, does that reduction apply to the limited member's separate pension?

*Early retirement
reduction and
limited member's
separate pension*

Commentary: yes, if the average age of retirement for the plan is before the age at which there is entitlement to unreduced benefits. In most cases, the average of retirement for the plan will probably be at or after the unreduced age. Some administrators, however, have indicated that they intend to continue to use the optimal age rather than the average age of retirement, in which case it is quite likely that an early retirement factor will continue to apply in the cir-

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cumstances.

- 2.64 After the limited member receives the lump sum transfer, or the separate pension, we are supposed to reduce the member's pension entitlement by deducting pensionable service (under Reg., s. 21). How does that affect other eligibility issues (such as qualifying for an unreduced pension, or where the plan text determines survivor benefits based on minimum levels of pensionable service?)

How does reducing the member's pension entitlement affect eligibility for benefits?

Commentary: reducing the member's pension entitlement because it has been divided with the former spouse does not affect the member's eligibility under the plan in any respect. Any question about eligibility for benefits that depends upon pensionable service would be determined having regard to accrued service before the pension division. [Reg., s. 21(5)]

- 2.65 Our preference would be to continue as under the *FRA*, and calculate the former spouse's share by reference to the optimal age (the age that places the highest value on the benefits), rather than the average age of retirement. Is that permitted?

Specifying "average age of retirement" as optimal age

Commentary: yes. An administrator may elect to use an age that is younger than the average age of retirement for the plan. [Reg., s. 23(5)] The policy is to permit the administrator to adopt sensible administrative procedures that in its view will simplify processing pension division arrangements, provided that those procedures do not prejudice either of the parties. Adopting the optimal age would not prejudice either party.

Many plans provide in the funding valuation a rule or formula for determining the average age of retirement, so there is no objection if the administrator elects a different formula for determining the average age of retirement under the *FLA*, provided it is consistent with the *FLA* policy (that the specified average age of retirement not be greater than the age used in the funding valuation).

- 2.66 To maintain benefits, our plan was amended to require members to pay substantially increased contributions. The limited member's share of the benefits relate to the period

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before the increased contributions, but the way the *FLA* works, the limited member's proportionate share applies to all of the benefits at the date of division, so will include some portion of the period that relates to the increased contributions. Does this increase in contributions require any adjustment to the limited member's share?

*Members required
to pay increased
contributions*

Commentary: no. An increase in the contributions that a member is required to make does not constitute purchasing additional service (which would be excluded from the division: see para. 2.19, 2.20 and 2.27). In these cases, the policy of the *FLA* is to base the limited member's proportionate share of the benefits as of the date the share is being received by the limited member (by lump sum transfer or separate pension), although adjusted to take into account the average age of retirement for the plan. The member is protected because the member's increased contributions relate to the pensionable service that accrued after the limited member's entitlement date, all of which the member keeps. But the division takes place on a pro rata basis based on current values.

- 2.67 Out plan gives members a choice to participate in two different plans, one that provides benefits based on 1% final average earnings, the other based on 2% final average earnings. The contribution rates are higher for the second plan. The member wants to switch to the 2% final average earnings plan, but the member's former spouse is a limited member of the plan. How would this switch affect the limited member's entitlement?

*Members can
elect to pay increased
contributions*

Commentary: this would constitute purchasing additional service (which would be excluded from the limited member's share: see para. 2.19, 2.20 and 2.27). The limited member's proportionate share would be based on the entitlement under the 1% final average earnings plan.

- 2.68 The limited member has elected to receive a separate pension and the member is some years from the average age of retirement. It seems reasonable in this case to calculate the limited member's share taking into account future increases in the value of the benefits between now and the average age of retirement. Is that permitted?

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*Early retirement
and projections
about future service
and benefits*

Commentary: no. Section 23(4)(ii) provides that the limited member's entitlement is based only on the benefits accrued to the valuation date.

2.69 Our plan provides for pre-retirement indexing on benefits of members who have terminated employment and have deferred vested entitlement. Would that indexing be included in determining the limited member's proportionate share of the benefits?

*Pre-retirement
indexing*

Commentary: yes.

CHAPTER III. DIVIDING BENEFITS IN A DEFINED CONTRIBUTION ACCOUNT (*FLA*, s. 114)

If the benefits are determined by the contributions made to the plan the plan is called a “defined contribution plan”. The contributions may be made by the employer or by the employee, to an account for the member, and the value of the account consists of the contributions plus investment returns, less administrative expenses. (These types of plans are different from plans, sometimes called target benefit plans, where benefits are determined by a formula, but capped by the contributions made to the plan.)

If the member’s benefits are in a defined contribution account, the benefits are divided by transferring to the credit of the spouse a share of contributions plus investment returns accumulated during the relationship. [FLA, s. 114, Reg., s.20] The spouse would send to the plan administrator the agreement or court order dividing the benefits, together with a Form P3. [FLA, Reg., s.4(1)(c)] The administrator would then request the spouse to direct where the funds are to be transferred (usually a locked-in RRSP, but the funds could also be used to purchase an annuity or transferred to another pension plan, with the consent of that plan's administrator). [FLA, Reg., s.26] Additional tax forms will be required to complete the transfer and the benefits are subject to “locking-in rules”.

Administrator Checklist 3 and Lawyer Checklist 2 (see the appendices) cover the steps for dividing benefits in a defined contribution account.

3.1 Is the pension plan subject to the FLA?

*Subject
to the FLA?*

Commentary: [See para. 1.8, and Chapter 1 generally]

3.2 Does the FLA apply to an agreement or court order made before the FLA comes into force?

*Pre-March 18, 2013
arrangements*

Commentary: [See Chapter 14]

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3.3 Why is a former spouse entitled to receive a share of a defined contribution account immediately, when benefits in a defined benefit plan are divided on a deferred basis?

*Why divide
DCP by
immediately
transferring
spouse's
share?*

Commentary: a defined contribution plan is like a bank account or an RRSP. Any future changes in its value will be because

- **more contributions are made to it, but the spouse cannot have a share of those contributions because they are made after the relationship breaks down, and**
- **because earnings are made by investing the contributions. But similar earnings on the spouse's share can be realized if it is transferred to the credit of the spouse and re-invested.**

(In contrast, when benefits are in a defined benefit plan, they are determined by a formula and their value increases by other factors that usually cannot be fully assessed until a future date. For that reason, benefits in a defined benefit plan are divided on a deferred basis, until those factors, or more of them, are known).

3.4 How is a former spouse's proportionate share of a defined contribution account determined?

*Spouse's
share
in a DCP*

Commentary: the former spouse is entitled to half of contributions, plus investment returns allocated to those contributions, made during the parties' relationship. The actual period is determined by dates specified by agreement or court order for the beginning of the relationship (the "commencement date") and the end of the relationship (the "entitlement date") [See para. 2.22, and Reg., s.1(1) definition of "commencement date" and "entitlement date" and Reg., s.20]

The Regulation provides for determining the former spouse's proportionate share of a defined contribution account by the formula

transfer amount = $\frac{1}{2}$ (account balance – pre-relationship contributions)

The “account balance” is the value of the account at the former spouse's entitlement date, plus investment returns up to the date the former spouse's share is transferred. The entitlement date will usually be the date of separation, but the parties can agree upon, and the court can direct, that a different date be used.

The value of the defined contribution account at the commencement date is referred to as the “pre-relationship contributions” in the Regulation, and includes investment returns from the commencement date to the date the former spouse's share is transferred from the account [Reg., s.20]. The commencement date will usually be the date that the marriage-like relationship began, which may or may not be the same as the date the parties commenced cohabiting. The parties can agree upon, and the court can direct, that a different date be used for the commencement date.

In either case, the administrator does not have to guess about what dates to use. These have to be specified in the agreement or court order, or by the parties in subsequent directions.

For an example of how the former spouse's proportionate share would be determined, suppose that,

- the account balance at the entitlement date is \$90,000,
- investment returns up to the date the former spouse's share will be transferred are \$5000,
- the value of the defined contribution at the commencement date is \$40,000, and
- investment returns from the commencement date to the date the former spouses share will be transferred are \$20,000

In this case, the former spouse's proportionate share would be

$$\frac{1}{2} ((\$90,000 \text{ plus } \$5,000) - (\$40,000 \text{ plus } \$20,000))$$

This works out to $\frac{1}{2}$ (\$95,000 - \$60,000) = \$17,500.

The example assumes that it will be possible to determine the investment returns at the specified dates. Some administrators will be able to provide that information. In other cases, where information is not available, the best that can be done is to approximate investment returns. See para. 3.7.

3.5 Does “investment returns” include commission expenses?

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*“Net investment
returns” and
commission
expenses*

Commentary: yes.

The definition of “investment returns” expressly provides that “related investment expenses” are deducted from proceeds realized from investing contributions. Commission expenses are normal investment expenses taken into account when calculating net returns on an investment. [Reg., s.1(1)]

- 3.6 Are employer contributions that have not vested by the entitlement date divided between the spouses? What about employer contributions that were not vested at the start of the relationship?

*Employer
contributions*

Commentary: employer contributions not vested by the entitlement date are not divided between the spouses.

Regulation, s. 9 divides “contributions to the plan to the credit of the member.” Until they are vested, contributions to the plan are not credited to the member because, if they do not vest, the member will never become entitled to them.

Where the unvested contributions are sizeable, a spouse may seek to divide the benefits by a compensation payment from the member. [FLA, s. 97] Under Regulation, s. 27(4), a spouse may choose to either (a) postpone valuation of a compensation payment until it is determined whether unvested entitlement vests, or (b) have the valuation proceed “assuming the entitlement will vest, but adjusting it to take into account the contingency that the member may die or leave employment before vesting.”

Even if employer contributions were not vested at the start of the relationship, they are taken into account determining the former spouse's proportionate share if they are vested at the date of that calculation (any other approach would be inconsistent with the policy of the FLA to credit a spouse with the value of property that spouse brought into the relationship).

- 3.7 What does the administrator do if it does not know the value of a defined contribution account at the “commencement date” and therefore cannot calculate the “pre-relationship contributions”?

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*Record
keeping:
pre-relationship
value*

Commentary: the administrator has been under an obligation to make sure it can value benefits as of past dates ever since July 1, 1995, when pension division rules were first enacted in B.C. In any case where records are not available, the only option is to estimate the pre-relationship contributions pro rata based on the value as of the closest date for which there are records.

- 3.8 Is a defined contribution plan now required to keep records that allow it to pin-point the value of any member's benefits on a daily basis to establish the pre- relationship contributions?

*Are daily records
required?*

Commentary: no.

Some defined contribution plans determine the account balance on a daily basis, others on a monthly basis, still others annually. The Regulation does not require plans to change the methods currently employed to value a member's benefits. What it does is require plan administrators to change how they keep historical records of those values.

At one time, many administrators did not keep historical records of the value of benefits. The effect of the Regulation, however, is to require administrators to retain records of the valuations they make (whether on a daily, monthly or annual basis). Where the record-keeping is not on a daily basis, the plan will be required to estimate the value by interpolation.

- 3.9 How long must a plan retain records to determine the pre-relationship contributions?

*Retaining
records*

Commentary: records must be retained indefinitely.

The Regulation requires a major change in record-keeping, but does not set out a limitation period.

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- 3.10 Suppose a plan has members in a number of provinces. If a member moves to B.C. and pension division is required, must the plan produce past records to establish the pre-relationship contributions?

*Records for
non-B.C.
members*

Commentary: no. There is no requirement on a plan to retain records for members that earn pension entitlement outside of B.C. The pre-relationship contributions would have to be estimated on a pro-rata basis. [See para. 3.7]

- 3.11 When is a transfer of the spouse's share made on a locked-in basis?

*Locked-in
transfers:
when made*

Commentary: the B.C. PBSA provides that once benefits vest the entitlement is "locked-in" (that is, must be used to produce life income at a later date: see para. 10.4). A pension vests after 2 years of continuous plan membership. [PBSA, s. 26(1), although this is slated to change under the new PBSA (Bill 38-2012)] If the member's entitlement is locked-in, the transfer to the spouse must be made on a locked-in basis. A transfer cannot change the status of the entitlement from locked-in to not locked-in.

Different locking-in rules apply depending on the legislation governing the plan. Federal rules differ from provincial rules. Make sure you know which rules apply. [See further Chapter 10, particularly para. 10.5]

- 3.12 Part of the member's benefits consist of pre-1993 contributions that are not locked-in. The spouse would like the transfer to be on a non-locked-in basis. Can the spouse elect to have the spouse's share paid only from the pre-1993 contributions?

*Pre and
Post
Jan. 1993
Contributions*

Commentary: no. The formula for division cannot be manipulated in that way. The legislation does not permit it because the transfer would not protect the retirement income for the spouse. [See para. 3.11. For the meaning of "locked-in" see para. 10.4]

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3.13 What transfer options are available to a former spouse?

*Transfer
options*

Commentary: [See Chapter 10]

3.14 If the plan is teetering on insolvency, or becomes insolvent, does that affect the former spouse's entitlement?

*The plan is
insolvent*

Commentary: to the extent that restrictions apply to the plan and its ability to transfer assets, they will apply to the former spouse's entitlement. [*Jordison v. Jordison*, [1996] B.C.J. No. 2694 (S.C.)] See para. 2.15.

3.15 The member has terminated employment and has elected to keep the benefits in the plan and make regular withdrawals. Does *FLA*, s. 117 apply, so all the former spouse can receive is a share of the withdrawals? Or can the former spouse still receive the share of the defined contribution account by a transfer from the plan?

Variable pension

Commentary: the former spouse can still receive the share of the defined contribution account by a transfer from the plan. The rules for dividing defined contribution accounts still apply so long as there are funds in the account, even after a member begins making withdrawals from the account or begins receiving a variable pension. [*FLA*, s. 114(1)]

At one time, the only option available to a member who terminated employment was to use the funds in the defined contribution account to purchase a lifetime annuity (the reason these plans are often called "money purchase plans"). However, the *ITA* was amended to permit other options (such as transferring the funds to a Life Income Fund from which regular withdrawals can be made subject to prescribed annual minimum and maximum amounts, or keeping the funds in the plan and receiving benefits in the same way).

If an annuity was purchased for the member using the funds in the defined contribution account, then the former spouse would receive the share under s. 117 (see Chapter 5).

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- 3.16 I'm entitled to a share of my former spouse's defined contribution account. The plan has a good track record for investments. Can I keep my share in the plan?

*Retaining
share in
plan*

Commentary: yes, if the administrator consents [*FLA*, s. 114(2)(b)]. You would have to file a Form P2 to become a limited member of the plan, and your share would be administered “subject to the same terms and conditions that apply to members”. The maximum administrative fee for a transfer from a defined contribution account is \$175. But if the former spouse becomes a limited member of the plan instead, the maximum fee increases to \$750.

CHAPTER IV. DIVIDING UNMATURED BENEFITS IN A HYBRID PLAN (*FLA*, s. 116)

A hybrid plan is a plan that determines a member's benefits by a combination of defined contribution and defined benefit principles [definition of "hybrid plan", FLA, s. 110]

If the member's benefits are in a hybrid plan, and the member's pension has not commenced at the time of the breakdown of a relationship, it is divided in two steps. [FLA, s. 116]

The defined contribution account is divided using the methods that apply to defined contribution plans (see Chapter 3). The part determined by a defined benefit provision is divided by the methods that apply to defined benefit plans (see Chapter 2).

The FLA also permits options for both parts of the plan to be treated in the same way (all divided as if all benefits were determined by defined benefit provision, or all divided as if all benefits were in a defined contribution account) if that option is available to the member, or if the administrator consents. [FLA, s. 116(2)]

4.1 Is the plan subject to the *FLA*?

*Subject to
FLA?*

Commentary: [See para. 1.8 and Chapter 1 generally]

4.2 Does the *FLA* apply to an agreement or court order made before the *FLA* comes into force?

*Pre-March 18, 2013
arrangements*

Commentary: [See Chapter 14]

4.3 The member's benefits are in a hybrid plan. The plan administrator has offered the spouse the option of leaving the portion that is based on defined contribution principles in the plan and dividing the whole of the pension benefits as if they were in a defined benefit plan, using the benefits in the defined contribution account at a later date

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to purchase additional, or enhanced, pension entitlement. May the spouse accept that option?

*Alternatives
to hybrid
split*

Commentary: yes. This is expressly permitted under Part 6. [FLA, s. 116(2)(b)]

- 4.4 Benefits under our plan are determined primarily by a defined benefit provision, but there is a defined contribution component that is used to purchase additional pension entitlement when the member elects to have the pension commence. Are we a hybrid plan?

*Is our plan
a hybrid plan?*

Commentary: yes, the rules under FLA, s. 116 that apply to hybrid plans would govern the division of the benefits. The defined contribution account would be divided by an immediate transfer to a prescribed plan for the former spouse, and the former spouse would become a limited member with respect to the benefits determined under the defined benefit provision.

- 4.5 Benefits under our plan are determined primarily by a defined benefit provision, but there is a defined contribution component that is used to purchase additional pension entitlement when the member elects to have the pension commence. We permit former spouses to deal with the former spouse's share of the defined contribution account in the same way. What administrative fee would we charge for this?

*Charging the
admin. fee*

Commentary: the administrator can charge up to \$175 for the transfer from the defined contribution account and up to \$750 for registering the former spouse as a limited member. [Reg., s. 28]

In this case, you are doing both: dividing the defined contribution account between the parties, and the former spouse is becoming a limited member of the plan. So the maximum that could be charged is \$175 plus \$750, or \$925.

- 4.6 Our plan consists of a defined contribution account, combined with a minimum defined benefit. Are we a hybrid plan? How are these benefits divided?

Minimum

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defined benefit

Commentary: yes, this meets the definition of “hybrid plan” in *FLA*, s. 110. It is not possible to provide advice on this point without more information but the guiding policy is that all aspects of the benefits must be shared. It would not be consistent with the requirements of the *FLA* to base the former spouse's share just on the defined contribution account if there is value in the minimum benefit provision.

CHAPTER V. DIVIDING A PENSION THAT HAS COMMENCED (*FLA*, s. 117)

When a member chooses to have the pension commence and begins receiving monthly payments, the pension is said to “mature.”

*If the pension has commenced, or if an annuity has been purchased by or on behalf of the member, the benefits are divided by the former spouse becoming a limited member of the plan (by filing a Form P2 together with a copy of the agreement or order dividing the benefits). [*FLA*, ss. 117, 118, Reg., s.4(1)(b)]*

The limited member is entitled to a proportionate share of each benefit paid out under the plan until the limited member dies, or until the termination of benefits under the plan.

This method of pension division is completely different from the methods used for dividing benefits in local plans before pension commencement (which were discussed in Chapters 2, 3 and 4). Before pension commencement, the former spouse is entitled to receive a separate share of the member's benefits (although the division is deferred for benefits determined by a defined benefit provision).

For matured pensions, in contrast, the pension is left intact and it is the income stream that is divided. (The federal PBSA, however, permits a plan to amend its text to permit dividing a matured pension into two single life pensions: s. 25(7), and some other province's also permit this).

Where the benefits are in a defined contribution account, and the member has begun receiving benefits by withdrawals (such as under a variable pension option), an exception is made. Section 114 still applies to the funds in the defined contribution account, not s. 117, and the former spouse can still receive a share of the defined contribution account by a transfer from the plan, as discussed in Chapter 3.

5.1 What is a matured pension?

What is a matured pension?

Commentary: benefits under a plan mature when a member begins to receive the pension. [See para. 2.55]

Technically, if a member is making withdrawals from a defined contribution

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account (sometimes referred to as receiving a variable pension) this would qualify as a matured pension. But the rules that apply to matured pensions do not apply if the benefits remain in a defined contribution account, because they can still be directly divided with the former spouse without prejudicing third parties. [FLA, s. 114(1)] See para. 3.15.

5.2 Is the matured pension in a plan subject to the *FLA*?

*Subject to
FLA?*

Commentary: [See para. 1.8 and Chapter 1 generally]

5.3 Does the *FLA* apply to an agreement or court order made before the *FLA* comes into force?

*Pre-March 18, 2013
arrangements*

Commentary: [See Chapter 14]

5.4 Section 117(2) says the spouse gets a share of benefits until the earlier of the termination of benefits under the plan or the death of the spouse. When do benefits “terminate?”

*When does
a pension
“terminate?”*

Commentary: a pension that is single life, without a guarantee period, is only payable for the life of the member. Such a pension would terminate when the member dies. The spouse would receive no further share after the member’s death.

If there is a survivor benefit payable (to anyone) when the member dies, the benefits do not terminate until the survivor benefit terminates. If the spouse is not the beneficiary of the survivor benefit, the spouse would receive a proportionate share of the amount payable to the beneficiary. [See Chapter 8]

5.5 How does the benefit split of a matured pension work where the spouse is a joint annuitant?

Where

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*the spouse
is the
joint
annuitant*

Commentary:

For example: the member's pension pays \$1000 per month. The limited member is entitled to 1/5 of benefits paid under the pension. The limited member is the joint annuitant. The survivor benefit reduces the monthly payment to 60% on the death of the member.

While both member and limited member are alive, the member receives \$800/mo. The limited member receives \$200/mo.

If the member dies first, the limited member becomes entitled to the whole of the survivor benefit: \$600/mo. [FLA, s. 124(5)]

Why does the legislation adopt a policy that increases the limited member's entitlement after the member dies? For these reasons:

- **any other approach would require opening up the pension and setting aside elections already made. Some, but not all, administrators would be capable of doing this. It would be difficult, for example, to open up the matured pension where an annuity has been purchased from a third party.**
- **in the example the limited member receives more money when the member dies, but that will not always be the case. More commonly, where the limited member's only source of income is the pension, the member may have been paying support, which ends when the member dies. Or the pension would have been divided by giving the limited member a greater share to promote the limited member's economic self-sufficiency.**
- **the arrangement, more often than not, will be a fair one. The member and spouse, in happier times, addressed their minds to the income needs of the survivor. They agreed to accept a slightly smaller pension during their joint lives to ensure that the survivor had an acceptable level of income after. The breakdown of a relationship probably affects not at all the level of income needed by the survivor.**
- **the member is advantaged if the member survives the limited**

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member. The member's share of the pension in the example remains at \$1000/mo. all of which, after the limited member's death, is paid to the member.

- 5.6 The member married shortly before pension commencement. As the *PBSA* required, the member took the pension with a 60% survivor benefit. The spouse and member have now split up. Can the member change the survivorship election?

*Can the
survivorship
election
be changed?*

Commentary: no, not under B.C. law. In most cases, the amount of the benefits payable during the parties' joint lifetimes, and the benefits payable after the death of a party, have been determined on an actuarial basis. The amounts are specific to the parties and their life expectancies.

The idea is that, whatever form of pension chosen by the member at pension commencement, the overall payments required under the plan will have the same value. But this would not be the case if the member could change the beneficiary of the survivor benefits at some later date. If the survivor benefits were based on the member's spouse being 50 at the date of pension commencement, changing the beneficiary of the survivor benefit to someone who is 5 years younger (and therefore likely to live 5 years more than the original spouse) would substantially alter the plan's financial obligations.

So it is not a simple thing to change who is entitled to survivor benefits on the death of a member. It would involve commuting the pension, and recalculating everything again to determine the amounts payable, based on the life expectancies of the member and the new beneficiary. B.C. law does not require an administrator to commute a joint annuity.

It is uncommon, but legislation in a few other jurisdictions does provide for commuting a joint annuity, or at least permitting an administrator to amend the plan text to provide for that. In some cases, an administrator will permit a limited window after pension commencement (60 days, for example) for the member to select another option.

See para. 5.20 concerning what constitutes an effective waiver of survivor benefits.

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- 5.7 How does the benefit split of a matured pension work where spouse2 is entitled to a proportionate share of the pension, but spouse1 is the joint annuitant?

*Spouse1 v.
Spouse2*

Commentary:

Example: the member is married to spouse1 at the date of pension commencement and takes a pension that pays a 60% survivor benefit. The member's pension pays \$1200 per month. The survivor benefit reduces the monthly payment to 60% on the death of the member. The relationship fails and spouse1 becomes entitled to 1/4 of the benefits paid under the pension. The member remarries. When the second relationship fails, spouse2 gets a court order giving the spouse a 1/2 interest in the member's remaining pension (or 3/8 of the entire pension).

This is a highly unusual scenario, because the rules under Part 6 only provide for the division of accruals during the relationship, and none of the pension would have been earned during spouse2's relationship with the member. (It is, however, open to a court to divide the member's remaining pension in this situation, under *FLA*, s. 95, if the Part 6 rules operate in a way that is significantly unfair having regard to specified factors. Moreover, *FLA*, s. 129 expressly permits the reapportionment of pension entitlement having regard to support needs.)

Before the failure of the member's second relationship, the divided pension would give the member \$900/mo. and spouse1 \$300/mo. When the second relationship fails, the member gets \$450/mo. and spouse2 \$450/mo., while spouse1 continues to receive \$300/mo.

If spouse1 dies first, the right to the full pension reverts to the member, but because it is subject to the interest in favour of spouse2, their respective portions would be recalculated under the terms of their pension division arrangements. If spouse2 is entitled to half of the benefits, then each would now receive \$600/mo.

If the member dies first, spouse1 receives the entire survivor benefit, \$720/mo. Because spouse2's interest arose after spouse1 became the joint annuitant, spouse2 would receive no share of the survivor benefit payable on the member's death. Spouse2's share ends when the member dies.

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- 5.8 How does the benefit split of a matured pension work where spouse1 is entitled to a proportionate share of the pension, but spouse2 is the joint annuitant?

*Spouse2 v.
Spouse1*

Commentary:

Example: member and spouse1 separate, but do not divide family property. In the meantime, the member forms a marriage-like relationship with spouse2. The member retires and takes a joint and 60% survivor pension with spouse2.

Because spouse1 delayed in advancing rights, the situation has become somewhat complicated. Under the legislation, spouse1 is entitled to a proportionate share of the pension and of the survivor benefit. [FLA, s. 117]

A problem like this is less likely to occur under Part 6. If well advised, spouse1 will send the plan Form P1 when the relationship ends. Then, when the member makes elections on retirement, the administrator must give spouse1 30 days notice before acting on them. [Reg., s. 9] That will give spouse1 time to advance the claim to the pension benefits.

- 5.9 Spouse1 is registered with our plan as a limited member and has been receiving a share of the member's matured pension. The member died and there is a survivor benefit payable to spouse2. Can we pay spouse2 the survivor benefit?

*Dividing benefit
between spouses*

Commentary: no, the administrator must pay each spouse their respective shares.

A limited member is entitled to a share of all benefits paid under the pension. [FLA, S. 117(2)] That would include a share of the survivor benefit payable to spouse2. Spouse2 would be a trustee for that share, [FLA, s. 144(1)] but the plan administrator is required to pay spouse1's share directly to spouse1. (Compare this situation with the situation considered in para. 5.7).

- 5.10 If the income stream under a matured pension is being divided between the parties, and the limited member dies before the member, does the plan keep the portion previously paid to the limited member?

*After the
limited*

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*member
dies*

Commentary: no.

In no situation involving the division of a matured pension will the plan keep the portion that had been paid to the limited member during the limited member's lifetime. Under the legislation, the amount formerly paid to the limited member will now be paid to the member. [FLA, s. 117(2)]

***If the pension is single life:* on the death of the limited member, the limited member's share is paid to the member.**

***If the pension is joint life:* the terms of the survivor option determine the amount that will be paid to the member.**

- 5.11 On a benefit split of a matured pension, is a limited member entitled to a share of the unexpired guarantee period when the member dies?

*Dividing the
unexpired
guarantee
period*

Commentary: yes.

If the limited member is beneficiary of the guarantee period, the limited member receives all of it. If the limited member is not the beneficiary, the limited member receives a share of it. [FLA, s. 117(2)]

These are the same principles that apply generally to dividing a postretirement survivor benefit [See paras. 5.7, 5.8 and 5.9] Payments made for the balance of the guarantee period would qualify as "benefits" paid under the plan, and therefore subject to division under s. 117(2).

- 5.12 When the member retired, spouse1 waived the joint annuity. The member elected a 10 year guarantee and designated spouse1 to be the beneficiary. The relationship ended two years later and spouse1 became a limited member of the plan.

The member changed the beneficiary of the guarantee period under the plan to spouse2. The member has now died and the guarantee period has not yet expired. Is this the result?

- spouse1 continues to receive the proportionate share of the pension until the guarantee period expires,

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- during the guarantee period, after paying spouse1 the proportionate share of the pension, the remainder is paid to the deceased member's new beneficiary,
- if spouse1 dies before the guarantee period expires, the full pension is paid to the new beneficiary for the duration of the guarantee period?

*Beneficiary
of the
unexpired
guarantee
period*

Commentary: this would be the result if the member can lawfully change the beneficiary designation. Typically, when a spouse signs the prescribed waiver for survivor benefits, the waiver specifies what is being received in exchange. If the waiver specified that the spouse was the beneficiary of the guarantee period, this would restrict options available to the member for changing the designation.

- 5.13 The member signed a false statement on retirement saying the member had no spouse. The member took a single life pension. In fact the member had a spouse, and the spouse has now delivered to the plan a Form P2 and an order giving the spouse a share of the pension. What can the plan do in this situation?

*The member
files a false
statement*

Commentary: if the plan had no notice of the order, nor of the existence of the spouse at the date of the member's retirement, there is no obligation on the administrator to open up the pension. The spouse's entitlement would be limited to a share of the single life pension. The spouse, however, has rights against the member.

Some plans allow a 60 day (or longer) period following the start up of a pension in which elections can be changed. If the spouse moves promptly enough, this would enable the spouse to require (a) the plan to convert the pension into the form of a joint annuity (if the former spouse satisfied the definition of "spouse" at the relevant time) or (b) to treat the division as being of an unmatured plan, with the rights available under s. 115.

Some plans are considering amending their plan text to allow the trustees discretion to extend the period for changing elections as may be needed in any

situation where there is non-disclosure by the member.

This kind of problem is usually avoided by record-keeping practices. Plans typically keep records about whether members have spouses. When a member retires, a plan that has a record of the existence of a spouse should require a good deal of convincing if the member purports to be unmarried.

- 5.14 Why does the *FLA* specify that a matured pension is divided by the administrator splitting the income stream between the parties?

*Plan-administered
benefit split
v. other
pension division
methods*

Commentary: the legislation adopts the policy that once the member's pension has commenced, undoing the arrangements made when the member retired would prejudice the plan too much. For example, in many cases, an annuity will have been purchased from a third party. Moreover, in most cases appropriate elections will have been made protecting both spouse and member. [See para. 5.5]

- 5.15 Is a plan-administered division of the income stream between the parties preferable to a *Rutherford* Order?

*Why not
use a
Rutherford
split?*

Commentary: the legislation requires the administrator to be responsible for dividing the monthly payments between the member and former spouse. In contrast, a *Rutherford* order requires the member to administer the benefit split. A plan-administered benefit split is better because the spouse doesn't have to rely upon the member. In many cases under the law that applied before B.C. adopted pension division legislation, the spouse was often required to bring further proceedings to enforce the division because the member declined to pay. In contrast, under Part 6, the spouse looks directly to the administrator for all entitlement to the pension.

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- 5.16 The member and spouse separated. The member retired and took the minimum joint annuity on the spouse. The spouse has now sent in Form P1. What obligations does the plan have?

*Form P1 and the
plan's obligations*

Commentary: the administrator must send the member a Form P6 advising that the Form P1 has been received. The plan should advise the spouse that the pension has matured (that is, is being paid). Until the plan receives a Form P2 with a court order or agreement recognizing the spouse's share in the pension, the administrator must continue to pay the member the entire pension.

When the plan receives the Form P2 and court order or agreement, it will be responsible for dividing the pension by a benefit split. [FLA, s. 117] The spouse will become a limited member and entitled to a proportionate share of each monthly pension payment. Rights on the death of the limited member or the member will be in accordance with the terms of the joint annuity.

There is no obligation on the administrator to undo the joint annuity election. [See para. 5.6, 5.8 and 5.20]

- 5.17 One spouse purchased an annuity from us. The funds did not come from a pension plan or RRSP. The other spouse is claiming an interest in the annuity. What rules apply in that case?

*Annuity and
tax withholdings*

Commentary: an annuity is divided in the same way as a matured pension [FLA, s. 118].

The administrator is required to make separate tax withholdings for the parties. In any case where there is a conflict between the FLA requirement and the *Income Tax Act*, however, the ITA would apply to determine the administrator's withholding obligations. If withholdings must be made from the member's share that are attributable to payments made to the former spouse, however, the former spouse would be required to compensate the member. [FLA, s. 141(1) and (2)]

- 5.18 We have received a Form P2 and other documents for the former spouse to become a limited member. The member's pension is in pay. Everything appears to be in order. What time frame do we have to implement the pension division arrangements?

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*Implementing
division of
pension in pay*

Commentary: the former spouse is entitled to receive from the plan administrator a proportionate share of the payment made on or after the 30th day that the administrator has received all required documents. [FLA, s. 137(2), Reg., s.15]. See Table 5 in Chapter 15.

- 5.19 We have received a Form P2 and other documents for the former spouse to become a limited member. Reg., s. 16(a) says that we have 60 days to register the former spouse as a limited member. Reg., s. 15 says that the former spouse is entitled to a share of payments made 30 days after we receive the required documents. Which applies?

*Implementing
division of
pension in pay*

Commentary: there is no conflict. They both apply. You have 60 days to register the former spouse as a limited member. But if a pension payment is made 30 days after all the required documents are received, even if you have not finalized the registration of the former spouse as a limited member, the former spouse is entitled to a share of that payment. You would pay it to the former spouse once you have finalized the limited member registration.

- 5.20 The member has provided us with an agreement under which the former spouse has waived any claim to the member's pension. The member elected a pension that pays a 60% survivor benefit to the former spouse. The member is insisting that we change the beneficiary of the survivor benefit to the member's new spouse. What are our obligations?

*Waiving the
60% survivor
benefit*

Commentary: B.C. law does not provide for the administrator commuting the pension and change the beneficiary of the survivor benefits: see para. 5.6.

Even if it were possible (under the plan text or governing legislation), the consent of the former spouse would be required. An agreement or court order where the spouse waives a share of pension benefits would not constitute a waiver of the survivor benefits. These are separate aspects of the pension. The survivor benefits are regarded as the property of the former spouse [FLA, s.

124(5)], so a waiver of the benefits paid during the member's lifetime would not extend to the survivor benefits payable to the spouse after the death of the member.

Under the *FRA*, if the agreement or court order clearly pertains to the survivor benefits, a waiver of those benefits is effective. However, even in that case, the waiver doesn't mean that the member can then change the beneficiary of the survivor benefits. It means that the former spouse would be under an obligation to pay the benefits, when and as received, to the person designated by the member: *Wice v. Wice*, 2009 BCSC 655.

As can be expected, cases concerning this issue involve a detailed consideration of what was intended under the agreement or court order. The survivor benefits usually constitute an extremely valuable asset. So it is important that a former spouse not accidentally waive entitlement to this benefit.

Under the *FLA*, a spouse is permitted to waive survivor benefits, but a prescribed form must be used so that this is done intentionally and with full knowledge of what is being given up [*FLA*, s. 126, Form P5]. Even a court order is ineffective to deprive a former spouse of survivor benefits unless the order expressly refers to s. 126(2) of the *FLA*.

There are very rare cases where it may make sense for the spouse with survivor benefits to agree to pay them to a third party.

In those cases, the spouse with the survivor benefits can sign the Form P5 waiver and then, as under the *FRA*, pay whatever the agreed share is to the other beneficiary. The duration of the survivor benefits would still be linked to the former spouse's lifetime.

There is no obligation on the plan administrator to assist and pay the benefits directly to the other beneficiary, and there is a general consensus that it would not be a good idea for the administrator to agree to do it (because of the problems of verifying whether the spouse entitled to the survivor benefits remains alive and entitled to receive them, for one thing, but there are a number of other pitfalls best to avoid entirely, such as tax issues).

This may seem a complicated method for waiving postretirement survivor benefits, but the policy underlying this part of the *FLA* is not to promote waiver, but to ensure that it is not done accidentally. (The expectation is that either no well advised former spouse would consent to such a waiver, or the circumstances where it would be reasonable will be exceptional.)

If a Form P5 has been delivered to the plan administrator, this cannot be withdrawn by using Form P7, "Withdrawal of Notice/Waiver of Claim": see para.

15.43.

- 5.21 The member elected a 50% survivor benefit on pension commencement. The parties have requested us to confirm that the survivor benefit will not be affected by their separation or divorce. What rules apply in that case?

*Are survivor
benefits affected
by changed
spousal status?*

Commentary: both the federal *PBSA* (s. 22(2)) and the B.C. *PBSA* (s. 35(1)) require that the pension in favour of a retired member pay a postretirement survivor benefit where the member has a spouse *at the date the pension commenced*: *Smiley v. Ontario Pension Board* (1994), 4 R.F.L. (4th) 275 (Ont. Gen. Div.).

This is a common provision in pension standards legislation. The member can elect another form of pension, but since it is the spouse that is entitled to the survivor benefits, this can only be done if the spouse signs a waiver prescribed under the pension standards legislation.

The general rule is that, provided spousal status exists when the member begins to receive the pension, a subsequent change of spousal status does not deprive the former spouse of the right to receive the postretirement survivor benefit. There are exceptions, however. [See para. 8.8]

CHAPTER VI. OTHER TYPES OF PLANS - SUPPLEMENTAL BENEFITS AND BENEFITS FOR SPECIFIED INDIVIDUALS (*FLA*, ss. 119 AND 121)

Supplemental Benefits

The Income Tax Act sets a ceiling on how much can be contributed to a pension plan on behalf of a member, and how much can be paid to a member under the member's pension. Some employers provide additional benefits through supplemental pension plans. These are not registered under the ITA, nor typically under provincial pension standards legislation. These plans are often unfunded, and benefits are typically financed through company revenue. These benefits qualify as family property and rules for dividing them are set out in FLA, s. 119.

A former spouse entitled to a share of benefits in a supplemental pension plan would become a limited member of the plan by sending the administrator a copy of the agreement or order dividing the benefits together with a Form P2. When the member elected to have the benefits commence, the limited member would be entitled to receive a share in the form of a separate pension payable for the limited member's lifetime. The separate pension would be determined in the same way as a limited member's separate pension under a plan registered under the ITA (see Chapter 2). The only difference is that the former spouse is not automatically entitled to take the share by a lump sum transfer, or to take the separate pension before the member chooses to have the pension commence.

If the supplemental pension has already commenced by the time the relationship ends, the former spouse would become a limited member of the plan and receive a share of the income stream, in the same way as for a matured pension under a registered plan (see Chapter 5).

Other options are available, with the consent of the plan administrator.

Benefits for Specified Individuals

The Income Tax Act permits pension plans to be set up for specified individuals (in general terms, a person who has 10% or greater ownership interest in the company, or who is related to the owner). The ITA also provides that any member earning more than a specified amount is also a specified individual, which means

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that non-connected high-income employees can also come with the definition of specified individual (in ITA Reg. - 8515(4)(b)).

One kind of plan for specified individuals is an Individual Pension Plan (one having three or fewer members). IPPs are becoming increasingly more popular and common. IPPs can be set up to permit contribution amounts that exceed those permitted for defined contribution plans and RRSPs.

A former spouse entitled to a share of benefits in a plan for a specified individual would become a limited member of the plan by sending the administrator a copy of the agreement or order dividing the benefits together with a Form P2. When the member elected to have the benefits commence, the limited member would be entitled to receive a share in the form of a separate pension payable for the limited member's lifetime. The separate pension would be determined in the same way as a limited member's separate pension under a plan registered under the ITA (see Chapter 2). The only difference is that the former spouse is not automatically entitled to take the share by a lump sum transfer, or to take the separate pension before the member chooses to have the pension commence.

If the pension has already commenced by the time the relationship ends, the former spouse would become a limited member of the plan and receive a share of the income stream, in the same way as for a matured pension under other local plans (see Chapter 5).

Other options are available, with the consent of the plan administrator.

- 6.1 Members of our plan are entitled to supplementary benefits financed from company revenue. The additional benefits are based on the member's average earnings and regular pensionable service that exceed the maximum amounts CRA will allow to be paid under registered pension plans. Are these divisible?

SPP

Commentary: in a supplemental pension plan are divisible under Part 6 [FLA, ss. 119, and 110, definition of "supplemental pension plan"], but the rules that apply are different from those that apply to benefits in a registered local plan (which are addressed in Chapter 2).

Under the FLA, the former spouse becomes a limited member of the plan and is permitted to receive the share of the benefits as a separate pension payable for the former spouse's lifetime, when the member elects to have the pension commence. The separate pension would be determined in the same way as a limited member's separate pension under a registered plan (which is also addressed in Chapter 2)

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Some supplemental pension plans are designed to pay out benefits for a limited time – 10 years being common. The limited member would be entitled to the same choices available to the member, so in these cases, instead of a separate pension, the limited member would be entitled to a separate share payable over the same specified period.

- 6.2 Why isn't the former spouse entitled to choose to receive a separate pension at any time after the member is eligible to do that? If that option is fair for benefits in registered plans, why is it not appropriate for supplemental pension plans?

*Why are options
for dividing SPP
restricted?*

Commentary: the fact that other options are not automatically available is in recognition that these types of plans are typically not funded, so requiring the administrator to pay the former spouse's interest before pension commencement could prejudice the plan. Any of the other options for dividing the benefits that apply to registered plans, however, are available with the consent of the administrator [FLA, s. 119(3)(a),(b) and (c)].

- 6.3 Our supplemental pension plan is set up based on defined contribution principles. Notional contributions are made to the plan, and notional investment returns allocated to the defined contribution account. The former spouse is making a claim to a share of these benefits. Are they divisible in the same way as registered defined contribution plans, by a transfer from the account to the credit of the former spouse?

*SPP is
DC Plan*

Commentary: no. The rules in s. 114 that apply to defined contribution accounts are only applicable to a supplemental pension plan with the consent of the administrator. [FLA, s. 119(3)] In most cases, where the plan is not funded, the administrator would not consent. The former spouse must become a limited member of the plan and would be entitled to receive the share when the member elects to have the pension commence (in the form of an annuity, instalments over a specified period, or withdrawals from the plan), by a separate pension, or by any of the other options available to members.

If the administrator consents to an immediate transfer, it must be realized that because supplemental pension plans are not registered under the ITA, the rules that apply to the roll-over of the tax incidences of registered pension

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benefits would not apply. The payment would be made to the former spouse in cash and subject to taxation in the year received.

- 6.4 The member terminated employment and is receiving benefits in the form of a lifetime pension. How does the former spouse receive the former spouse's share in this situation?

Lifetime pension

Commentary: s. 117 applies, and the former spouse becomes a limited member of the plan and entitled to receive a proportionate share of the monthly benefit paid to the member until the earlier of the death of the former spouse and the termination of benefits under the plan.

See, further, Chapter 5, with respect to the various issues that can arise in dividing a matured pension.

The administrator is required to make separate tax withholdings for the parties. In any case where there is a conflict between the *FLA* requirement and the *Income Tax Act*, however, the *ITA* would apply to determine the administrator's withholding obligations. If withholdings must be made from the member's share that are attributable to payments made to the former spouse, however, the former spouse would be required to compensate the member. [*FLA*, s. 141(1) and (2)]

- 6.5 The member terminated employment and is receiving benefits under the supplemental pension plan by specified instalments. The member elected to receive the instalments over a 10 year period. How does the former spouse receive the former spouse's share in this situation?

*Instalment
payments*

Commentary: s. 117 applies. See para. 6.4. Payments to the former spouse would continue until the earlier of the death of the former spouse and the termination of benefits under the plan. In this case, the benefits would terminate when the 10 years of instalment payments are completed.

- 6.6 The member was receiving a supplemental pension, but payments were subject to a forfeiture provision. In this case, the benefits were forfeited when the member took employment with a competitor of the plan sponsor. How does this affect the former spouse's entitlement?

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Forfeiture

Commentary: payments to the former spouse cease. The former spouse's entitlement is subject to the same terms and conditions that apply to the member's benefits. If the member's benefits are adjusted, suspended or end under the terms of the supplemental pension plan, this also applies to the former spouse's entitlement. If a forfeiture clause applies to the member's supplemental benefits, it applies equally to the former spouse's proportionate share of those benefits. [FLA, s. 119(4)]

The former spouse, however, may have a remedy against the member. [FLA, s. 120]

- 6.7 When the member's supplemental pension commenced, the limited member received a separate pension. The member has taken steps that forfeit the supplemental benefits. How does this affect the limited member's separate pension?

*Forfeiture of
separate pension*

Commentary: the same rules apply as were discussed in para. 6.6. The separate pension is also forfeited.

- 6.8 What is the administrative fee for dividing benefits in a supplemental pension plan?

Admin. fee

Commentary: the maximum fee that can be charged for registering a former spouse as a limited member of a supplemental pension plan is \$750. If the former spouse is becoming a limited member of the registered pension, and of the supplemental pension plan to the registered plan, the administrator could charge a maximum of \$1500. Usually in these cases, however, the administrator would charge only \$750 for the registration.

- 6.9 How is the limited member's proportionate share of the supplemental benefits determined?

*Proportionate share
of SPP*

Commentary: if the agreement or court order providing for the division does not address how the former spouse's proportionate share is determined, it would be determined in accordance with the Regulation. If the supplemental benefits have matured into a pension, or if they are unmatured and deter-

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mined under a defined benefit provision, s. 17 of the Regulation provides that the proportionate share is determined on a pro rata basis using pensionable service. See para. 2.17. This will produce the same result as the limited member's share of the registered pension, unless benefits under the supplemental pension plan are determined by a formula that differs from the registered plan.

If the benefits are determined by defined contribution provisions, s. 20 of the Regulation would apply. See para. 3.4.

- 6.10 Under our supplemental pension plan, benefits are calculated by determining the whole of the member's entitlement if there were no *ITA* ceiling, determining the part paid under the registered pension and then providing the balance through the supplemental pension. If the limited member takes a share of the registered benefits before the member's pension commences, it would be easiest for us to determine the limited member's share of the supplemental benefits at the same time. Can we do that?

*Providing separate
pension for SPP before
member's pension commences*

**Commentary: yes the option can be made available to the limited member.
[FLA, s. 119(3)(d)]**

- 6.11 Under our plan, different defined benefit provisions are used for determining entitlement to the registered pension and the supplemental benefits and, in this case, the member has been granted pensionable service under the supplemental pension plan in addition to time actually worked. How is this dealt with?

*Formula for SPP
is different from
formula for RPP*

Commentary: if the parties' agreement or order does not address this directly, the proportionate share of each would be determined separately under Reg., s.17. Additional service granted under the supplemental pension plan would be determined by when it was "accumulated". If the grant was made during the relationship, then it would be included in the numerator of the formula.

- 6.12 Isn't there a problem calculating entitlement to the registered benefits and the supplemental benefits at different dates? The CRA ceiling changes over time, and this

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means that benefits that at one time would have been paid under the supplemental pension plan could, at a later date, be considered paid under the registered pension. How is this dealt with?

*Benefits migrate
from SPP to RPP*

Commentary: yes, in some cases, this migration of benefits occurs between the registered and supplemental pension plans as a factor of plan design. The default rules do not directly address this issue, beyond the general principle that the limited member is entitled to a proportionate share of all of the benefits under each of the plans. See para. 6.10 for one solution. Otherwise, the directions of the parties on this issue should be requested.

- 6.13 The former spouse is a limited member of our supplemental pension plan. The member has died before pension commencement. How does this affect the limited member's entitlement?

*Death of member
and limited member's
share of SPP*

Commentary: see para. 8.13.

- 6.14 Our plan does not have a filed valuation report, nor any defined average age of retirement. This is probably the case for most supplemental pension plans. How do we determine the average age of retirement?

*Average age of
retirement and SPP*

Commentary: the ability of the administrator, under Reg., s. 24(5), to select an age was designed to deal with this issue. In most cases, it would be appropriate to use the same average age of retirement that applies to the benefits under the registered pension plan. See para. 2.55.

- 6.15 The court order we received refers to dividing benefits under the plan we administer. The member is also entitled to benefits under a supplementary plan, but the order does not refer to those benefits. Are they subject to division as well?

*Order or agreement
silent about SPP*

Commentary: the usual rule is that, if the agreement or order is silent about

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benefits, the benefits are deemed to be allocated 100% to the member. [*FLA*, s. 111(2)] That doesn't mean that the former spouse might not be able to establish entitlement to a share of the benefits, because the *FLA* expressly provides that nothing affects the court's jurisdiction under Part 5 to review an agreement or court order. [*FLA*, s. 111(3)] A major factor for determining whether a court should intervene at a later date is whether there has been adequate disclosure of a contested asset. [*FLA*, s. 93(3)(a)]

However, another principle also applies in these cases. If the benefits are integrated with the registered pension, then it that would usually be sufficient to require them to be included in the division (unless the order or agreement clearly provided that they were excluded): *Thoburn v. Thoburn* (1993), 46 R.F.L. (3d) 265 (BCSC)

- 6.16 We administer an Individual Pension Plan. The member's former spouse is claiming a share of the benefits in the plan. How would this be divided?

*Dividing
an IPP*

Commentary: benefits in an IPP are divisible under Part 6. [*FLA*, s. 121] But the rules that apply are different from those that apply to benefits in other registered local plans (which are addressed in Chapter 2).

Under the *FLA*, the former spouse becomes a limited member of the plan and is permitted to receive the share of the benefits as a separate pension payable for the former spouse's lifetime, when the member elects to have the pension commence. The separate pension would be determined in the same way as a limited member's separate pension under a registered plan (which is also addressed in Chapter 2).

- 6.17 Why isn't the former spouse entitled to choose to receive a separate pension at any time after the member is eligible to do that? If that option is fair for benefits in other registered plans, why is it not appropriate for an IPP?

*Why are options
for dividing IPP
restricted?*

Commentary: the fact that other options are not automatically available is in recognition that these types of plans are set up for 1 to 3 members. Dividing benefits before pension commencement for a plan with few members may cause problems for plan funding, and may prejudice other members. For this

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reason, the former spouse's entitlement is to receive a separate pension when the member chooses to have the pension commence. Any of the other options for dividing the benefits that apply to registered plans, however, are available with the consent of the administrator. [FLA, s. 121(3)]

- 6.18 The former spouse is a limited member of the individual pension plan for the member. The member has died before pension commencement. How does this affect the limited member's entitlement?

*Death of
member & IPP*

Commentary: the death of the member ends the deferral of the pension division arrangements. See para. 8.2.

- 6.19 The *FLA* refers to "specified individuals within the meaning of the *Income Tax Act*". But the *ITA* has two different definitions of "specified individual", one in s. 120.1 of the *ITA* which deals with residents who are under 17, and another in the *ITA* Regulation, s. 8515(4), which deals with pension plans. Which one applies?

*ITA definition
of specified individual*

Commentary: Regulation, s. 8515(4), which deals with pension plans, applies. S. 120.1 has no application to benefits under Part 6. To the extent that there is any confusion on this point, an ancillary amendment to the new *Pension Benefits Standards Act* (Bill 38-2012), will add an express reference to Reg., s.8515(4).

- 6.20 Pension plans for connected members (generally IPPs) do not file actuarial valuations with the superintendent. How do we determine the average age of retirement?

*Average age of
retirement and IPP*

Commentary: the ability of the administrator, under Reg., s. 24(5), to select an age was designed to deal with this issue. See para. 2.55.

CHAPTER VII. DIVIDING BENEFITS IN AN EXTRAPROVINCIAL PLAN (*FLA*, s. 123)

If the member's benefits are not in a local plan, they are subject to the rules that apply to "extraprovincial plans." [FLA, s. 123, s. 110, definition of "extraprovincial plan"]

No forms are prescribed for use with extraprovincial plans.

A pension in an extraprovincial plan is divided by legislated methods applied in the plan's jurisdiction.

If there is no legislated method of pension division, the benefits are divided in the same way as a matured pension (see Chapter 5) by the administrator dividing the monthly pension payment between the member and former spouse. (Even if there is a legislated method, a B.C. court can order a plan-administered benefit split if the legislated method produces a result that is significantly less generous than a plan-administered benefit split.)

7.1 What is an extraprovincial plan?

*Extraprovincial
plan
defined*

Commentary: an "extraprovincial plan" is a plan that is not a "local plan." The definition of "local plan" in *FLA*, s. 110 is broad, and includes private plans registered outside B.C., and federally regulated occupational plans, to the extent the member accrues pension entitlement while working in B.C. or the plan has any B.C. members. So it is important not to conclude too quickly that the benefits are in an extraprovincial plan (and therefore not subject to the rules that apply to local plans) just because it is registered outside of B.C. [See para. 1.12 and Chapter 1 generally]

7.2 How are benefits in an extraprovincial plan divided?

*Dividing
benefits in an
extraprovincial
plan*

Commentary: if the plan is subject to legislation that sets out a method of pension division, the legislated method applies. [FLA, s. 123(2)(a)]

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If the governing legislation does not provide a method of pension division, the benefits are divided by waiting until the pension commences and the administrator paying the former spouse a proportionate share of each monthly pension payment.(sometimes referred to as a “plan administered benefit split”). [FLA, s. 123(2)(b)]

A court can also order that this method apply, if the legislated method would operate unfairly having regard to policies adopted under B.C. pension division legislation. [FLA, s. 123(3)]

There may be some difficulty enforcing such an arrangement against a plan located outside B.C. As a practical matter, having the member pay the former spouse the proportionate share of the monthly payments may be the only available method of dividing the pension. If problems in this respect arise, the spouse is protected by s. 144, which designates the member to be a trustee of the spouse’s proportionate share (so, if the administrator pays any part of the spouse’s share to the member, the member would be under an obligation to pay it to the spouse).

Where a court’s ability to make an order dividing property on the breakdown of a relationship is limited because the property is located outside the province, the court will often adjust the division by reapportioning entitlement to property located within the province.

7.3 Is the Canada Pension Plan an extraprovincial plan?

*CPP is an
extraprovincial
plan*

Commentary: yes. [See *Coulter v. Coulter*, (1998) 60 B.C.L.R. (3d) 6 (C.A.)] In accordance with the *FLA* rules that apply to extraprovincial plans, CPP entitlement would be divided under the rules set out under the *Canada Pension Plan Act*, R.S.C. 1985, c. C-8.

7.4 Are federal public service pension plans (which are subject to division under the federal *Pension Benefits Division Act*) extraprovincial plans?

*Federal public
service plans are
extraprovincial
plans*

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Commentary: yes. [See *Baker v. Baker*, (1998) 34 R.F.L. (4th) 364 (BCSC)] In accordance with the *FLA* rules that apply to extraprovincial plans, federal public service plans would be divided under the rules set out under the *Pension Benefits Division Act*.

- 7.5 The member earned benefits under the Canada Post Plan while employed in B.C. Is the Canada Post Plan an extraprovincial plan?

*Benefits earned
from employment in
B.C.*

Commentary: no, in these circumstances (because the benefits were earned from employment in B.C.) it would qualify as a local plan. The Canada Post Plan is governed by the federal *Pension Benefits Standards Act*. That Act provides that provincial law governs the division of pension benefits (although it also permit benefits to be divided by an assignment to the former spouse under s. 25(4)). The definition of “local plan” in *FLA*, s. 110 includes plans that, under their governing legislation, are subject to provincial law. See para. 1.11.

- 7.6 Does a former spouse have security for the interest in benefits in an extraprovincial plan?

*Security for
spouse's interest?*

Commentary: if the legislation governing the plan provides a pension division mechanism, that depends upon the provisions of that legislation. If the benefits are being divided by the administrator (or member) being responsible for dividing the income stream after pension commencement, the spouse may have limited, or no, security through the plan itself and alternative arrangements (such as life insurance) may need to be explored. See para. 8.7.

CHAPTER VIII. SURVIVOR BENEFITS (*FLA*, ss. 124-126)

Pension entitlement does not simply vanish when a member dies. Preretirement survivor benefits are usually payable when a member dies before pension commencement. Postretirement survivor benefits may be payable when a retired member dies.

Preretirement Survivor Benefits

Preretirement survivor benefits may take one of two forms: a pension or a lump sum. If the member is survived by a spouse (as defined under the PBSA), the spouse has the option of receiving the preretirement survivor benefit in the form of a pension. [PBSA, s. 34(1)(a)] If the member is not survived by a spouse, the preretirement survivor benefit is usually a lump sum paid to either (a) a beneficiary designated by the member, or (b) the member's estate. [PBSA, s. 34(1)(b)]

The preretirement survivor benefit replaces the pension benefits. Many plans provide for preretirement survivor benefits that, depending upon vesting rules and length of pensionable service, have the same commuted value as the pension would have (this is the case, for example, for B.C. public sector plans, and also federal public sector plans). Under the PBSA, the minimum preretirement survivor benefit is 60% of the commuted value of the pension. In some cases, however, the value of the benefit may be significantly less than the value of the pension as of the date of the member's death.

Issues about dividing preretirement survivor benefits don't arise when it is a defined contribution account that is being divided, because the account is divided immediately: see Chapter 3. Questions about preretirement survivor benefits only arise where a limited member has to wait for a share of entitlement determined by a defined benefit provision.

Postretirement Survivor Benefits

Postretirement survivor benefits may also take the form of either a continuing pension or a lump sum payment. If, when the member retires, the member has a spouse (as defined under the PBSA), the member must, unless the spouse signs a prescribed waiver, take the pension in the form of a joint annuity that will provide a pension to the survivor of the member and the spouse that pays at least 60% of the amount received during the parties' joint lifetimes.

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If the waiver is signed, and a member takes a single life pension with a guarantee period and dies before the guarantee period expires, a beneficiary designated by the member, or the member's estate, will receive the benefits for the balance of the guarantee period.

Some plans provide additional options for which the general rules described in this Chapter may not apply.

Competition Between Limited Member and Others

In any of these cases, questions may arise concerning the rights of a member's former spouse under an agreement or court order dividing pension entitlement. If the member forms a new relationship, rights between the former spouse (spouse1) and the current spouse (spouse2) may come into conflict. The FLA and the PBSA, however, set out rules for resolving the conflict.

This Chapter deals with the questions that arise when the member dies before or after retirement. Additional information about issues that may arise when the member dies after retirement can also be found in Chapter 5.

- 8.1 If the limited member dies before the member's pension commences and before receiving a share of the benefits, what happens to the limited member's share?

*Limited
member
dies before
the member*

Commentary: the limited member's share is paid to the limited member's estate in a lump sum. [FLA, s. 124(4)] This is the same rule that applied under the FRA.

The limited member's share is based on the commuted value of the benefits at the date of the limited member's death, assuming the pension commences at the average age of retirement. [Reg., s. 23(3)(d) and (4)]

- 8.2 The member has died before pension commencement. The limited member has not yet received the share of benefits by a lump sum transfer or separate pension. The member's new spouse, not the limited member, is the beneficiary of the preretirement survivor benefits. What rights does the limited member have?

Member dies

*before benefits
divided*

Commentary: under the *FLA*, the death of the member ends the deferral of the pension division arrangements. The limited member's share of the benefits must be determined the day before the member's death. [*FLA*, s. 124(2)] The Regulation, allows a bit of flexibility on the valuation date, however, by providing that the valuation not be earlier than the end of the month immediately proceeding the death of the member. [Reg., s. 23(3)(c)]

The administrator is required to give the limited member 30 days notice before taking any steps as a result of the member's death. If, at the date of the member's death, the member was eligible for pension commencement, the limited member can choose between the lump sum transfer option, or receiving a separate pension. [Reg., s. 24(2)] Otherwise, the limited member would receive the share by a lump sum transfer.

The member's benefits would then be adjusted to reflect the division. [Reg., ss. 21 and 22].

Survivor benefits payable to the member's new spouse would be calculated by the administrator based on the member's adjusted entitlement. [Reg., s. 22]

[See Introduction to Chapter 8 and para. 2.9]

- 8.3 The member died before pension commencement. There is an old beneficiary designation in favour of a former spouse, who is also a limited member of the plan. Although that relationship ended years ago, the member never changed the beneficiary designation to someone else. Is the former spouse entitled to all of the preretirement survivor benefits, or just the proportionate share of the pension benefits under Part 6?

*Unchanged
beneficiary
designation*

Commentary: all of the survivor benefits. Entitlement to survivor benefits is determined by the member's beneficiary designation (subject to the statutory priority of a new spouse under the *PBSA*). [*FLA*, s. 125] If the former spouse is the beneficiary of the preretirement survivor benefits, and there is no new spouse, the spouse will receive the whole of the survivor benefits.

There are a number of cases dealing with unchanged beneficiary designations after the breakdown of a relationship, so a remedy may be available. Certainly, in most cases, the fairest resolution will be for the court order or agreement to provide that the former spouse receives only the former spouse's share of the

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benefits under Part 6, and no share of preretirement survivor benefits payable under the member's remaining share. [See para. 2.5 and 11.3]

- 8.4 The *FLA* rules are different from the *FRA* rules. Under the *FRA*, if the member died before the benefits were divided, a limited member was only entitled to receive a share of the preretirement survivor benefits. What happens if the agreement or order was made before the *FLA* came into force? Do the *FRA* rules still apply, or does the *FLA* govern this question?

*Does the FLA
apply to pension
div. arrangements
under the FRA?*

Commentary: the *FLA* applies to pension division arrangements put in place under the *FRA*. [*FLA*, s. 253(2)]

If the agreement or order dividing the benefits does not expressly direct what is to happen in any situation, so that the pension division arrangements have to be determined by reference to the default rules under the Regulation, and a question arises after the *FLA* comes into force, then the question will be decided by reference to the *FLA* default rules.

This means that,

- if the member dies after the *FLA* comes into force,
- the limited member has not already received the proportionate share of the pension benefits by a lump sum transfer or a separate pension, and
- the agreement or order dividing the benefits does not provide directions concerning what is to happen in this circumstance,

then the *FLA* rules will apply. The limited member will receive a share of the benefits determined the day before the member's death. See para. 8.2

The member's pension will then be adjusted to reflect the division, and survivor benefits determined based on the member's remaining share will be payable to the member's new spouse, designated beneficiary or estate.

The reason for this is that the *FRA* approach, which based the limited member's share on the preretirement survivor benefit, meant that in some cases the limited member could receive substantially more, and in other cases, substantially less, than the share that would have been received had the pension benefits been divided during the parties' joint lifetimes. The *FLA* rule means

that the limited member will receive the same share in either case.

The other problem with the *FRA* approach is that the default rules were based on the assumption that the survivor benefits would have a lower value than the pension, and so allocated all of the survivor benefits that accrued during the relationship to the surviving spouse. This worked reasonably well where the survivor benefits were reduced in value, but meant that the surviving spouse received double the share in any case where the survivor benefits equalled the commuted value of the benefits.

Cases often arose where the parties intended an equal division of the benefits, but did not over-ride the default rules. When the member died, and these questions had to be resolved, they were typically resolved by the parties agreeing to rectify the court order or agreement to provide for an equal division. Typically, giving the surviving spouse a disproportionate share meant that there were insufficient resources to support the deceased member's dependents.

There may be cases where the agreement or order is silent about what is to happen in this scenario, and the limited member, or the member's estate, may argue that the *FRA* rules should continue to apply. If the application of those rules would produce a result that differs from an equal division of the benefits, however, it is important to note that the court retains a jurisdiction to revise pension division arrangements in any case where they would operate inappropriately in the existing circumstances. [*FLA*, s. 131]

It is unlikely that a court would exercise this jurisdiction to enforce an accidentally unequal division of the benefits. In cases where the parties intended an equal division of benefits (the usual case) but the default rules did not achieve that, the usual remedy would be rectification based on their intentions, or based on mutual mistake: see, for example, *Madsen v. Madsen*, 2012 BCSC 1535 (which dealt with rectification where the parties mistakenly specified the wrong legislation to govern the division of the benefits).

- 8.5 The *FLA* provides that the *FLA* default rules do not apply in any question where the administrator consulted with the parties. What is the policy rationale for that?

*Administrator
consults
with parties*

Commentary: the default rules under the *FLA* apply in any case where the parties' agreement or order does not adequately deal with the issue. In any case

where the administrator consults with the parties, it is to confirm the parties' intentions and to receive directions on particular issues. [FLA, s. 253(3)] See para. 14.18. In that case, the directions would govern the issue. In contrast, if there is some kind of discussion or conversation between the administrator and the parties, but it does not result in further directions, then that discussion would have no significance.

This is really no different from the main case, where if the parties' agreement or court order provides adequate and lawful directions on a specific issue, this means that there is no reason for the *FRA* or *FLA* default rules to apply.

- 8.6 The member died (before pension commencement). Spouse1 has served the plan administrator with a court order made 5 years ago providing that she is entitled to a share of the benefits and that the member was required to designate her as beneficiary of the preretirement survivor benefit. But the member designated spouse2 to be the beneficiary of any preretirement survivor benefit. Who is entitled to the benefit?

*Required beneficiary
designation
not made*

Commentary: in a case like this, the best course may be to interplead (pay the money into court if it is a lump sum benefit, or if it is an annuity, file materials with the court registry describing the nature of the asset). Spouse1 and spouse2 must then establish their claims in court.

As to the principles that govern rights in this situation: the court will protect the interests of spouse1 notwithstanding that the beneficiary designation was not made. There may be a remedy against the member's estate for breach of the court order. If the benefits have already been paid to a third party, spouse1 may have a claim against the third party. [*Gregory v. Gregory*, (1994) 92 B.C.L.R. (2d) 133 (S.C.); and *Fraser v. Fraser*, (1995) 16 R.F.L. (4th) 112 (BCSC)] If the administrator made the payment without any notice of the court order, there would be no liability on the administrator to pay the benefits twice.

It is also worth noting that, under the *FRA*, it was held that pension division arrangements finalized before the member's death are enforceable even if the former spouse has not become a limited member by that date: *Martens v. Martens*, 2009 BCSC 1477. Filing the forms to become a limited member was regarded as an administrative formality, not a necessary requirement to perfect substantive rights to the benefits. Since the same administrative provisions are carried forward under the *FLA*, it is expected that a court would consider the earlier precedent binding. See para. 13.24.

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- 8.7 Is there any reason why a member should designate the limited member a beneficiary of the preretirement survivor benefits? Is this necessary to provide security for the limited member receiving the proportionate share?

*Designating
limited member
beneficiary*

Commentary: once a former spouse becomes a limited member, the limited member is secure for the proportionate share and would look to the administrator to enforce that interest. The idea that a former spouse should be designated beneficiary of survivor benefits derives from the original *Rutherford* Order, where that was the only possible way of providing some measure of security to the former spouse for receiving the proportionate share. With the implementation of pension division legislation in B.C. the beneficiary designation became unnecessary as security since 1995.

That does not mean that there may not be other reasons and situations where it would be appropriate for a member to keep a former spouse as beneficiary, just that it's not a necessary part of dividing pension benefits in local plans under Part 6. If providing security for the former spouse's share is the only reason for the designation, it may well cause unexpected problems depending on how future events unfold (such as where the benefits are divided, but the beneficiary designation is left unchanged. *See* para. 2.5.)

If the benefits are in an extraprovincial plan, however, a beneficiary designation can provide important security for the former spouse, and the member is required to make the beneficiary designation. [*FLA*, s. 123(4)] *See* para 7.6.

- 8.8 Under our plan, a postretirement survivor benefit is payable only if the survivor continues to have spousal status at the date of the member's death. We are administering a division of a matured pension. But the limited member no longer qualifies as a spouse. What happens when the member dies?

*Change in
spousal status
after
retirement*

Commentary: for plans subject to the federal *PBSA* or the B.C. *PBSA*, a subsequent change in spousal status by divorce or annulment would not affect the plan's obligation to pay a survivor benefit. [*See* para. 5.21] This is also common

feature of the pension standards legislation across Canada.

If, however, the member's pension commenced before the relevant legislation came into force, the plan text would be determinative on these issues. Similarly, if the spouse waived the statutorily defined survivor benefit when the member retired, then the plan text would be determinative of benefits paid under the form of pension selected by the member.

An issue in cases where there is a waiver is whether the former spouse had full knowledge of what was being received in exchange for what was given up. In many instances, the information provided by the plan administrator is silent, or ambiguous, about entitlement depending upon continued spousal status and it is expected that, in those cases, the waiver would be ineffective.

The new *Pension Benefits Standards Act* (Bill 38-2012), once in force, will deal with this situation. Section 81(2) of the Bill provides that change of spousal status after pension commencement does not affect entitlement to survivor benefits elected at pension commencement, whatever the plan text may say.

The administrator should consider amending the plan text to comply with the requirements of the governing legislation.

- 8.9 Section 117(4) says that if the limited member dies before receiving all of the limited member's share, the administrator must pay that to the limited member's estate. What happens if the limited member chooses a separate pension, and dies after payments commence?

*Payment to limited
member's estate*

Commentary: section 117(4) applies only where the limited member has not yet chosen to receive the proportionate share by a lump sum transfer or a separate pension. If the lump sum transfer has been made, there is no remaining entitlement. Similarly, if a separate pension is chosen, the separate pension represents all of the limited member's share. It will have been calculated based on the election made by the limited member. If the limited member chose a single life pension, all of the limited member's entitlement is received as of the death of the limited member, by definition (subject to any residual benefit that may be available if, for example, payments were less than contributions associated with the share).

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- 8.10 What is the proportionate share if the limited member predeceases the member before the benefits are otherwise divided?

*Proportionate share
if limited member
dies before
the member's
pension commences*

Commentary: if the limited member dies before the member's pension commences, and before the benefits are otherwise divided, a proportionate share of the commuted value of the benefits is paid to the limited member's estate. [FLA, s. 124(4)] See para. 8.1. The proportionate share would be calculated by the same formula that would have been used if the benefits were divided during the parties' joint lives. [FLA, Reg., s.17] See also para. 2.17.

- 8.11 The member has provided us with a separation agreement in which the former spouse waives any claim to the pension benefits. The member is receiving the pension and there is a 60% survivor benefit for the former spouse. The member wants to change the beneficiary of the survivor benefit to his new spouse. What are our obligations?

*Agreement waives
survivor benefits*

Commentary: see para 5.6.

- 8.12 The member died (before pension commencement). The member and the former spouse (spouse1) separated 20 years ago. The member was in a marriage-like relationship with a new spouse (spouse2) at the date of his death. Who is entitled to the survivor benefits? Spouse1 has now filed a Form P1.

*Competition between
separated spouse
and common law
spouse*

Commentary: the administrator must pay the survivor benefits to spouse2. Although spouse1 may have rights in this situation, a court order must be obtained to advance them.

Because spouse1 has filed a Form P1, the administrator must first give spouse1 30 days notice before paying out to spouse2. If in this time spouse1 gets an injunction or starts legal proceedings, consider interpleading. [See para. 8.6]

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- 8.13 The former spouse is a limited member under our plan, with entitlement to a proportionate share of registered benefits and also of a supplementary pension. The former spouse has not yet received the share of the benefits by a separate pension or a lump sum transfer. The member has just died. We know that the registered pension is now to be divided with the limited member, under *FLA*, s. 124(2). But what is the position with respect to the supplemental benefits?

*Death of member
and supplemental
benefits*

Commentary: Part 6 does not automatically provide for the division of supplementary benefits on the death of the member because not all supplementary plans provide for the payment of benefits if the member dies before pension commencement. If, however, the supplemental pension plan pays a preretirement survivor benefit, then the former spouse is entitled to a share of the supplemental benefits determined the day before the member's death. [*FLA*, s. 124(1)(b) and (2)] The Regulation allows a bit of flexibility on the valuation date, however, by providing that the valuation be not earlier than the end of the month immediately preceding the death of the member. [Reg., s. 23(3)(c)]

- 8.14 The member has applied for pension commencement. Our records show that the member has a spouse. The member has provided us with an agreement under which the spouse waived any claim to the benefits. But the information provided shows that the parties have been separated for less than two years. Doesn't that mean that the former spouse still qualifies as a spouse under the *PBSA* rules? *PBSA*, s. 35(6) says that the obligation on the member to elect a 60% survivor benefit for a spouse doesn't apply if there is an order or agreement dividing the benefits, but it's not clear that includes a situation where the spouse waives a claim. How do we sort this out? Does the member have to elect a 60% survivor benefit for the former spouse? Does the member have to get the former spouse to sign the prescribed waiver under the *PBSA* to make another election?

*Former spouse
still qualifies as
spouse under PBSA*

Commentary: the agreement overrides the *PBSA* rules. Although not tested in court, the general consensus is that the *PBSA* provision covers this off but, regardless, the *FLA* deals comprehensively with this question. Once the benefits are divided, or a former spouse becomes a limited member, or there is an

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agreement adjusting for the former spouse's pension entitlement in some other way, or the former spouse waives any claim to pension benefits, the obligation on the member to elect the 60% survivor benefit no longer applies. [FLA, s. 145]

- 8.15 The member has died before pension commencement. The former spouse still qualifies as a spouse under the *PBSA* rules and so appears to be entitled to the survivor benefits. *PBSA*, s. 34(12) says that the priority of a spouse to preretirement survivor benefits does not apply if there has already been a division of the benefits. The member's personal representative has provided us with a copy of an agreement that provides that the former spouse waives any claim to the pension benefits. Does that come within s. 34(12)? Who is entitled to the preretirement survivor benefits?

*Former spouse
still qualifies as
spouse under PBSA*

Commentary: the same position applies as discussed in para. 8.14. The agreement overrides the *PBSA* rules. Although not tested in court, the general consensus is that the *PBSA* provision covers this off but, regardless, the *FLA* deals comprehensively with this question. [FLA, s. 145] The survivor benefits would be paid to the beneficiary designated by the member or, if none, to the member's estate.

CHAPTER IX. DISABILITY BENEFITS (*FLA*, s. 122)

Some pension plans are set up to provide a disability benefit to a member. The FLA provides for the division of these disability benefits [FLA, s. 122], but this provision does not apply to disability benefits paid under non-pension plans. This is because the FLA definition of “plan” [FLA, s. 110] refers to plans that provide pensions.

The FLA provides that compensation for disabilities is excluded property [FLA, s. 85(c) and (d)], and therefore not divisible between spouses when the relationship ends, unless the compensation is for lost income. Under the FRA, disability benefits were usually regarded as family assets and therefore theoretically subject to division between the parties. Even so, typically under the FRA, disability benefits were reapportioned so that the disabled spouse received them all. It is likely that, in most cases, a similar position will be adopted under the FLA.

In some cases, it is appropriate to divide disability benefits, such as where the non-disabled spouse has no ability to be self-supporting. In these cases, the FLA provides that the spouse can become a limited member of the plan and receive a share of the disability benefits in the same way as the spouse would receive a share of a matured pension. [FLA, s. 122. See also Chapter 5, which discusses dividing benefits after pension commencement.]

- 9.1 Our plan provides disability benefits in addition to pension benefits. The member's former spouse is a limited member of the plan. The member has qualified for disability benefits. The court order dividing the benefits doesn't refer to disability benefits. Is the limited member entitled to a proportionate share of them?

*Court order
silent*

Commentary: no. If the agreement or order is silent about disability benefits, they are deemed to belong to the member. [FLA, s. 122(3)] The limited member may be able to apply for a share of the benefits but, from the administrator's perspective, they must be paid to the member until the administrator is presented with an order or agreement to the contrary.

- 9.2 Does Part 6 affect the law relating to whether or not disability pensions qualify as family property?

Disability

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benefits:
divisible
family property?

Commentary: no. The *FLA* provides a mechanism for dividing disability benefits paid under a pension plan if there is an agreement or order that provides that the benefits are to be divided. But the fact that there is a mechanism for doing this does not affect the initial question under Part 5 of whether or not the spouse is entitled to share in those benefits at all.

9.3 Does Part 6 allow for the division of a disability benefit paid under CPP?

Disability
benefits
under CPP

Commentary: no.

It is likely that the same analysis applied under the *FRA* would mean that CPP disability benefits qualify as a pension within the meaning of Part 5 of the *FLA* and, as such, are family property by definition. [*FLA*, s. 84(2)(e). *Webb v. Webb*, (1985) 49 R.F.L. (2d) 279 (BCSC); *Coulter v. Coulter*, (1998) 60 B.C.L.R. (3d) 6 (C.A.)]

The Part 6 pension division rules, however, do not apply to CPP disability benefits. The CPP Plan qualifies as an “extraprovincial plan”: see para. 7.3. Division of CPP benefits is governed by the federal *Canada Pension Plan Act*, which provides for the division of unadjusted pensionable earnings between former spouses. If the disabled spouse was the family's main bread winner, a division of CPP will probably result in reducing the disability benefit, with no offsetting amount being payable to the member's spouse (at least until the spouse qualifies for the normal CPP benefit). For this reason, in *Coulter v. Coulter*, the B.C. Court of Appeal reapportioned the CPP disability benefit 100% to the member, and protected the spouse by awarding support. [See also para. 11.20]

The finding that a disability benefit (such as CPP disability benefits) qualifies as family property (because it is a “pension”) is only the beginning of the analysis. Entitlement to family property is subject to reapportionment under *FLA*, s. 95.

While courts will divide disability benefits, or order that compensation be paid for them, many courts, often with little analysis, will reapportion entitlement to provide the member with most, or all, of the benefit. The reason most

commonly cited under the *FRA* for finding that an equal division is unfair is the member's greater need for economic self-sufficiency. [See, for example, *Fuller v. Fuller*, [1998] B.C.J. No. 1738 (S.C.); *McNiven v. Feng*, [1995] B.C.J. No. 279 (S.C.); *Kossen v. Kossen*, [1999] B.C.J. No. 595 (S.C.)]

However, in later cases, courts have taken into account that the disability benefits may have significant value, and allocating them to the disabled spouse does not necessarily mean that their capital value should be ignored in arriving at a fair division of the remaining assets: *Hemstreet v. Hemstreet*, 2006 BCSC 64.

The factor of economic self-sufficiency is not included under s. 95 of the *FLA*, so it is not at this point clear how a court would deal with this issue under the new legislation. However, *FLA*, s. 95(2)(i) allows the court to consider any other factor that may lead to significant unfairness, which would seem broad enough to take into account a spouse's disabilities (and the value of disability benefits) in arriving at a fair division of family property.

- 9.4 Are disability benefits that are not paid under pension plans divisible between the parties when their relationship ends? If so, how are they divided?

*Disability benefits
that are not a
disability "pension"*

Commentary: the Part 6 rules apply to benefits that are paid under pension plans. Not all disability benefits will meet that definition. [See the Introduction to this Chapter]

If the disability benefit is not provided under a pension plan within the meaning of Part 6 of the *FLA*, but is nevertheless divisible family property under *FLA*, Part 5, the administrator may be prepared to assist in dividing the benefits. If not, the member could be required to divide each payment between the member and the spouse. [See *Webb v. Webb*, (1985) 49 R.F.L. (2d) 279 (BCSC); and *Coulter v. Coulter*, (1998) 60 B.C.L.R. (3d) 6 (C.A.), where the spouse's share took the form of support.]

- 9.5 Our plan provides disability benefits in addition to pension benefits. The member's former spouse is a limited member of the plan. The member has qualified for disability benefits. The court order dividing the benefits provides for dividing the disability benefits between the parties. What are our obligations with respect to making separate tax withholdings?

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*Tax
withholdings*

Commentary: it is not possible to provide any tax advice in this book and if tax issues arise, qualified professionals should be consulted. However, as a general principle, the *ITA* provisions that provide for the former spouses being separately taxed on their respective shares of *pension benefits* may not apply to disability benefits even if paid under a pension plan, so it may not be possible for the plan administrator to make separate withholdings. The plan may be required to make withholdings from the member's share, and the former spouse would have to compensate the member for the taxes payable on the former spouse's share. [FLA, s. 141]

- 9.6 If a court order or separation agreement is silent with respect to the disability pension, the former spouse can apply to become a limited member while the member is receiving a disability pension. Must the former spouse wait until the member's disability pension is converted to a regular pension (when the plan member reaches age 60) before receiving a proportionate share of the benefit, or could the former spouse apply for a lump sum transfer or a separate pension at the plan member's earliest retirement age despite the plan member being in receipt of a disability pension?

*Disability benefits
and limited member's
options*

Commentary: payment of disability benefits does not limit the options available to the limited member with respect to receiving a share of the pension benefits. In the case where the lump sum transfer option and the separate pension option would be available to the limited member if no disability benefits were being paid, those options continue to be available to the limited member notwithstanding the payments of the disability benefits.

- 9.7 Under our plan, a member receiving disability benefits is also continuing to accrue pensionable service. How is that taken into account?

*Disability benefits
and continued
accrual of service*

Commentary: in determining the limited member's proportionate share under Reg., s. 17, the service would be subject to the same rules that apply to any other accrual of service as if the member had been working and not disabled.

CHAPTER X. TRANSFER FROM A PLAN

A lump sum transfer of pension entitlement from a plan will occur in four situations:

(a) when the division is of funds in a defined contribution account [see Chapter 3],

(b) when the division is of benefits determined under a defined benefit provision before the pension commences, and the spouse elects to take a lump sum transfer at some time after the member becomes eligible for the pension to commence [see Chapter 2],

(c) when the administrator requires the spouse to accept a transfer because the share is beneath a prescribed threshold (under FLA, s. 139(b)), and

(d) in other special cases where a plan is prepared to make the transfer option available to the spouse.

In most cases, the pension entitlement will be “locked-in” (see para. 10.4) and must be transferred to a prescribed pension vehicle for the spouse (that is, the funds will be paid into an RRSP or another pension plan or be used to purchase an annuity). [Reg., s.26]

Where the pension entitlement is not locked-in, it may be transferred directly to the spouse (although such a transfer would trigger income tax consequences).

- 10.1 The separation agreement gives the spouse a share of the member’s unmatured benefits in a defined benefit plan. The administrator has offered to make an immediate transfer of a sum of money to an RRSP to satisfy the spouse’s entitlement. How does the spouse know if it’s a fair share?

Valuing the transfer

Commentary: such a transfer will be treated as a compensation payment in lieu of a proportionate share of the benefits. The spouse is not obliged to accept the trade-off. Reg., s.27 sets out some of the rules for calculating a transfer value in this situation. The valuation must make reasonable allowance for projected increases in the value of the benefits. Most plans that are prepared to make an immediate transfer, however, are structured to value the transfer on the assumption the member terminates employment immediately and does

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not commence receiving the pension until the normal retirement age (often 65). This usually places a smaller value on the benefits than is required under the Regulation. A person who has doubts must either retain an actuary to verify the calculation or consult a lawyer.

As to the impact of tax on a valuation, see 11.23.

The legislation does not stipulate how to adjust the member's benefits in this situation. Before agreeing to the option, a plan administrator should seek the member's consent.

- 10.2 The member's pension has not yet commenced. The benefits are determined by a defined benefit provision. Under Part 6, the spouse is entitled to have the administrator transfer a share to a locked-in RRSP when the member becomes eligible to have the pension commence. [FLA, s. 115(2)] Can the spouse require a plan administrator to make a transfer before the member becomes eligible for pension commencement?

*Can the spouse
require
the plan
to transfer
immediately?*

Commentary: no. [See the Introduction to this Chapter for times when the transfer can be made.]

- 10.3 One of the transfer options available to a spouse is to transfer the share of the benefits to an account in the same plan. Can the spouse require the administrator to do this?

*Transfer
to same
plan*

Commentary: no. This is available only with the consent of the administrator. [See paras. 2.39-40]

- 10.4 What are "locked-in" benefits?

*"Locked-in"
defined*

Commentary: "locked-in" benefits must be used to provide retirement income for their owner's lifetime. If B.C. law applies, the life income can start when the person reaches age 55 (or an earlier age, if that was available under the plan

from which the funds were transferred.)

If the member's benefits are locked-in, a transfer of a share of them to the spouse must also be on a locked-in basis (that is, they cannot be cashed out and can only be used to produce a life income).

The lock-in rules that apply to the spouse's transferred funds are essentially the same as those that apply to the member: the former spouse may use the locked-in funds to produce a life income when either the former spouse or the member reaches age 55 (or an earlier age, if that was available under the plan from which the funds were transferred.) [*PBSA* Reg., s.30 (6.1)]

Another option is available where the funds are subject to the lock-in rules under the federal *PBSA*. In that case, funds transferred into an RRSP can be converted into a LIF for which there is no minimum age for the commencement of the life income. [See para. 10.5]

Locking-in rules are determined by the pension benefits standards legislation of the territory having jurisdiction over the plan. The rules vary, so it is important to confirm the applicable legislation. B.C. has quite limited unlocking options (for more information, refer to the excellent resources on the B.C. Financial Institutions Commission website at:

www.fic.gov.bc.ca

and, in particular, the information for plan members booklet at pp. 7 and 8:

<http://www.fic.gov.bc.ca/pdf/Pensions/InformationForPlanMembers.pdf>).

In contrast, some jurisdictions have quite flexible unlocking rules.

- 10.5 When may a former spouse use funds transferred from a federal public sector plan (such as the RCMP Superannuation Plan) to a locked-in RRSP to produce a life income by a transfer to a Life Income Fund?

*Federal
locking-in rules*

Commentary: the *Pension Benefits Division Act Regulation* [*PBDA*, Reg 17(1)] provides that a transfer of vested benefits is governed by the federal *PBSA* locking-in rules (under the federal *PBSA*, the transfer to a LIF can be made at any age). If the benefits are not vested, they are transferred to an RRSP or RRIF for the former spouse on a non-locked-in basis.

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- 10.6 We have a former spouse registered as a limited member of our plan. The member is still some years from being eligible for pension commencement. We have been provided with documents that establish that the limited member has a terminal illness. Our plan provides for unlocking benefits in that case for plan members. Can the limited member make this election as well?

*Unlocking –
terminal illness*

Commentary: yes. A limited member has the rights of a member. The *PBSA* provides for unlocking in these circumstances, if the plan text permits it. [*PBSA*, s. 40]

CHAPTER XI. AGREEMENTS

An administrator cannot assist in dividing pension benefits unless there is a court order, or a written agreement between the parties, expressly providing for the benefits to be divided. [FLA, s. 134]

If the parties wish, they can make an agreement using Form P9, "Agreement to Have Benefits Divided Under Part 6".

The member and former spouse can modify some aspects of pension division under Part 6 of the FLA by agreement. [FLA, s. 127] They can, for example, vary the spouse's share or waive division entirely.

But, for the most part, how pension division works is determined by the legislation.

- 11.1 The spouse wants a compensation payment in exchange for waiving entitlement to a share of the benefits. Can the member require the benefits be divided under Part 6 instead?

*The spouse
wants a
compensation
payment*

Commentary: probably. If the member will not agree to make a compensation payment, the spouse's only alternative is to seek a court order. [FLA, s. 111(1)]

In contrast to other jurisdictions (such as Ontario) where, until recently, the payment of compensation was the usual approach to adjusting pension entitlement, B.C. case law suggests that B.C. courts are reluctant to order a compensation payment. Except in a few circumstances, requiring a member to use current assets to purchase pension entitlement that the member may never live to enjoy is viewed as being unfair. [See para. 2.23]

This means that a compensation payment is usually only available with the member's consent. There are cases where the courts have awarded compensation instead of dividing the benefits based on special circumstances (typically where the value involved is low, or the parties are many years from reaching a retirement age).

- 11.2 The member's benefits are unmatured and determined by a defined benefit provision. The member refuses to agree that the spouse can accept a transfer of a share of the

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commuted value of the benefits when the member becomes eligible for pension commencement. What recourse does the spouse have?

*The member
won't agree
to a lump sum
transfer*

Commentary: if the benefits are to be divided under Part 6, there is no need to obtain the member's agreement for that option to be available. Part 6 provides that a former spouse who becomes a limited member may choose to receive the share by a lump sum transfer. The member may not realize that the rules for adjusting the benefits after a division mean that the member receives the same pension entitlement whether the spouse elects to take the proportionate share before, or at the same time, as the member's pension commences. [See paras. 15.30-15.35]

11.3 How formal must an agreement respecting pension division be in order to use Part 6 of the *FLA*?

*Features
of an
agreement*

Commentary: the detailed rules set out in Part 6 and the Regulation mean that all that is necessary in an agreement or court order is to: (a) identify the pension plan or the employment under which the member accrued the benefits, (b) provide that the benefits will be divided in accordance with Part 6 of the *FLA*, and (c) set out the dates for determining the portion of the benefits that will be divided. [See para. 1.3 and 2.22]

The *FLA* requires the agreement to be in writing, but there are no other formalities stipulated. A simple letter agreement between member and spouse, signed by both of them, would be satisfactory. The Regulation also sets out a form (Form P9) that can be used by the parties. As a matter of practice, however, it is preferable if signatures are witnessed on formal documents (by someone other than the other spouse).

Technical areas that the agreement must address will usually arise from making sure the remainder of the financial affairs of the spouse and member are resolved in ways that are consistent with the pension division arrangements. This is particularly true, for example, when determining when a support obligation should end. The *FLA* provides that support is reviewable when

a member starts receiving pension benefits and when a supported spouse becomes eligible to receive benefits. [FLA, s. 169] This is helpful, and certainly an improvement over the *FRA*, where these events often were not factors a court could consider. However, in most cases it will assist the parties to consider these questions in more detail, so that there is no doubt over what is to happen if, for example, a former spouse paying support decides to take early retirement, or a supported spouse decides to defer using a share of pension benefits.

In some cases, the default rules under the legislation need to be adjusted for the particular plan. See para. 8.3 and 11.13. Many plans are able to provide counselling on these issues. See para. 2.32.

If the agreement was made after July 1, 1995 (the date Part 6 of the *FRA* came into force) it is not even necessary for the agreement (or order) to refer to the Part 6 rules. Simply providing that the benefits are to be divided is sufficient to trigger the operation of pension division rules (under the *FRA*, and also under the *FLA*). Part 6 applies unless (a) the parties waive its application, or (b) the agreement or order is silent about pension division. [FLA, s. 111(1). See paras. 1.5, 1.7 and 12.2]

- 11.4 When the member and spouse divorced, the member agreed to keep the spouse as beneficiary of the benefits so that the spouse would get whatever benefits were available on the member's death. This arrangement was never written down, but the member kept his word and, when the member died (before pension commencement) the spouse ("spouse1") was still the beneficiary. However, the member had formed a marriage-like relationship in the meantime, with a person who is claiming the benefit as the member's new spouse ("spouse2"). What rights does spouse1 have in this case?

*Oral agreement
and beneficiary designation*

Commentary: the *PBSA* gives priority in this case to spouse2. [*PBSA*, s. 34(1); *PBSA*, s. 1 definition of "spouse"; *Re Hodgins Estate*, (1996) 11 C.C.P.B. 109 (BCSC)] Had the agreement to maintain the spouse as a beneficiary been in writing and qualified as a separation agreement, spouse1 would probably have had priority with respect to benefits accruing up to the date the new relationship commenced. Section 64 of the *PBSA* recognizes that pension benefits are subject to the terms of a separation agreement, but s. 34 provides that the current spouse has priority to preretirement survivor benefits, so until decided by a court, it's an open question concerning how these two provisions operate if they come into conflict. See also para. 13.15.

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Often, in these cases, spouse1 and spouse2 are prepared to divide the benefit. The plan administrator can follow their joint directions if they do reach a settlement.

- 11.5 If the spouse and member make an agreement under *FLA*, s. 127, can they require the plan administrator to allocate to the former spouse the share they agree upon?

*Departures from
Part 6:
Effect on
administrator's
responsibilities*

Commentary: yes. The *FRA* provided that the share specified by an agreement had to be beneath the 50% ceiling. To receive more than 50% of the benefits required a court order. In contrast, the *FLA* provides that the parties can specify any share, even one that leaves the member with none of the benefits. [*FLA*, s. 127] Experience under the *FRA* shows that members give up pension entitlement only reluctantly, so that the requirement for a court order merely introduced unnecessary costs into finalizing pension division arrangements. Moreover, the policy of the *FLA* is to encourage parties to resolve disputes by agreement or dispute resolution methods other than through litigation.

- 11.6 If the spouse and member have entered into an agreement that sets out the spouse's share according to a different formula from the Regulation, what is the "proportionate share?"

*Proportionate
share*

Commentary: if the agreement or court order adopts Part 6 of the *FLA* without modification, the Regulation defines the "proportionate share." [Reg., ss. 17(2) and 20(2)] But this applies only if the agreement or court order does not set out a specific share or formula for determining the former spouse's entitlement. If an agreement or court order does set out a specific share or formula, that would be the proportionate share (which could also be amended by a later agreement or court order) [*FLA*, ss. 127, 129 and s. 110, definition of "proportionate share", Reg., ss. 17(2), 20(2)]

- 11.7 The plan has received the prescribed forms, and an agreement that gives the spouse a larger proportionate share of the benefits than set out in the Regulation. Does the ad-

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ministrator have to use the agreed-upon proportionate share, or is the excess something the member must pay directly to the spouse?

*Spouse's share
exceeds
the share
under the
Regulation*

Commentary: the administrator must use the agreed-upon proportionate share. [See para. 11.5]

11.8 Can the benefits be divided partly by the member making a compensation payment and partly by requiring the administrator to administer the division of a specified share?

*Compensation
payment*

Commentary: yes. This is quite a common arrangement, particularly where both spouses have separate pension entitlement: see para. 11.14.

If benefits are being divided through a compensation payment, it would usually be prudent for the parties to either retain an actuary to calculate the payment, or consult a lawyer to make sure that the compensation payment is reasonable in the circumstances. It would be a mistake for the parties to pull a figure from the air. (In many cases, for example, parties mistakenly assume that a statement about contributions is a reasonable estimate of the value of the benefits.)

11.9 Should the agreement provide that the member is a trustee for the limited member?

*Trust
clauses*

Commentary: many lawyers think that it is a good idea to do so.

Agreements and court orders made before July 1, 1995 usually provided that the member was a trustee for the spouse as an aid to enforcing the terms for dividing the pension benefits. Part 6 allows the limited member to enforce all of these rights directly against the plan administrator. It also provides that in various situations where the member, or another person, receives benefits belonging to a former spouse, the recipient holds those benefits as a trustee for the spouse. Similarly, a former spouse who receives more than a specified share holds the benefits in trust for the member, or other person entitled to

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the benefits. [FLA, s. 144]

Nevertheless, as a matter of drafting, including a clause like this would help in those cases where the administrator, relying on apparently valid materials, pays the spouse's share to the member, or allows the member to make an election that prejudices the spouse. The trust provision served an important protective function, for example, in *Munro v. Munro Estate*, (1995) 4 B.C.L.R. (3d) 250 (C.A.).

- 11.10 We have received a Form P2 and an agreement dividing unmatured benefits determined under a defined benefit provision. We have registered the spouse as a limited member. One of the terms of the agreement provides that the member has the right to buy-out the spouse. What obligation does this place on the plan administrator? Can the parties agree to such an arrangement?

*Right to
buy out
spouse*

Commentary: the parties can enter into this agreement. The limited member designation for unmatured benefits in a defined benefit plan provides for a deferred division of the benefits. It is open to the spouse to subsequently waive an interest in the benefits and there is no restriction on when the waiver may be made. [FLA, s. 127] The spouse would do this by filing a Form P7 with the plan administrator.

The plan is protected in any event by the obligation to send a Form P6 notice to the member if the limited member elects to take a transfer of the commuted value of the benefits any time after the member becomes eligible for pension commencement.

- 11.11 The agreement dividing the pension entitlement sets out the interests of the spouse and member based on the assumption that the member will pay tax on the whole amount. But the legislation requires the administrator to make separate withholdings for the member and the spouse, which leads to a different result. What should the administrator do?

*Agreement
divides
benefits
on a
net basis*

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Commentary: [See para. 12.1]

- 11.12 The parties are considering the member keeping all of the pension and paying compensation to the former spouse for the share being given up. Is the average age of retirement used for determining a compensation payment?

*Determining
the compensation
payment*

Commentary: an actuary would determine the value of the former spouse's benefits in accordance with accepted actuarial practice in Canada. The policy underlying the regulation is the expectation that actuaries will apply the Canadian Institute of Actuaries Standards of Practice that relate to marriage breakdown.

However, the former spouse's entitlement under Part 6 would be determined having regard to the average age of retirement for the plan: *see* para. 2.55. So this factor could certainly be a relevant consideration for both member and former spouse in arriving at an agreement on the amount of compensation to be paid.

- 11.13 Does the agreement have to deal with beneficiary designation issues?

*Beneficiary
designation*

Commentary: not in the usual case. A former spouse's entitlement under Part 6 is secure without recourse to preretirement survivor benefits. See para. 2.5, 2.9, 8.2 and 8.7.

(There may be special circumstances where the parties will want to provide directions about making beneficiary designations, to the extent that is possible under governing legislation).

- 11.14 Both spouse and member have benefits under pension plans. Neither of their pensions has commenced. The member's benefits are worth more. Do both parties' benefits have to be divided? What options are available to them?

*Both spouse
and member
have pension
entitlement*

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*and neither
has retired*

Commentary: rather than divide both parties' pension entitlement, it might make sense to take both interests into account, but divide only one party's benefits. Calculating a limited member's entitlement based on average age of retirement means that in some cases, such as where one or both intends to take immediate or early retirement, setting off pension entitlement might preserve more overall pension value than dividing each party's pension entitlement separately.

- 11.15 The parties' agreement waived division of a matured pension. The pension is a joint annuity that provides the spouse with a 60% survivor benefit. Does the waiver affect the survivor benefits, or is the spouse still entitled to them?

*Waiving
division*

Commentary: the spouse is still entitled to the survivor benefits. The waiver can only relate to the pension payable during the member's lifetime. In this context, the survivor benefits are the spouse's separate property. [*FLA*, ss. 124(5), 126]

Even if the agreement specified that the survivor benefits were waived, it would be ineffective. The *FLA* provides that a waiver of postretirement survivor benefits is effective only if it is in prescribed form. [*FLA*, s. 126(2)(a), Form P5] See para. 5.6 and 8.11.

- 11.16 Both parties have benefits under pension plans. Under the terms of the agreement, each party's pension entitlement is to be divided in accordance with Part 6 of the *FLA*. But neither is to be divided until both parties have elected to have their pensions commence. The member of our plan has just started receiving the pension. What happens to the spouse's share until the spouse's pension commences?

*Deferring division
until both
retire*

Commentary: the agreement limits the methods of pension division available under Part 6. Essentially, the first pension to be divided must be divided by the rules that apply to matured pensions (that is, by a plan-administered split of the monthly payments made under the pension). [See Chapter 5]

The full amount of the member's pension will be paid to the member until the

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former spouse's pension commences. Under the terms of their agreement, the former spouse has no interest in the member's pension until that date.

When the former spouse's pension commences, the share becomes payable. At that time the former spouse will be entitled to a share of each monthly payment made after that date.

This is not that uncommon an arrangement. Where both parties have pension entitlement, this arrangement protects the retirement income of the party who retires first (the only other way to do this would be by requiring the former spouse who keeps working to pay support until retirement).

Not all administrators are prepared to accept this arrangement, because of the challenges it raises in determining when events outside of their control take place (such as when the working spouse's pension commences). A reasonable way of accommodating that concern is for the parties to deliver a copy of the agreement to the administrator for information purposes, but not apply to become a limited member of the plan until the date that the pension division arrangements are to be implemented.

- 11.17 Can a spouse waive rights to pension entitlement in an agreement made before the parties marry or commence living in a marriage-like relationship?

*Waiver:
prenuptial
or cohabitation
agreement*

Commentary: the question of waiver arises in two cases:

(a) entitlement to a preretirement or postretirement survivor benefit, and

(b) division of the pension entitlement on the breakdown of a relationship.

(a) entitlement to a preretirement or postretirement survivor benefit: the *PBSA* provides that a "spouse" is entitled to a preretirement or postretirement survivor benefit unless the spouse signs a waiver. Prescribed forms must be used for the waivers. [Note, however, that unmarried spouses, after they separate, and married spouses, after living separate and apart for more than 2 years, are no longer considered to be spouses under the B.C. *PBSA*, s. 1(1)]

The waiver of the postretirement survivor benefit must be signed within 90 days of pension commencement. [*PBSA*, s. 35(4) and (5). B.C. Reg. 455/99,

Form 2 of Schedule 2] This right could be waived in an agreement made at the beginning of the relationship, provided the prescribed form is used, but it would be of no use unless the member's pension commences within the next 90 days. [See also *PBSA*, s. 35(6) respecting orders]

The waiver of a preretirement survivor benefit can be signed at any time. [*PBSA*, ss. 31, 34. B.C. Reg. 455/99, Form 4 of Schedule 2)] This right could be waived in a prenuptial or cohabitation agreement, provided the prescribed form is used.

(b) *division of the pension benefits on the breakdown of a relationship*: Part 6 of the *FLA* governs pension division on the breakdown of a relationship. A spouse can waive any right to or interest in a member's pension or any benefit under it [*FLA*, s. 127], subject to the B.C. *PBSA* and the *FLA* restrictions on waiving survivor benefits. A spouse, therefore, can waive entitlement to have the benefits divided on the breakdown of a relationship in a prenuptial or cohabitation agreement, subject to court review under *FLA*, s. 93.

Part 6 stipulates that if a form of waiver is prescribed, it must be used, but currently no form for waiving pension division is prescribed. [*FLA*, s. 136] (There is a form (Form P7) for withdrawing pension division arrangements that were delivered to the administrator).

A separation agreement that is silent about pension entitlement functions as a waiver since it is deemed to allocate all of the benefits to the member. [*FLA*, s. 111(2)] However, this is subject to the court's jurisdiction to review agreements (under Part 5: see *Mann v. Mann*, 2009 BCCA 181). If an agreement is significantly unfair because it did not divide the pension benefits appropriately – whether there is an express waiver or the agreement is silent – a court may reapportion entitlement to the pension benefits, although a failure to divide the pension benefits is not, in itself, necessarily considered to be unfair: *Gariepy v. Gariepy*, [1996] B.C.J. No. 1544 (BCCA). Based on cases under the FRA, the most important factor for court intervention is if the pension benefits were not disclosed when the pension division arrangements were finalized, or if misleading information was provided about their value.

Special rules apply to waiving CPP credit splitting. [See para. 11.18]

- 11.18 The spouse and member have agreed that the spouse will not claim an interest in the member's CPP benefits. What is needed to waive entitlement?

*Waiving CPP
entitlement*

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Commentary: there is no prescribed form of waiver, but the waiver must

- **expressly mention the *Canada Pension Plan Act*, R.S.C. 1985, c. C-8, and**
- **state that “there be no division of unadjusted pensionable earnings under s. 55, 55.1 or 55.2” of the *Canada Pension Plan Act*, R.S.C. 1985, c. C-8. [CPP Act, s. 55.2(3)]**

Under the *CPP Act*, division can’t be waived unless provincial legislation is enacted to allow it. The *FRA* provided for waiving CPP entitlement, and this policy has been carried forward in the *FLA*. [*FRA*, s. 62 and s. 80(1)(c). *FLA*, s. 127(2)]

11.19 The agreement dividing family property did not divide Canada Pension Plan entitlement. But there was also no waiver of a division of unadjusted pensionable earnings. Is the spouse still entitled to apply for credit splitting?

*No CPP
waiver*

Commentary: yes. Division of unadjusted pensionable earnings under the *Canada Pension Plan* takes place unless there is an enforceable waiver. [See para. 11.18] There is no specific need for the agreement or court order to provide expressly for division if that is what the parties want. [*Verbeek v. Craig*, (1998) 37 R.F.L. (4th) 143 (BCSC)] However, an application for credit splitting must be made by one of the former spouses.

11.20 Are there any guidelines for determining whether or not to divide CPP in the context of a general division of family property?

*When to
waive
a division
of CPP*

Commentary: for information about whether in the specific case it is beneficial to split CPP credits, contact Services Canada. [1 (800) 277-9914]

In some cases, equalizing CPP will reduce the entitlement of the spouse with higher contributions without benefiting the other spouse.

Example 1: the *Canada Pension Plan* protects a spouse who is out of the work force for a period of years to look after young children.

Specified contribution periods (when the spouse received family allowance payments or the child tax benefit) are subject to a drop-out (they do not count against the spouse) when determining CPP entitlement. Equalizing CPP contributions for these periods subtracts entitlement from one spouse, but doesn't benefit the other because it either removes the benefit of the drop-out, or is dropped out and so not used.

Example 2: CPP provides for a drop-out of a percentage of the lowest earning years. If these drop-out periods correspond with the relationship period, again the equalization of CPP reduces the working spouse's entitlement without benefiting the non-working spouse.

Example 3: CPP disability benefits are determined by a formula that consists of two parts: component A, which is a fixed amount, and component B, which is an amount based on CPP unadjusted pensionable earnings accumulated by the pensioner. Equalizing CPP contributions in favour of a spouse who will not qualify for CPP for a number of years produces this result: (a) it immediately reduces the disability benefit (by reducing component B), but (b) the spouse of the disabled person receives no offsetting amount (until the spouse qualifies for the normal CPP benefit). For this reason, in *Coulter v. Coulter*, (1998) 60 B.C.L.R. (3d) 6 (C.A.) the court reapportioned the CPP disability benefit 100% to the member, and protected the spouse by awarding support.

- 11.21 Regulation, s. 27(1)(a) and (b) refer to a "compensation payment", while Regulation, s. 27(1)(c) refers to a compensation payment *or* an "amount to be transferred under s. 128(2)" of the *FLA*. What is the difference between them?

*Compensation
payment*

Commentary: the Regulation sets out some rules and assumptions for valuing benefits for different purposes and in different situations. Regulation, s. 27(1)(a) and (b) are referring to compensation payments made by a member to a spouse under s. 97 or 127 of the *FLA*. Regulation, s. 27(1)(c) is referring to the calculation of a transfer amount from a plan to a spouse under s. 128(2) of the *FLA*.

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- 11.22 Regulation, s. 27 governs calculating compensation payments. It refers to a number of assumptions but only requires the “possibility” of their occurrence to be taken into account. Isn’t “possibility” too vague a word?

*Valuation
assumptions*

Commentary: the formulation is an adequate direction to an actuary to calculate the commuted value taking into account future contingencies. The actuary will not, for example, simply assume changes in contingencies will be fixed on the entitlement date or the retirement date. The calculations will be weighted to take into account possible occurrences at different times, on an actuarial basis. The policy underlying the regulation is the expectation that actuaries will apply the Canadian Institute of Actuaries Standards of Practice that relate to marriage breakdown.

- 11.23 Regulation, s. 27 doesn’t refer to the impact of tax on valuing pension benefits. Shouldn’t tax consequences be taken into account when determining the commuted value of the future pension benefits?

Tax

Commentary: yes. Regulation, s. 27 doesn’t provide a restrictive list of assumptions to take into account when determining the commuted value of future pension benefits. It directs that the prospect of some future events, such as benefit upgrades, should be taken into account to provide direction on an issue of B.C. law that was in doubt before the equivalent of this Regulation under the *FRA* was promulgated.

Other aspects of the calculation should be carried out in accordance with accepted actuarial practice in Canada. Refer to standards published by the Canadian Institute of Actuaries. See para. 11.22.

The impact of tax, for example, should be taken into account even though not listed in Regulation, s. 27. [*Park v. Park*, (2000) 73 B.C.L.R. (3d) 153 (C.A.)]

CHAPTER XII. COURT ORDERS

A court order can vary some aspects of pension division. A court can, for example,

(a) provide, having regard to specified factors, that the spouse receives an equal of the pension benefits, or a share that is less than, or more than an equal share, [FLA, ss. 95 and 129 of the FLA]

(b) vary the dates to be used to determine the benefits that are attributable to the relationship, or

(c) allocate the former spouse's share against other property. [FLA, s. 97(2)]

Additional Directions

Where an agreement or order dividing pension benefits has been made, and questions arise concerning how to implement the division, an application can be made to the court for directions to clarify how the benefits are to be divided. [FLA, s. 130]

Modifying aspects of the pension division rules - an extraordinary power

A court is also empowered to modify aspects of pension division under Part 6 of the FLA where the default rules would produce an inappropriate result. [FLA, s. 131] But this is an extraordinary power. A court will be reluctant to depart from the methods set out under Part 6 except in extreme cases where the legislated rules will produce an unfair result. The statutory methods are designed to protect the interests of the spouse, member, plan administrator and other plan members. So a consent order obtained by the parties without notice to the plan administrator would not be an effective exercise of the jurisdiction under s. 131.

Departures from the statutory division methods may well prejudice one of these parties. There must be a specific finding that the usual rules under Part 6 are inappropriate because of some special feature of the terms of the plan. It is not a jurisdiction to depart from the legislative rules simply because the parties would prefer some other method of pension division. Section 131 was designed to ensure that the court retained a jurisdiction to deal with unexpected provisions in pension plans.

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Balancing the interests of all parties concerned

The legislation provides the court with flexibility to make an appropriate order in the circumstances, but the court must be vigilant to see that the order is consistent with the policies sought to be advanced by the legislation. Before Part 6 of the FRA came into force in 1995, courts refused to make orders binding on plan administrators. Plans were regarded as innocent third parties to the dispute between the former spouses. Courts will continue to make sure that orders do not prejudice plans.

Moreover, every departure from the rules set out in Part 6 carries with it some risk. The change might upset the basis upon which the plan is funded, for example. Or the change might make it more difficult and more expensive for the plan to administer the pension division simply because the plan will not be able to rely upon the systems put in place to give effect to Part 6 divisions.

A person requesting an order that substantially departs from the methods of division set out under Part 6 must give the plan administrator notice of the application.

- 12.1 The court order sets out the interests of the spouse and member based on the assumption that the member will pay tax on the whole amount. But the legislation requires the plan administrator to make separate withholdings from the shares of the member and the spouse, which leads to a different result. What should the plan do?

*Court order
divides pension
on a
net basis*

Commentary: the order is inconsistent with the requirements of the *ITA* and Part 6 of the *FLA*. The tax provisions in the order are based on the kinds of arrangements that were necessary before changes to the *Income Tax Act* were introduced and before CRA's policy on this issue was more completely settled. It is clear now, however, that under the *ITA* each of the parties is responsible for taxes payable on their respective shares of pension benefits paid under registered plans that are divided under provincial legislation (for the position with respect to disability benefits paid under a pension plan, see para. 9.5). Part 6 requires separate withholdings. [*FLA*, s. 141(3)]

The plan administrator should

- explain the problem to the member and spouse,

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- recalculate entitlement by applying the proportionate share formula to the gross pension,
- show the member and spouse the amount they are entitled to on a net basis, after making separate source deductions (this will usually result in no change, or larger shares for spouse and member), and
- have them agree to the variation.

12.2 We have received a court order dividing the pension benefits, but it does not refer to Part 6 of the *FLA*. Is the order binding on the administrator anyway?

*Court order
doesn't say
Part 6
applies*

Commentary: yes. Part 6 of the *FLA* applies in any case in which the spouse is entitled under Part 5 of the *FLA* to a share of pension benefits (unless the parties expressly agree, or the court expressly orders, that Part 6 does not apply). [*FLA*, s. 111(1)] Provided the agreement or court order indicates that the benefits are to be divided, there is no need for an express reference to Part 6 for the agreement or order to be binding on the administrator (although it is obviously better practice to include such a reference). [See paras. 1.5, 1.7 and 11.3]

12.3 We have received a court order that gives the spouse 100% of the member's benefits. Is that a valid order under the legislation?

*Court order
gives all
to spouse*

Commentary: yes. The spouse's proportionate share, whether specified by agreement or court order, can be any amount. [*FLA*, ss. 95, 127 and 129]

As a matter of policy, a court should be reluctant to make such an order if opposed by the member. It is important to protect the nature of the pension entitlement, which is to provide retirement income for both spouse and member. One situation where the order would be appropriate, and consistent with the policy of protecting retirement income for the spouse and member, is where the member has two pensions. Allocating all of one pension to the former

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spouse might be a very sensible way of apportioning entitlement in such a case.

12.4 When should a court order the division of pre-relationship accruals?

*Pre-relationship
pension
accruals*

Commentary: [See para. 2.23 and 2.25]

12.5 Our plan is a defined benefit plan. We have received a Form with an order attached that provides that the benefits are to be divided under Part 6, that the value of the pension is \$36,000 and that the spouse is entitled to 1/3 of that. This makes no sense in terms of the requirements of Part 6. How do we administer the division of these benefits?

*Insufficient
information to
divide*

Commentary: send the spouse and member a notice under *FLA* Regulation, s. 7(2) explaining why it is not possible to act on the materials that were filed and what must be provided to divide the benefits. Explain the problem. The notice must be sent within 30 days of receiving the Form P2. [See para. 12.6 on revising the obligations under a court order]

12.6 The administrator sent the member and spouse a notice under Regulation, s. 7(2) explaining that the materials filed do not provide enough information to divide the benefits. The spouse and member are in agreement about how the order should be revised. Do they have to apply for a new order before the administrator can act on their agreement?

*Further
directions*

Commentary: no. An administrator can act on their agreement without a new order. Parties can vary the terms of a court order by agreement to the extent that it applies to them and not third parties. All the plan administrator would require in this case would be written instructions signed by both the spouse and member. It might be easiest for the administrator to set out the new instructions and request the spouse and member to sign a copy and return it. It is usually a good idea to require the signatures to be witnessed.

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However, if further directions are required, and the parties cannot agree, the *FLA* permits a court application to be brought by either of them to clarify how the benefits are to be divided. [*FLA*, s. 130] This is a legislative version of the common clause found in agreements and court orders dividing benefits that provides that the parties continue to have liberty to apply for an order to facilitate or enforce the division of the benefits in accordance with the specified pension division arrangements.

- 12.7 We administer a defined benefit plan. We have received a Form P2 and a court order providing for an immediate transfer of the spouse's share from the plan, but the member is not yet eligible for pension commencement (and this option is not available under Part 6 until the member becomes eligible for pension commencement). What are our obligations?

*Invalid
court order*

Commentary: you are correct that, under Part 6, a transfer of the commuted value of the spouse's share of benefits determined by a defined benefit provision is not available until after the member becomes eligible for pension commencement. [*FLA*, s. 115(3)] Technically, a court can make an order departing from the Part 6 rules, but the jurisdiction to do so depends upon a finding that some aspect of the plan's terms makes the default rules inapplicable, which is not the case on these facts. [*See Chapter 12, Introduction*]

Consequently, you should advise the parties, using Form P6, that the order is ineffective because it does not comply with the Act.

- 12.8 The member's pension has commenced and the parties have provided us with an excerpt from the judge's "Reasons for Judgment" which sets out some pretty vague guidelines about determining the spouse's share. It's not clear if this is meant to be a direction to apply the Part 6 rules, or a variation of them. What should we do?

*Entered order
required*

Commentary: the plan administrator's obligation to assist in dividing the benefits arises when it receives from the parties either (a) a written agreement dividing the pension benefits, or (b) an entered court order. [*FLA*, s. 134] The Reasons for Judgment are not the same thing as an entered order.

After a judge hands down a decision, the parties must then take the steps necessary to have the decision recorded in the form of an order. That order must

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be entered in the registry. Only then is it binding on third parties, such as the plan administrator.

Until the parties provide you with the entered order, the former spouse must look to the member for the spouse's share of the benefits.

Once the entered order is delivered to the plan (with Form P2 and the administrative fee, if required), payments can be made directly to the spouse.

- 12.9 We have a client that wants to bring a claim for a share of a former spouse's pension benefits under the *FLA*. The parties divorced 4 years ago, and there is no order or agreement dividing the pension benefits. What options are available to our client for pursuing this claim?

*Limitation periods and
court orders*

Commentary: your client's claim may no longer be available because of the expiration of a limitation period. The *FLA* carries forward basically the same basic rules as the *FRA* on this point. Under the *FLA*, there is a time limit rule for bringing any claim to family property under Part 5 (2 years from divorce or, for spouses in a marriage-like relationship, 2 years from the date of separation). [*FLA*, s. 198(2)]

Under the *FRA*, the time limit was built into the definition of spouse. [*FRA*, s. 1, definition of "spouse"] An application had to be made within two years of an order of divorce, nullity or judicial separation. The B.C. Court of Appeal, in *Suckau v. Suckau*, 2002 BCCA 300, interpreted this as meaning that rights vested under Part 6 were lost when a person ceased to qualify as a spouse.

See para. 13.22-13.23.

There may be alternative means of advancing claims under the *FLA*. If the parties made an agreement about their property, the agreement may be reviewable by the court if the benefits were not disclosed, or on other grounds. [*FLA*, s. 93((3)(a))] The limitation period for an application to set aside or replace an agreement about family property is two years from the date the spouse discovered, or ought reasonably to have discovered, the grounds for making the application.

Although it does not sound like it would help in this case, it is also open to the parties to agree to have benefits divided under Part 6 (effectively waiving the application of the limitation period).

CHAPTER XIII. USING THE FORMS AND NOTICES

Part 6 of the FLA requires forms (set out in the Regulation) to be used for dividing pension benefits. [See Appendix B for the forms]

Form P1, “Claim and Request for Information and Notice” notifies the plan administrator that the spouse has a potential interest in the member’s benefits. Once the administrator receives the notice, the administrator is under an obligation (a) to notify the member, (b) to provide the spouse with requested information about the benefits, [Reg., s. 10] and (b) to give the spouse advance notice before it acts on a direction received from the member in connection with the benefits or other event (such as the death of the member). [Reg., s. 9]

Form P2, “Request for Designation as Limited Member” is used after the spouse’s interest in the benefits has been recognized by agreement or court order. The Form directs the plan administrator to register the spouse as a limited member. It is used in one of the following cases, (a) the pension has commenced, or the member is receiving an annuity, (b) the benefits are determined by a defined benefit provision and are unmatured, (c) the benefits are in a supplemental pension plan or a plan for specified individuals, (d) the spouse is entitled to a share of disability benefits paid under the pension plan, or (e) the benefits are in a defined contribution account and the administrator consents to administer the spouse’s share in the plan. Form P2 is used basically in any case where the former spouse must wait to receive a share, or the share will be paid to the former spouse by the administrator over a period of time. [See Chapter 2]

Form P3, “Request for Transfer from Defined Contribution Account” is used if the member still has benefits in a defined contribution account. After the spouse’s interest in the benefits has been recognized by an agreement or court order, the form is used to direct the plan administrator to transfer the spouse’s share to another pension vehicle, such as an RRSP. If the administrator consents to administer the spouse’s share in the plan, then a Form P2 would be required for the spouse to become a limited member. [See Chapter 3]

Form P4, “Request by Limited Member for Transfer or Separate Pension” is used for dividing benefits determined by a defined benefit provision before pension commencement. After the spouse is registered as a limited member, this form is used by the spouse to select how the spouse’s share will be received. The former spouse may choose either a lump sum transfer, or a separate pension. These options are available once the member becomes eligible for pension commencement.

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Form P5, “Waiver of Survivor Benefits after Pension Commencement” allows a spouse, who is entitled to survivor benefits, to waive that interest in favour of another party. This doesn't permit the other party to become the beneficiary of the survivor benefits, however. It would require the spouse to hold the benefits in trust and pay them to the other party (see para. 5.6 and 8.11).

Form P6, “Administrator/Annuity Issuer Response” is used by the administrator of the benefits to give notice to the member and former spouse as required under the Act.

Form P7, “Withdrawal of Notice/Waiver of Claim” is used by a former spouse to advise the administrator that the former spouse is no longer claiming an interest in the benefits, and to withdraw documents already filed.

Form P8, “Change of Information” can be used by a former spouse to keep the administrator advised of any changes in personal information (although if this information is provided by some other means, that is equally effective).

Form P9, “Agreement to Have Benefits Divided Under Part 6”. If the former spouse and member are in agreement about dividing the benefits and the dates to be used for that purpose, they can use Form P9 to record that agreement.

13.1 What should an administrator do when the Form received is incomplete?

*Incomplete
or invalid
Forms*

Commentary: an administrator must act within 30 days of receiving a Form. [FLA, Reg., s.7] If the Form is incomplete, the administrator must promptly advise the party who submitted it so that it can be corrected.

If the administrator does not act in 30 days, the spouse and member are at liberty to bring court proceedings to compel the administrator to act (although in most cases they will contact the administrator first). [FLA, Reg., s.8] If the administrator failed to act because the Form was defective, but didn't advise the parties of the reason, a court might be inclined to award costs against the administrator for causing unnecessary proceedings to be brought.

13.2 What should the plan do if the Form isn't valid? *For example*, what happens if

- the plan administrator receives a Form without an agreement or order?
- the plan administrator receives an agreement or order without a Form?

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- the Form is incorrectly filled out?
- the plan administrator is sent the wrong Forms?

*Invalid
Forms*

Commentary: each of these is an example of an invalid application. The plan administrator cannot rely upon an invalid application.

The plan administrator is required within 30 days of receipt to advise the spouse and member that the application is defective. [FLA, Reg., s.7(2)] In most cases, the problem can probably be rectified by e-mail or a quick telephone call. (If a former spouse provides the administrator with an e-mail address on the Forms, the administrator may communicate with the former spouse using that e-mail address: Reg., s.2(2)).

E-mail and faxes are deemed to be received on the day they are sent. Mail is deemed to be received 5 days after mailing: Reg., s.2(3)]. *See further* para 15.39.

But, if not rectified, the legislation clearly requires a notice (see Form P6) to be sent in the time required.

- 13.3 Is a Form invalid if it does not contain all of the indicated personal information? We have received a Form P1 that does not include any contact information for the member.

*Missing
information*

Commentary: no. Reg., s.4(2) expressly provides that a notice or other document is not defective or ineffective if it does not contain the member's address, fax number, e-mail address, telephone number or spousal status. This is protected personal information that will not always be available to a former spouse. There may be situations where this information, or other information, will be required to identify the member. But that does not make the Form invalid.

- 13.4 If the parties provide the plan administrator with an agreement dividing the pension benefits and file the required forms, what is the position if the administrator does not take the required steps for dealing with the benefits? Can a court award costs against a plan that forces a spouse to get an order compelling the administrator to act?

Court

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costs

Commentary: yes. It can do that under the general power of a court to award costs when legal proceedings take place.

- 13.5 Should all of the prescribed Forms be flowing through the plan administrator or can the holder of the pension funds deal directly with the member or limited member in obtaining appropriate Forms?

*Who gets
the Forms?*

Commentary: the legislation refers to the obligations of the plan administrator. Typically the first Forms will be sent to the administrator. There is no prohibition on the administrator directing the parties to deal directly with the holder of the pension funds.

- 13.6 The former spouse has filed a Form P1 with our plan. We have also received a letter from the former spouse's lawyer requesting information about the plan. Can we provide that information?

*Authorizing
a personal
representative*

Commentary: not without a written authorization from the former spouse. The administrator has statutory and fiduciary obligations not to disclose information about the member or the member's benefits to third parties. The *FLA*, however, expressly provides that the administrator must provide specified information to a former spouse that files a Form P1 with the plan.

The former spouse can designate a representative to assist in pursuing a claim to pension benefits. [Reg., s. 12] Considering how complicated plans can be, the former spouse will often want the assistance of a professional advisor.

Once the administrator has a written authorization from the former spouse, information can be released to the former spouse's representative. Reg., s. 12(1) provides that the information must be copied to both the representative and to the former spouse. But if a substantial amount of photocopying is involved, the administrator should check to see if the parties want to insist on this, or receive a single copy and save costs.

Form P1 contains an area that the former spouse can use to authorize a representative.

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- 13.7 When a plan gets a Form, does the Form have immediate legal effect? Regulation, s. 7(2) says a plan must notify the spouse and member within 30 days if it cannot act on the Form. Does that postpone the effective date of the Form?

*Time a
Form takes
Effect*

Commentary: the Form is effective from the date of receipt. If, for example, the pension has commenced, and the former spouse has filed all of the documents required to become a limited member, the former spouse is entitled to a share of the payment made 30 days after the date of receipt. [Reg., s. 15(a)] The time given the administrator to advise parties that Forms are incomplete (also 30 days, see para. 13.2) is a limitation period. If the administrator doesn't act within that time, either the spouse or the member can get a court order compelling it to act. The 30 day period does not act as a postponement of the effective date for the Form if it is complete.

- 13.8 Form P1 says the spouse is claiming an interest based on *FLA* s. 81. What steps does the administrator have to take to confirm that the person filing the form is a "spouse", that the parties have separated and that the former spouse has a potential claim under s. 81?

*Proving
spouse is
entitled*

Commentary: the Form P1 is sufficient in itself. Provided that the information confirms that the parties were married, or that they have been cohabiting for at least 2 years in a marriage-like relationship, and are, therefore "spouses" within the meaning of the *FLA*, there is no other obligation on the plan administrator to make further inquiries about the status of the parties' relationship. See also para. 12.9, 13.22 and 13.23.

The member is protected from invalid claims by the obligation on the plan administrator to give the member notice that Form P1 was received. [Reg., s.7(1)] The administrator can require a person to provide evidence about a claim. [*FLA*, s. 135(3)] In most cases, the administrator will have information on file confirming whether the member has a spouse and the identity of the spouse. If a request is made by someone else, then it would be reasonable for the administrator to take additional steps to confirm the facts.

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Nothing prevents the administrator from adopting procedures to verify spousal status. Under the *FRA*, many administrators required a party requesting information to provide a copy of the marriage certificate. For unmarried spouses, it may be reasonable to request confirmation of the parties' relationship in the form of a sworn affidavit. However, in practice, an affidavit is unlikely to provide any more assurance than a signed and witnessed statement (such as is required under Form P1 in the first place).

See para. 13.17.

13.9 Can the Forms be placed in a computer?

Computers

Commentary: yes. The Forms are valid so long as any deviations from the Forms as set out in the Regulation are not calculated to deceive. [*Interpretation Act*, s. 28(1)] See para. 13.17 and 13.27.

13.10 If the former spouse and member agree not to divide the benefits, should they send a copy of the agreement (or court order) to the plan?

*Agreement
not to
divide*

Commentary: this would certainly confirm the position, but it will usually not be necessary to go that far. If a Form P1 has been filed, then all that is required to withdraw it (or any other documents relating to the spouse's claim to a share of benefits filed with the administrator) is for the former spouse to send the administrator a Form P7 "Withdrawal of Notice/Waiver of Claim." If the former spouse declines to do so, however, then it is certainly open to the member to establish that the former spouse no longer has a claim by alternative means, such as providing a copy of the agreement or court order.

13.11 We sometimes receive phone calls from lawyers asking for information about our plan. These are relationship breakdown files. What are we supposed to do if the former spouse hasn't filed a Form P1 yet?

*Providing
general
information
to third parties*

Commentary: the administrator cannot provide information about the member or the member's benefits to anyone without proper authorization: see para. 13.6.

However, there is no prohibition about providing general information to a third party and this will often be helpful to member and former spouse. Many lawyers advise that plans should not give out any information until they have the Form P1 on file to avoid the risk that, in providing general information, the plan may end up disclosing protected personal information.

Obviously, this is a judgment call. But answering general questions will often help move things forward and save the parties from incurring unnecessary additional legal costs. Questions like: is the plan a defined benefit plan or a defined contribution plan? how are preretirement survivor benefits determined? where are you registered? or what is the plan's correct name? are unlikely to pose any risk to the plan administrator.

Even better would be to have this type of information available on-line so that callers can be directed to the plan's website.

- 13.12 What are the minimum requirements for an agreement dividing pension benefits? Is it enough for the parties to draw up and sign their own agreement, or does it need to be certified or notarized?

*Pension division
agreements*

Commentary: the *FLA* does not set out the minimum requirements that must be met for an agreement to be effective.

For the purposes of Part 6, not a great deal of formality is called for. The parties are free to draw up and sign their own agreement dividing the benefits, or to use Form P9. However, because pension benefits are often the most valuable asset owned by the parties, they would be well advised to seek professional advice before finalizing the terms for dividing the benefits.

Even so, there is certainly no need for the agreement to be certified or notarized. [See para. 1.3 and 11.3] It is the administrator's judgment call whether the administrator will accept a photocopy of an agreement. In practice under the *FRA*, many administrators had no difficulty with accepting photocopies, faxes or scanned versions of the agreement.

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- 13.13 My spouse has entitlement to benefits in two different plans. Are there special rules for dividing pensions in this case?

*Entitlement
to pensions
in two
different
plans*

Commentary: each plan must be treated separately. Each plan administrator must receive separate Forms and each is entitled to charge an administrative fee for dividing the benefits.

- 13.14 What happens if the Forms are not submitted in a timely fashion?

*Late filing
of Forms*

Commentary: there is no time limit under the legislation for submitting the Forms. Problems may arise if a required Form is delivered after something has happened (for example, the member has died, the limited member has died, the member is eligible for pension commencement, or the member's pension has commenced). A former spouse may find that payments due the spouse have been made to the member or another party.

The parties' substantive rights are determined by the agreement or court order dividing the benefits. The forms are an administrative requirement that do not subtract from the parties' substantive rights, but are a formality for involving the administrator in the pension division arrangements (see, for example, *Martens v. Martens*, 2009 BCSC 1477). See para. 13.24.

If payments of a spouse's share are made to a third party because of late filing, the spouse will have a claim against the recipient of the payments, but not against the plan administrator. The administrator's obligations arise when it receives the required documents. [FLA, s. 137] (Although an administrator that receives notice of an order or agreement without the correct Forms will sometimes be placed in a position where notice to the former spouse will be required: see para. 13.15.)

- 13.15 The member and the spouse agreed, orally, that spouse1 would be beneficiary of the pension benefits. But the member died before changing the designation. When the member died, the member was in a marriage-like relationship with spouse2.

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*If the
Forms
are not
submitted*

Commentary: so far as the plan is concerned, the dispute does not concern it. If spouse2 qualifies as a spouse, the preretirement survivor benefit is paid to spouse2. Spouse1's rights would affect the plan only if the appropriate Form, together with a written agreement or court order, is received.

Spouse1 may have rights against spouse2, and may be able to assert priority over spouse2, but in the example cited above, that would require spouse1 obtaining a court order to do so. See para. 11.4.

If there is an order or agreement dividing the benefits, this should be delivered to the administrator promptly. In the absence of a restraining order, a Form P1, or delivery of an order or agreement dividing the benefits made before the member's death, the administrator has no obligation to protect the interests of the former spouse. [*Chaisson v. Chaisson* (1997), 33 R.F.L. (4th) 205 (Ont. Gen. Div.)]

- 13.16 What should an administrator do if it receives an order dividing the benefits that was made before Part 6 of the *FLA* came into force?

*Orders made
before FLA
comes into force*

Commentary: [See Chapter 14]

- 13.17 It would help us to add another box to Form P6 that deals with advising a former spouse when the member changes a beneficiary designation. The Form currently lists two options: "you have ceased to be the beneficiary" and "you have become the beneficiary". There will be cases where the spouse is not the beneficiary and the changed designation means that "another person has become the beneficiary". Can we add that box to the Form?

*Revising the
Forms*

Commentary: changes like this would be acceptable. Deviations from prescribed forms that are not deceptive do not invalidate a form: see para. 13.9. It would be prudent, however, to indicate on the Form any changes that are made. [See Chapter 14]

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- 13.18 The relationship of the member and spouse1 ended 5 years ago. Spouse1 obtained a court order for a share of the benefits, but never delivered it to the administrator. The member's pension commenced 2 years ago and the member took a joint annuity with spouse2. What is spouse1 entitled to?

*Order not
served on plan
until after member
retired*

Commentary: Spouse1 is entitled to a proportionate share of the member's pension, and if spouse2 survives the member, of the survivor benefit. There is no obligation on the administrator to commute spouse1's interest to establish separate pension entitlement now, or when the member dies. [See para. 5.6]

- 13.19 The spouse requested a Form P1, which we sent out. It was never returned to us. The employee has now quit and directed that pension entitlement be transferred from the plan. What are the plan administrator's obligations? Are we required to alert the spouse?

*Form P1
requested but
not filed*

Commentary: no. The administrator is under a fiduciary obligation to the member not to disclose personal information to third parties, including the member's spouse. Part 6 of the *FLA* changes that, but only once you have the Form P1. The only other circumstance in which an administrator is required to give a spouse notice is where there has been an incomplete application, including a spouse filing with the plan administrator the agreement or court order, even if no forms are filed at all, or the filed forms are defective. [*FLA*, s. 143(1)]

- 13.20 The employee quit and directed that pension entitlement be transferred from the plan, which was done. The spouse has now filed a Form P1. Are we under an obligation to tell what was transferred and to where?

*What information
must be disclosed*

Commentary: yes. The administrator's obligation to provide requested information includes information about benefits that were transferred from the

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plan after the Form P1 is filed with the plan, or within 2 years before it is filed. [Reg., s.10(1)(h)] See para. 15.20.

- 13.21 The member's former spouse has an order dividing the pension benefits that was made in 1992. The spouse has now sent in a Form P1 and requested information about the pension benefits. Are we obligated to provide that information?

*Form P1 and old
orders and
agreements*

Commentary: yes, provided the former spouse still qualifies as a “spouse”. In the example, if the order was made under the *FRA*, a former spouse continues to qualify as a spouse for the purposes of enforcing the order. [*FRA*, s. 1, definition of “spouse”] A spouse claiming an interest in benefits is entitled to this information after sending in a Form P1. [*FLA*, s. 133(1), Reg., s.10] *FLA*, s. 133(1) refers to a spouse claiming an interest in general, which would include an interest arising under an order made before Part 6 came into force. Form P1 refers to a claim under *FLA*, s. 81, but that was included on the Form to remind spouses that there had to be some legal basis to the claim, not to restrict the right to information conferred under s. 133.

- 13.22 We have received a Form P1 from the member's common law spouse together with a request for information. The dates on the form show that the parties separated more than 2 years ago. Can we provide the information?

*Limitation period -
spouse in marriage-like
relationship
requests info*

Commentary: yes, if the information on the Form P1 states that the parties have been cohabiting in a marriage-like relationship for at least two years (the requirement under the *FLA* to qualify as a “spouse” who is entitled to a share of family property when a relationship ends). [*FLA*, s. 1, definition of “spouse”, and s. 3]

An unmarried spouse has 2 years from the date the parties separated to bring a claim under the *FLA*. [*FLA*, s. 198(2)(b)] After 2 years, the unmarried spouse ceases to be a “spouse” within the meaning of the *FLA* for the purposes of claiming entitlement under that Act. There are provisions that suspend the running of time where the parties are engaged in “family dispute resolution”

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with a “family dispute resolution professional”. [FLA, s. 198(5)] It's possible that an application to vary an order can be made even after the two year limitation period. Time starts to run after the spouse first discovered, or reasonably ought to have discovered, the grounds for making the application. [FLA, s. 198(3)]

“Spouse” includes a “former spouse”. [FLA, s. 3(2)] It is not the administrator's responsibility to determine in advance that a spouse's claim under the *FLA* will be successful. Even if an unmarried spouse has been separated from the member for more than 2 years, the unmarried spouse is entitled to file a Form P1 and receive requested information. If the *FLA* is closed to the former spouse, the former spouse may still be able to establish entitlement to a share of the pension benefits through a claim based on unjust enrichment. See para. 12.9.

If the member is opposed to the former spouse receiving information about the benefits, the member would be required to obtain a court order prohibiting its release. The administrator's obligation to provide the member with notice (using Form P6) means that the member can take appropriate steps where the application is made by someone who has no entitlement to information. See, however, para. 13.26.

- 13.23 We have received a Form P1 from the member's former spouse. The member says they divorced a few years ago. Can we still provide the former spouse with information?

*Limitation period –
Divorced spouse
requests info*

Commentary: yes.

A married spouse has 2 years from the date of an order for divorce or nullity to bring a claim under the *FLA*. [FLA, s. 198(2)(a)] After 2 years, the married spouse ceases to be a “spouse” within the meaning of the *FLA* for the purposes of claiming entitlement under that Act. See, however, para. 12.9.

However, under the *FLA*, “spouse” includes a “former spouse”. [FLA, s. 3(2)] So, even if the parties have been divorced for more than 2 years, the former spouse is entitled to file a Form P1 and receive requested information. If the *FLA* is closed to the former spouse, the former spouse may still be able to establish entitlement to a share of the pension benefits through a claim based on unjust enrichment.

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- 13.24 We have a file where the spouse sent in a Form P2 with a Divorce Order attached to it, but nothing that deals with the pension benefits.

On another file, the former spouse of a member has claimed an interest in the member's pension benefits and sent in a Form P2. Their relationship ended years ago, and the agreement dividing their property did not mention the pension benefits.

Are either of these spouses entitled to become limited members and request pension division?

*Order/agreement
silent about
the pension*

Commentary: a plan cannot register a spouse or former spouse as a limited member unless there is an agreement or court order dividing the benefits. [FLA, 134] An agreement or court order that is silent on that point is deemed to allocate the entire pension to the member. [FLA, s. 111(2)] See paras. 1.5, 11.15 and 14.14.

For the rules that apply to CPP, see para. 11.18-20.

- 13.25 The member and spouse's relationship ended last year, and they entered into a separation agreement dividing the unmatured benefits in a defined benefit plan. The spouse died before filing the forms to become a limited member. Can the spouse's personal representative file the forms on behalf of the deceased and have the spouse's share transferred to the estate?

*Agreement not
served on plan
until after spouse
died*

Commentary: yes. The agreement is sufficient to vest an interest in the benefits in the spouse. Processing the forms is a procedural requirement, not a substantive one. The chief concern about delay in filing forms is that (a) payments may be made to a third party before the administrator receives notice of the spouse's interest, and (b) the spouse may have difficulty recovering the spouse's share from the recipient. [See also paras. 8.6, 13.14, 15.6 and 15.12]

- 13.26 We have received a Form P1 from a person claiming to be the member's former spouse. We sent the member notice in Form P6 and the member tells us that he has never co-habited with the person who has filed the form?

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*Stranger
requests info*

Commentary: although the administrator is not under an obligation of determining a spouse's entitlement in advance in order to provide information about pension benefits, circumstances where the member takes the position that there was no relationship (as opposed to arguing that parties who have cohabited for several years do not qualify as unmarried spouses under the *FLA*) clearly raise special considerations.

If the member verifies the member's position in writing, advises the spouse and gives the spouse an opportunity to respond. Depending on the information provided, it may be necessary to take the position that no steps can be taken without a court order. If either party has caused unnecessary legal proceedings to be pursued, this can be addressed through an order for costs.

- 13.27 It looks like there are typos in Form P9 as published in the Regulation. The paragraph numbering is not in sequence. Can we correct that on the forms we are providing the parties?

*Correcting
typo on Forms*

Commentary: it is hoped that this can be fixed promptly. But in the meantime there is no problem with correcting the paragraph numbering. Section 28 of the *Interpretation Act* says that deviations from a form that do not affect its substance or are not calculated to deceive do not invalidate the form used. See para. 13.9 and 13.17.

- 13.28 Form P9 contains the advice: "Don't file this form if you already have a written agreement, or an order, dividing the benefits." There are cases where it might be convenient for the parties to use Form P9 when they have an order or agreement made before pension division legislation was enacted in B.C. on July 1, 1995. Would they be able to use Form P9?

Using Form P9

Commentary: yes. The caution in Form P9 is to make sure that it is not used by parties who already have an agreement or order that is enforceable under Part 6 of the *FLA* (to prevent the plan administrator from being faced with two inconsistent agreements, for example). But where the parties have an old order or agreement that cannot be brought within the operation of Part 6 of the *FLA* without a further agreement, there is no reason why they could not use

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Form P9 for this purpose.

CHAPTER XIV. TRANSITION ISSUES - AGREEMENTS AND ORDERS MADE BEFORE MARCH 18TH, 2013

The FLA will apply to any pension division arrangements completed after it comes into force.

There will be various issues about the interplay between the FRA and the FLA for agreements and orders made before the FLA comes into force, and where initial steps have been taken under the FRA. The FLA provides transition rules addressing these questions. [FLA, s. 252-3] See Table 4 at the end of this Chapter.

B.C. first enacted pension division legislation on July 1st, 1995.

Any agreement (or order) made after that date addressing the division of pension benefits is automatically subject to B.C.'s pension division legislation, unless the pension division arrangements expressly exclude its operation. It is not necessary for the agreement or order to provide that Part 6 applies. [FRA, s. 71(1), FLA, s. 111(1)] Agreements (or orders) made before that date can be brought under the pension division legislation (discussed further below).

How the FLA applies to agreements or orders made under the FRA

If the pension division arrangements spell out all aspects of the pension division, and they don't conflict with the requirements of B.C. legislation, then the agreement or order would be sufficient for determining each party's entitlement.

However, if events take place that are not addressed in the pension division arrangements, then B.C.'s pension division legislation fills in the gaps. The legislation is sometimes referred to as providing "default rules" because its provisions apply in the absence of express directions in the agreement or court order.

The FLA provides that it applies to pension division arrangements completed under the FRA (s. 253(2)). This means that,

- any additional options for pension division provided under the FLA apply to pension division orders or agreements made under the FRA (for example, under the FRA, a supplemental pension was divided by a benefit split while under the FLA the former spouse is entitled to receive the share by a separate pension when the member's pension commences - See Chapter 6. The transition rules mean that a spouse entitled to a share of a supplemental pension under the FRA can choose to receive the share by a separate pension as provided for under the FLA), and

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- if the order or agreement made under the FRA does not address an issue that has arisen, the FLA default rules would apply to resolve what is to happen.

For the most part, the FLA rules are the same as the FRA rules, but there are two important exceptions:

(a) the FLA has different rules for determining the commuted value of benefits determined by a defined benefit provision, and the separate pension payable to a limited member. [See Chapter 2] (In this case, the FRA rules will apply if an application is made by the limited member for the share under the FRA either before the FLA comes into force or, if the administrator provided a written notice about the limited member's options, within the period specified in the notice for making the election. If no period is specified, it is 60 days from the date of the notice, [Reg., s.29(2) and (3)]) and

(b) the FLA has different rules for determining a limited member's entitlement if the member dies before pension commencement [See Chapter 8]

Forms filed under FRA but things remain to be done when FLA comes into force

If forms have been filed taking various steps towards dividing pension benefits under the FRA, but things still remain to be done (such as registering the former spouse as a limited member or transferring the former spouse's share from the plan), the steps already taken are still valid and the former spouse does not need to file new FLA forms to replace the FRA forms. [FLA, s. 253(1)]

Proceedings to challenge or review pension division agreements

If proceedings have been commenced under the FRA that involve a claim to pension benefits, the FRA continues to apply to those proceedings, unless the parties otherwise agree to continue under the FLA. [FLA, s. 252(2)(b)]

Any challenge to an agreement made under the FRA (to set it aside, or for re-portionment) would be brought under the FRA. [FLA, s.(2)(a)] If the agreement is made after the FLA comes into force, then it would be subject to review under the FLA rules.

How the FLA applies to agreements or orders made before July 1st, 1995

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If an order or agreement was made before July 1st, 1995 and it was brought under the umbrella of the FRA (by agreement of the parties, or the provisions of the FRA) the FLA will apply to that order or agreement in the same way as if it had been made after July 1st, 1995 (as discussed above).

Agreements and orders that were made before the FLA comes into force, and to which Part 6 of the FRA did not apply, can be brought under the FLA:

(a) if the order or agreement provides that, after pension commencement, the member will pay a share of each monthly pension cheque to the former spouse (sometimes in B.C. called a "benefit split" or a "Rutherford Order") the former spouse can require the administrator to make the payments directly to the former spouse by delivering a Form P2. [FLA, s. 112(3)(b)]

(b) the parties can also agree to have Part 6 of the FLA apply to the order or agreement. [FLA, s. 112(3)(a)]

(c) in some situations, the parties are deemed to have agreed to have Part 6 of the FLA apply (where the agreement or court order requires the former spouse's share to be severed from the member's benefits, as explained more fully in this Chapter: see para. 14.1). [FLA, s. 112(5)]

- 14.1 The former spouse has a court order dividing the member's pension. It provides that, when the pension commences, the member will pay a specified share of each monthly payment to the former spouse. The order was made before July 1, 1995. Does the former spouse have rights under the *FLA*?

*Old order or
agreement:
opting in*

Commentary: the *FLA* allows opting in for pension division agreements and orders made before it comes into force. Agreements or court orders made after July 1st, 1995 were automatically subject to Part 6 of the *FRA*, and so also automatically subject to Part 6 of the *FLA*.

For agreements or orders made before Part 6 of the *FRA* was in force, these are the options that are available.

After the member's pension commences

After the member's pension commences, the spouse can require the plan administrator to administer the benefit split. [FLA, s. 112(3)(b)] The spouse would file Form P2 to become a limited member of the plan. The spouse's

share, and other matters, will be determined by the court order or agreement. In all other respects, this situation is no different than had the agreement or court order been concluded after the *FLA* came into force.

Form P2 can be filed at any time. It is not necessary to wait until the member's pension commences. If the former spouse chooses to file the Form P2 before the member's pension commences, the administrator would register the spouse as a limited member of the plan, entitled to information and a division of the benefits by a plan-administered benefit split under *FLA*, s. 117. (In this case, though, the limited member is not entitled to the pension division options available under *FLA*, s. 114, 115 or 116.)

Before the member's pension commences

Before the member's pension commences, the spouse and member can agree to opt into Part 6. [*FLA*, s. 112(3)(a)] They can do this by filing the appropriate form (a Form P2 for a defined benefit plan or a Form P3 for a defined contribution plan) and related material. The administrator will also want directions signed by the spouse and member that say they agree to opt in under *FLA*, s. 112(3). (This would be required unless *FLA*, s. 112(5) applies discussed below under "Deemed to opt-in".) Form P9 "*Agreement to Have Benefits Divided under Part 6*" could also be used. See para. 13.28

To the extent that the court order or agreement is relevant to the mechanisms for division under the legislation, it applies. Some parts of it will be irrelevant, such as a requirement saying the spouse is entitled to survivor benefits after receiving either a transfer of entitlement or a separate pension. [See also para. 14.12] After either of these events, the spouse should no longer be entitled (unless specifically designated by the member) to any share in the member's remainder of the pension benefits). [Reg., s. 25]

Typically, the well-drafted agreement or court order will indicate which parts become inoperative when the spouse receives a separate share.

Part 6 provides a template for bringing the original pension division arrangement into Part 6. [Reg., s. 25]

Deemed to opt-in

Part 6 also provides that if the original order or agreement places an obligation on the member to sever the spouse's share from the member's pension benefits (a very common term), that term is conclusively deemed to be an agreement to opt into Part 6 of the *FLA*. [*FLA*, s. 112(5)] The member's agree-

ment to have Part 6 apply to an order or agreement made before the *FLA* comes into force, consequently, is not necessary if the agreement places an obligation on the member to sever the spouse's share of the benefits whenever that becomes possible.

There are sometimes problems in cases where the formula determining the spouse's share is ambiguous. This is often the situation when the benefits being divided are in a defined contribution plan and a *Rutherford* formula has been used. The Regulation addresses these issues. [See para. 14.2] But if there is any situation where, after applying the Regulation, an ambiguity remains, the administrator should simply advise that it requires the joint direction of the member and spouse (or a court order) concerning how to calculate the proportionate share.

- 14.2 The member has benefits in a defined contribution plan. The parties have an agreement made before July 1, 1995 dividing the benefits. It requires the member to sever the spouse's share when that becomes possible, so the parties are deemed to opt in under s. 112 (5). The agreement, however, says that the benefits must be divided by a *Rutherford* order. How does that work?

*Opting-in
for
DC plans*

Commentary: the reference to a *Rutherford* order incorporates a formula for determining the spouse's share which is very similar to the formula used under Part 6. The general formula is $1/2 \times A/B$ where A is pensionable service during the relationship and B is all pensionable service up to the date that the former spouse's share is determined, which is essentially the same formula used under the *FLA* Regulation for determining entitlement to a matured pension or unmatured benefits determined by a defined benefit provision. See para. 2.17. [Reg., s. 17]

Unfortunately, this formula does not work very well when applied to a defined contribution account. In these cases, the Regulation requires the former spouse's share to be calculated using the *FLA* rules in Reg., s.20 for determining a proportionate share of a defined contribution account. See para. 3.4. The dates specified in the agreement or order defining the portion subject to division would be used for the commencement date and entitlement date. [Reg., s. 25(2)]

In some cases, the pension division arrangements will provide enough information to determine the dates. For example, the pension division arrange-

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ments may specify that the former spouse's share is from the date of marriage to the entitlement date. Both of these can be determined objectively. The marriage date can be verified by a party providing a marriage certificate. If not specified, the entitlement date under the *FRA* would be the "triggering event", which is the first of the following events to occur: the date the parties made a separation agreement, the date of an *FRA*, s. 57 declaration of irreconcilability, and the date of an order of divorce, nullity or judicial separation.

If no dates are specified, or cannot be determined, the parties must provide directions on that point.

- 14.3 Does B.C. pension division legislation apply if the spouses separated before July 1, 1995 (the date pension division legislation was first implemented in B.C.)?

*The spouses
separated
before
July 1, 1995*

Commentary: the date of separation is not determinative. The determinative factor is the date of the order or agreement dividing the pension benefits. If the order or agreement dividing the pension is made after July 1, 1995, then B.C. pension division legislation applies.

If the order or agreement is made before July 1st, 1995, B.C. pension division rules apply only if the spouse and member agree to opt in (or are deemed to opt in: see para. 14.1).

- 14.4 The member and spouse have an agreement made in 1993 dividing the pension by a *Rutherford* benefit split. The member's pension has not yet commenced, but the member does not want to opt into Part 6. What rights does the spouse have?

*If the
member
won't
opt in*

Commentary: the spouse has the right to be designated a limited member of the plan and receive from the administrator a share of the monthly payments made when the member's pension commences, by delivering a Form P2 to the administrator with the agreement. [*FLA*, s. 112(3)(b). See para. 14.1]

If the agreement provides that the spouse's share of the benefits is to be sev-

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ered when that becomes possible, then the parties are deemed to opt in to Part 6, making additional methods of pension division available to the spouse. [See para. 14.1]

14.5 Why would the member want to agree to opt in?

*Member's
best interests
to opt in*

Commentary: members are often reluctant in these cases to agree to opt in. But usually it is in the member's best interests.

Opting in means that the member can make decisions respecting the pension benefits that fit the member's personal situation. For example, the *PBSA* requires a member to elect a pension with a survivorship option for the member's current spouse (spouse2), but spouse1's rights complicate this and make uncertain the extent to which spouse2 is protected. Opting in means that once spouse1 has received a share of the benefits, the member can take a survivorship option on spouse2 that would be free of any claim by spouse1. If the member declines to opt in, and it is not possible to provide security for spouse1's share, it is very common to find that the member is under an obligation to provide alternative security (in the form of life insurance, for example) which can be much more costly than simply dividing the pension benefits under Part 6.

The former spouse benefits by being able to access separate pension entitlement.

14.6 The member has decided to have the pension commence. We have on file an agreement dividing the pension by a *Rutherford* order and requiring the member to sever the spouse's share if that is possible, but neither party has taken the necessary steps to do that. Can we simply ignore the agreement?

*Obligation
to sever
in agreement
or order*

Commentary: no. The agreement places an obligation on the administrator as well as on the member. The administrator must advise the member in writing that it can't act on the retirement election until (a) the opt in has taken place, or (b) the spouse waives the application of that part of the agreement.

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- 14.7 Our plan has received a Form P2 and a separation agreement made before July 1, 1995 is attached to it. The member's pension has commenced. What share does the spouse get: the proportionate share set out in the Regulation? or the share stipulated in the separation agreement?

*Proportionate
Share*

Commentary: the share stipulated in the separation agreement.

S. 112(3)(b) allows a spouse to have the administrator administer the benefit split in accordance with s. 117. S. 117 provides that a spouse is entitled to a proportionate share of benefits paid under the pension. The formula for determining the proportionate share under Part 6 is overridden by an agreement or court order. [See *FLA*, s. 110, definition of “proportionate share.” Reg., ss. 17(2), 20(2).] See also para. 11.6.

(See, however, para 14.2 if benefits are still in a defined contribution account, and there is an obligation on the member to sever the former spouse's share. In that case, Reg., s. 25(2) would apply.)

- 14.8 The member has not made all payments to the spouse required under the court order. Can a spouse who files a Form P2 with a plan recover the arrears from the plan administrator?

Arrears

Commentary: no. [See, for example, *Swan v. Canada*, (1998) 47 R.F.L. (4th) 282 (F.C.A.)]

The spouse is entitled to receive from the plan administrator the proportionate share of those benefits starting with payments made 30 days after the spouse has filed with the administrator Form P2, the agreement or court order dividing the benefits and any required administrative fee. [FLA, ss. 117(2), 137, Reg., s.15] The administrator has no obligation to account to the spouse for a share of benefits paid before that date.

The spouse's claim for payments made before that date is against the member (or, if the member has died, against the member's estate). [See *FLA*, s. 97(2)(c)] and s. 141(2) which makes the member a trustee for the former spouse; *Hart v. Hart*, 2012 BCSC 334; *Mangat v. Mangat*, 2009 BCCA 143; *Vestrup v. Vestrup*, [1999] B.C.J. No. 1057 (S.C.); *Leppard v. Leppard*, [1991] B.C.J. No. 1053 (S.C.)] Or the arrears may be taken into consideration when determining a compen-

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sation payment for the spouse for waiving a share of the benefits. [*Penner v. Penner* (1984), 42 R.F.L. (2d) 402 (BCCA)]

Under the *FRA*, courts reserved to themselves a jurisdiction (under *FRA*, s. 65 and 66) to

(a) decline to award compensation for arrears if that would be unfair in the circumstances (for example, because the retired member did not have the financial ability to repay the amount that had accumulated, or because the funds were used to enhance other family property that was being divided), or

(b) provide for their repayment in instalments.

It is likely that the same legal position will apply under the *FLA*. Even if arrears are recoverable from the member, they may not be recoverable for a period during which the retired member was paying support. [*W.(R.S.) v. W.(A.T.)*, [1997] B.C.J. No. 3065 (BCSC)]

- 14.9 The parties have been dividing the matured pension for several years now according to a *Rutherford*-type court order made before July 1, 1995. The spouse has sent the plan administrator a Form P2 requesting it to administer the benefit split. The member seems to have made a mistake – in the member’s favour – calculating the spouse’s share. We have advised the member of this and the member has threatened to sue us. What is our obligation?

*Form P2 and
calculating the
spouse’s share*

Commentary: once the former spouse becomes a limited member of the plan, the administrator’s obligation is to administer the benefit split and pay the spouse the correct amount. See paras. 11.11, 12.1 and 14.9. The spouse probably has a claim for compensation against the member.

- 14.10 The *FLA* is not yet in force. The former spouse has applied to become a limited member under the *FRA* and the administrator has requested the parties to clarify how certain aspects of the pension division arrangements are to operate. They have also advised how they will interpret the parties’ agreement in the absence of additional directions. Can we ignore this request for directions because the *FLA* rules address the questions raised?

Request for

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*directions but
FLA will fix it*

Commentary: this is a case where the administrator's consultation will mean that the *FLA* rules will not supplement the pension division arrangements. [*FLA*, s. 253(3)]. See paras. 8.4 and 8.5. It is difficult to comment on this question without knowing more about the pension division arrangements and the issues that need to be clarified. In many cases, it would probably make sense to wait until the *FLA* comes into force, and then stipulate that the *FLA* rules apply.

- 14.11 The parties' pre-1995 agreement has a "deemed retirement" provision and requires the member to sever the spouse's share. The spouse has relied on *FLA*, s. 112(5) and has become a limited member of the plan. Is the "deemed retirement" provision still in effect?

*Deemed
retirement*

Commentary: no. [For information on "deemed retirement" arrangements, see para. 2.48] Severing the benefits results in ending the deemed retirement arrangements (because the former spouse can directly access the share of the benefits, notwithstanding the member's decision to postpone retirement). See, for example, *Muzzillo v. Muzzillo*, 2000 BCSC 363 aff'd 2001 BCCA 44.

- 14.12 The member and spouse want to opt in to Part 6, but they want to change one part of the order. The order requires the member to postpone pension commencement until age 60, but the member wants to retire earlier than that. The spouse consents because bringing the arrangements under Part 6 means that the spouse has separate rights in the pension benefits. Can the parties do that?

*Changes
to the old
order or
agreement*

Commentary: if the term is solely included for the purposes of dividing pension benefits (as opposed to forming part of carefully structured arrangements for when support ends), requiring the member to postpone retirement is an example of a part of the order that is unnecessary under Part 6. The agreement made by the spouse and member opting in to Part 6 should list that term as one that becomes inoperable once the spouse becomes a limited member of the plan.

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As to providing directions that differ from the terms of a court order, see para. 12.6.

- 14.13 The member and spouse want to opt in to Part 6, but they have agreed to reduce the spouse's proportionate share set out in the order. Can the administrator give effect to that agreement?

*Changing the
proportionate
share*

Commentary: yes. S. 112 (3)(a) allows the spouse and member to agree to divide the benefits "in accordance with this Part." They can agree, under FLA, s. 127(1), on the spouse's proportionate share, including using a different proportionate share than the one set out in the pre-existing court order or agreement. See para. 12.6.

- 14.14 We have received from a former spouse of a member a Form P2 and a court order. The court order does not refer to the pension benefits. The member's pension has commenced. Is the former spouse entitled to a share of the pension?

*Order
doesn't
refer
to the
pension*

Commentary: maybe, but the spouse will have to produce something more. The legislation, for the purposes of Part 6, deems an order or agreement that deals with family property, but is silent about the pension entitlement, to allocate the entire pension entitlement to the member. [FLA, s. 111(2). See paras. 1.5 and 11.15]

- 14.15 To what extent is a plan bound by the terms of an order or agreement made before July 1, 1995?

*Old orders
and
agreements
are still
binding*

Commentary: it is quite common for agreements and orders to require the member to obtain the spouse's consent before having the pension commence (or to give notice of an intention to have the pension commence, or to obtain consent to the form of election made on retirement). These types of contractual provisions are often unwisely ignored by both member and plan administrator.

The purpose of provisions of this nature is to ensure that the election the member makes protects the spouse's interests in the benefits. [*Walker v. Walker*, (1993) 142 A.R. 374 (Alta. Q.B.)] If the member elects a single life pension, for example, a spouse who is entitled to a share of the income stream under the pension will be prejudiced because the pension will end when the member dies.

These kinds of concerns do not arise if division is under Part 6, and the spouse receives a share either in the form of a separate pension, or a transfer of the commuted value of the benefits. But where the agreement provides for a *Rutherford*-type division, the form of the pension is a very important part of ensuring the division operates as intended.

Where the obligation is ignored, the spouse would have remedies against the member for breach of contract (see, for example, *Woodrow v. Woodrow*, [1997] O.J. No. 2014 (Ont. Gen. Div.) and, if the contract places trust obligations on the member, for breach of trust. If the administrator had notice of the agreement, the plan may be liable as well.

Another common contractual provision is the requirement that, on retirement, the member will elect to take the pension in the form of a joint annuity (a joint annuity will provide continued benefits to the joint annuitant on the death of the member). If the member fails to make the appropriate election on retirement, the same remedies would be available.

However, in some cases the member is simply unable to make the required election. The terms of the plan, or its governing legislation, may provide, for example, that a survivor benefit is only available when the member has a spouse. This is true for most federal public plans, as well as many federally regulated private plans. What happens in these cases?

This was the situation that arose in *Munro v. Munro Estate*, (1995) 13 R.F.L. (4th) 139 (BCCA). The Court of Appeal held that, even though it was not possible for the member to make the appropriate election, because the member had not inquired, he was in breach of the contractual and trust obligations imposed on him by the pension division arrangements. As such, the member's estate was liable to the former spouse to compensate for the pension rights lost

on the member's death.

Similarly, if the administrator is aware that the agreement or order places a positive duty on the member to sever the spouse's interest in the benefits when that becomes possible to do, the administrator may be liable if it accepts the member's pension commencement election without severing the spouse's share. [See para. 14.6]

Because the administrator has notice of the requirements of the parties' pension division arrangements, to allow the member's pension to commence (a) without protecting the former spouse's interest, or (b) without obtaining the spouse's written consent in advance, would be to participate in the member's breach of trust.

- 14.16 The *FLA* is now in force. We administer a defined benefit plan and have received from the former spouse an agreement dividing the member's unmatured benefits. The former spouse filed a Form 1 under the *FRA* with us in 2012. The agreement refers to the benefits being divided under Part 6 of the *FRA*. How do we deal with this?

*Agreement
made under
the FRA*

Commentary: *FLA*, s. 253(1) provides for the continued application of the former Act to ensure that no rights are lost by the expiration of a limitation period. The rules under the *FRA* that determined whether or not the former spouse was entitled to a share of benefits continue to apply.

However, unless the pension division arrangements are completed before the *FLA* comes into effect, the *FLA* rules apply to the division of the benefits. See the introduction to this Chapter.

Even if the former spouse became a limited member under the *FRA*, the *FLA* rules apply. [*FLA*, s. 253(2)]

Any application for a share of the benefits, or to become a limited member, made after the *FLA* comes into force, would be governed by the *FLA*.

- 14.17 The former spouse became a limited member in 2010, under the *FRA*. The limited member has applied for a separate pension. The member is eligible for pension commencement, but has not yet made that application. Under the *FRA*, the former spouse had to wait until the member's pension commenced to receive a separate pension. Are we required to pay the limited member the separate pension?

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*Application for
separate
pension*

Commentary: yes. Entitlement to benefits is determined under the *FLA*, even where the former spouse registered as a limited member under the *FRA*. [*FLA*, s. 253(2)] This means that the former spouse can make the choice provided under the *FLA*, to receive the proportionate share as a separate pension at any date after the member becomes eligible for pension commencement.

- 14.18 S. 253(3) of the *FLA* says that, where the pension division arrangements were formalized under the *FRA*, entitlement to benefits is determined under the *FLA*, unless the administrator “consulted” with the member and spouse about a particular issue. What does this mean?

*Administrator
consulted with
parties*

Commentary: the reference to consulting doesn't mean that, if the administrator and the parties had general discussions about the forms or the parties' pension division arrangements, the *FLA* somehow no longer applies.

The *FLA* rules apply if there are insufficient directions in the agreement or court order.

The reference to consulting refers to where the plan administrator has requested directions from the parties about particular issues, which were provided. If so, the consultation on those issues has the same status as an express direction in the agreement or court order. See para. 8.5.

Alternatively, the plan administrator may have advised the parties how the pension division arrangements would be interpreted unless they advised to the contrary. This too would constitute consulting, or be the equivalent of directions that would determine how the benefits were to be divided, meaning that there would be no need for the *FLA* default rules to be applied on that question.

- 14.19 The former spouse became a limited member under our plan in 2010, under the *FRA*. The *FLA* is now in force, the limited member has not yet received the share of benefits and the member has just died. The member's pension had not commenced. How do we determine the limited member's entitlement? The pension division arrangements are silent about what happens in this situation.

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*Limited member's
share if member
has died*

Commentary: this is one of the reasons that the *FLA* rules apply to pension division arrangements formalized under the *FRA*. Under the *FRA*, the limited member was entitled to a share of the preretirement survivor benefits, but this sometimes led to unequal division that prejudiced either the limited member (where the preretirement survivor benefits were inadequate) or the member's estate (where the preretirement survivor benefits equalled the share of the benefits before the member's death). See Chapter 8 and para 8.4 in particular.

The *FLA* provides that the limited member receives the share of the benefits determined the day before the member's death: see para. 8.2. This over-rides the *FRA* rules that apply in the absence of specific direction on the point (or consultation on this issue by the administrator). [*FLA*, s. 253(2)]

- 14.20 We often provided members and former spouses with general information about how a Part 6 division operates, including information about how shares are determined if the member died before pension commencement and the parties' agreement did not deal with how benefits were to be divided. Does this constitute "consulting" and mean that the *FLA* rules will not apply on that question?

*Is providing
general
information
consulting?*

Commentary: no. The policy is to ensure that formal discussions with the administrator about specific issues respecting the operation of the parties' pension division arrangements are recognized and protected, not that general information about the *FRA* will mean that the *FLA* rules cannot apply in any case.

- 14.21 We received a Form 1 from the former spouse in 2010. The *FLA* is in force and we have just received a court order dividing the benefits, together with a Form 2 under the *FRA*. Can we accept that to register the former spouse as a limited member?

*Using an
FRA Form 2
under the FLA*

Commentary: yes, the administrator has discretion about accepting the *FRA*

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forms. [FLA, s. 253(4)]

But the administrator can also require the parties use the *FLA* forms.

- 14.22 Does the administrator's discretion about using the *FRA* or the *FLA* forms mean that the administrator gets to decide which Act applies to dividing the benefits?

*Administrator
discretion and
applicable law*

Commentary: no. The administrator's discretion extends only to determining which forms to use. Technically, once the *FLA* is in force, all aspects of the *FLA* pension division procedures apply, including the use of the *FLA* forms. But processing the forms is a procedural requirement, not a substantive one, and there will be many cases where pension division arrangements are in process where nothing is gained by insisting that the parties refile using the *FLA* forms.

- 14.23 This is a situation where all communications with the parties have taken place after the *FLA* came into force. For some reason, the former spouse has used a Form 2 instead of a Form P2 in the application to become a limited member. Can we accept it?

*Using an
FRA Form 2
under the FLA*

Commentary: yes. Technically, all aspects of the *FLA* apply in this case, including the use of the *FLA* forms. But processing the forms is a procedural requirement, not a substantive one and the *FLA* gives the administrator a discretion to accept the *FRA* forms or require the parties to use the *FLA* forms. [FLA, s. 253(4)] This discretion is intended to simplify the administrative issues that may arise in the transition to the *FLA*, so that applications that have been in the works are not rejected on non-substantive grounds.

- 14.24 The former spouse became a limited member of our plan in 2010, under the *FRA*. The member is now eligible for pension commencement. The *FLA* is now in force and the former spouse has applied to receive the share by a lump sum transfer. Under the *FRA* rules, the former spouse's share was determined assuming the member's pension commenced at the date elected for the transfer. Under the *FLA*, however, the former spouse's share is determined assuming pension commencement at the average age of retirement. Which Act governs in this case?

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*FRA or
FLA?*

Commentary: the *FLA*. [FLA, s. 253(2)] If a spouse became a limited member under the *FRA*, but benefits have not been divided as of the date Part 6 of the *FLA* comes into force, Part 6 of the *FLA* applies to the division of the benefits.

The *FRA* applies if the application for the transfer was made before the date the *FLA* comes into force, even if not completed until after that date. [Reg., s. 29(2)]

There is a window where the *FRA* rules are preserved for a limited time, if the administrator provided the limited member with a statement of options for receiving the benefits. The limited member may receive the benefits in accordance with the statement (and the *FRA* rules) if the election is made within the date specified in the statement or, if no date is specified, within 60 days after the date of the notice. [Reg., s. 29(3)] The election would be made in accordance with the statement and by filing a Form P4.

Some plan administrators advise they intend to provide limited members with notice about the changed rules and specify a more extended window than required under the *FLA*, to ensure that no one is taken by surprise by the new rules.

- 14.25 The *FLA* is now in force and we have received a separation agreement that was drafted under the *FRA*. There are no entitlement dates indicated but we have the date of marriage on file and can apply the default provisions under the former *FRA* to obtain the end date. Should we apply the *FRA* default provisions for the start and end entitlement dates or request the parties to clarify the dates under the *FLA*?

*Dates not
specified*

Commentary: the *FRA* rules would apply. Although the *FLA* does apply to fill in gaps in an order or agreement, this is one case where the *FLA* does not have a rule so entitlement would be determined by the law that applied at the date the agreement or order was finalized. If the agreement or court order was made when Part 6 of the *FRA* was in force, and no dates are specified for determining the portion of the benefits that are subject to division, the period subject to division is from the date of marriage to the triggering event. See para. 2.26. If the agreement or court order is made under the *FLA*, and no dates are specified, the parties must provide joint directions concerning the dates to be used.

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- 14.26 We present a plan member. The former spouse is claiming a share of the pension benefits. Proceedings were commenced under the *FRA*. There has been no triggering event. What date will determine the end of the period subject to division: a triggering event under the *FRA*, or the date of separation under the *FLA*?

*FRA or
FLA?*

Commentary: the triggering event under the *FRA* (at least as a starting point). Proceedings started under the *FRA* continue under the *FRA* (*FLA*, s. 252(2)). (Although, the parties can agree to have the *FLA* apply).

But courts under the *FRA* have not blindly applied the triggering event as the end date. There are numerous cases where the date of separation was used. In other cases, a midpoint between the date of separation and the triggering event was selected. The principle under the *FRA* for determining the appropriate end date for dividing the benefits has sometimes been characterized as selecting the date when any prejudice caused by the marriage or its breakdown has been compensated -- sometimes this is when support started being paid, or when the other spouse returned to employment and began accruing pension entitlement in their own right: *Green v. Green*, 2000 BCCA 301.

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Table 4 – Transition Rules – FRA – FLA & Pension Division

Issue	Which Act applies?
1. <i>FLA</i> in force, but application for pension division in process under <i>FRA</i> .	<i>FRA</i> : <i>FRA</i> administrative rules continue to apply to steps already taken (s. 253(1)). (The policy is to not invalidate interim steps that have been taken in finalizing pension division arrangements). <i>FRA</i> forms already filed with plan administrator are still valid. <i>FLA</i> forms should be used to complete the pension division arrangements, but administrator has discretion to accept <i>FRA</i> forms (s. 253(4)).
2. Former spouse becomes limited member under <i>FRA</i> .	<i>FLA</i> : Agreement or court order governs the division of the benefits. Additional rights available under the <i>FLA</i> are available to the limited member. If agreement or court order does not provide sufficient directions on particular issues, <i>FLA</i> rules apply.
3. Agreement or order made while <i>FRA</i> in force, but former spouse becomes limited member under <i>FLA</i> .	<i>FLA</i> : Same as in 2 .
4. Agreement made before <i>FLA</i> comes into force dealing with pension benefits, and a party wants to enforce or vary it after the <i>FLA</i> comes into force.	<i>FRA</i> : Questions about whether the agreement is enforceable at all, or whether the agreement should be varied because it is substantially unfair, are subject to the <i>FRA</i> (s. 252(2)(a)). This is the general rule that applies in all cases, not just pension division situations. The parties can agree, however, to have these issues decided under the <i>FLA</i> . (This is different from questions about how the pension division arrangements are to operate: see 5 .)
5. Agreement made before <i>FLA</i> comes into force dealing with pension benefits, but there are questions about how to deal with a particular circumstance.	<i>FLA</i> : Questions about how pension division arrangements are to operate are determined under the <i>FLA</i> . (s. 253(2)) If the pension division arrangements do not specify what is to happen in a particular situation, the <i>FLA</i> default rules would be consulted. Or the court can review pension division arrangements under ss. 130 (<i>clarifying division of benefits</i>) or 131 (<i>changing division of benefits in unusual circumstances</i>).
6. Agreement made before <i>FLA</i> comes into force dealing with pension benefits, but silent about dates to be used.	<i>FRA</i> : questions about determining the former spouse's proportionate share would be determined under Parts 5 and 6 of the <i>FRA</i> (from date of marriage to date triggering event).
7. Proceedings under <i>FRA</i> respecting pension division not concluded when <i>FLA</i> in force.	<i>FRA</i> : <i>FRA</i> continues to apply to the proceedings (s. 252(2)(b)), unless the parties otherwise agree.
8. Steps taken under <i>FRA</i> about pension benefits, but proceedings commenced after <i>FLA</i> in force.	<i>FLA</i> : <i>FLA</i> protects steps already taken with respect to filing forms and applications under Part 6. [<i>FLA</i> , s. 253(1)] But substantive rights to pension benefits in proceedings commenced after the <i>FLA</i> is in force would be subject to the <i>FLA</i> .

CHAPTER XV. MISCELLANEOUS ADMINISTRATIVE ISSUES

- 15.1 The legislation sets out maximum amounts that may be charged by a plan to offset costs of dividing a pension: \$750 for registering a former spouse as a limited member of the plan; and \$175 for transferring benefits from a defined contribution account. If the benefits are in a hybrid plan, and the administrator is required to do both, the fee would be \$925. Does the plan have to charge the administrative fee?

*Waiving the
admin. fee?*

Commentary: no.

It is not mandatory to charge a fee. The *FLA* sets out the maximum that can be charged if the administrator decides to charge a fee. [*FLA*, s. 140(1)(a), Reg., s.28] Some administrators see this as a service that should be made available to members.

Clearly, not all members will benefit from this service equally (since not all members are in a relationship and not everyone's relationship breaks up). But plans provide other kinds of services and benefits even though not all members will take advantage of them.

Under the *FRA*, some administrators did not charge an administrative fee, and some administrators recognized situations where the fee, or part of it, would be waived. It is expected that similar policies will apply under the *FLA*.

- 15.2 In what circumstances would it be appropriate to waive the administrative fees?

*When to
waive
fees*

Commentary:

Examples of situations under the *FRA* where administrators often waived the fee:

- **where the application for division is late in the life of the pension (*for example*, the member took a single life pension and, at the time the Forms are received, the guarantee period has expired).**

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- **where the member acquired benefits under two or more related plans that are being divided. In these cases, many administrators would charge just one administrative fee.**

The examples are not exhaustive.

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Table 5 – Time limits for discharging administrative obligations

	<i>Administrator's Obligation</i>	<i>Time for completing</i>
1	Member gives administrator direction with respect to benefits. If Form P1 on file, or former spouse is limited member, administrator must notify former spouse. [Reg., s. 9(1)]	Former spouse must receive 30 days advance notice before acting on the direction.
2	Administrator advised of member's death. If Form P1 on file, or former spouse is limited member, administrator must notify former spouse. [Reg., s. 9(1)]	Former spouse must receive 30 days advance notice before acting on the direction.
3	Administrator receives documents and prescribed forms from former spouse. Administrator must notify member using Form P6 [Reg., s. 7(1)]	30 days of receiving document from former spouse.
4	Administrator cannot act on document received from former spouse. Administrator must notify former spouse and member using Form P6 explaining why and what is required [Reg., s. 7(2)]	30 days of receiving document from former spouse.
5	Implement division of benefits under a matured pension, annuity or disability benefits. [Reg., s. 15]	Begins with benefits payable on or after the 30 th day after receiving all required documents.
6	Register a limited member and confirm registration to former spouse and member [Reg., s. 16(a)]	Within 60 days of receiving all required documents.
7	Transfer funds from defined contribution account [Reg., s. 16(b)]	Within 60 days of receiving all required documents.
8	Start payment of separate pension [Reg., s. 16(c)]	Within 60 days of receiving all required documents.
9	Transfer funds from defined benefit plan [Reg., s. 16(d)]	Within 60 days of receiving all required documents.

- 15.3 The administrator has just received a request for information from a former spouse who wants to be able to value the pension benefits. Can the administrator demand payment of administrative fees before the information is provided?

*Charging
the fee:*

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*when
information
is requested?*

Commentary: no. The administrator is required to provide requested information to a spouse upon receipt of a valid Form P1, which tells the plan that the spouse is claiming an interest in the member's benefits. Administrative fees should not be charged until the administrator is asked to take a positive step in dividing the pension benefits. The fee could not be charged on receiving Form P1 because the benefits may end up being divided in other ways that do not involve the plan.

15.4 If the administrator intends to charge an administrative fee, when should it be charged?

*When to
charge
the fee*

Commentary: the correct time to charge the fee is

- when a Form P2 is received to register a former spouse as a limited member, and
- when a Form P3 is received to transfer a proportionate share from a defined contribution account.

Even in these cases, however, it may be appropriate to defer matters. The *FLA*, for example, permits an administrator to deduct the administrative fee from the payment of benefits, which may not take place until some later date: see para. 15.8.

15.5 Who should be billed, the member or the spouse?

*Who is
billed?*

Commentary: each party is responsible for half of the fee. [*FLA*, s. 140(1)(b)] It is not the administrator's responsibility to collect the fee from the parties. If an administrative fee is not paid with the application, the administrator may deduct the fee from the payment of benefits and adopting this as the

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plan's usual policy may be the most efficient approach for dealing with this issue. [FLA, s. 140(3)] See para. 15.8.

- 15.6 Can the administrator refuse to register the spouse as a limited member until paid the administrative fee?

*Parties refuse
to pay the
administrative
fee*

Commentary: yes. [FLA, s. 137(2), Reg., s.16(a)] The administrator is required to register the former spouse as a limited member within 60 days of receiving Form P2, the administrative fee (if required), the agreement or court order dividing the benefits, and other documents reasonably required by the administrator with respect to the registration. But see para. 15.12 concerning the differences between procedural requirements and substantive rights.

- 15.7 Does the administrative fee have to be paid to the administrator? Can the sponsor collect it on behalf of the plan?

*Paying the
administrative
fee to
the plan*

Commentary: the legislation does not require an administrative fee to be paid, and there is no prohibition on an administrator requiring that the administrative fee be paid to a third party, such as the plan sponsor.

- 15.8 Can the administrator permit the administrative fee to be paid by instalments or by deductions from pension benefits?

*Paying by
instalments
or deducted
from benefits*

Commentary: yes to both options.

Just as it is up to the administrator concerning whether to charge an administrative fee at all, the administrator can decide how it wishes to be paid. Full payment can be required before acting on a direction to divide the benefits, for example, or the administrator can accept another arrangement for satisfying the fee.

The *FLA* expressly permits an administrator to deduct administrative fees from benefits. [*FLA*, s. 140(3)]

If the pension has commenced, the administrative fee can be deducted from the monthly payments to each of the parties.

In this case, it is important to note that the benefits are subject to tax in the hands of the member and former spouse. If \$375 is deducted from each party's share, each will end up having to pay taxes on the \$375, so they end up paying more than \$375. The administrative fee is not a tax deductible expense: see para. 15.10. If the administrator allows the parties to select this option, the parties should also be advised about the tax position. They may prefer to make the payment from some other source.

Similarly, if the former spouse elects to have benefits transferred from the plan, s. 140(3) permits the administrator to agree to deduct the administrative fee from those benefits. Again, however, there would be tax payable on the deregistered benefits.

15.9 Are the administrative fees subject to the GST?

GST

Commentary: when pension division legislation was first enacted in B.C. in 1995, this question was raised with the federal government, which provided a non-binding interpretation that GST was not chargeable. Inquiries are being made on the current position.

15.10 Is the administrative fee tax deductible?

Income tax

Commentary: CRA took the position that the administrative fee was not tax deductible under the *FRA* and it is expected that the same position will apply

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under the FLA.

15.11 Does paying an administrative fee offend the *Income Tax Act*?

*Income Tax Act
and the
admin. fee*

Commentary: no. The payment cannot be characterized as a “contribution” to the plan and cannot be used as a deductible expense from the payer’s income tax. The Registered Plans Division of the Canada Revenue Agency, however, indicated that under the FRA it was acceptable as a payment to offset administrative costs, provided the payments were not made through the plan itself, and it is expected that the same position will apply under the FLA.

15.12 The spouse sent in Forms P1 and P2 with an agreement dividing the pension benefits. Form P2 was returned because the spouse couldn’t afford to send in \$750 to pay the administrative fee. The spouse has now died. What are the rights of the spouse’s estate?

*Administrative
fee not paid
before spouse’s
death*

Commentary: in this case, there is a valid agreement. Part 6 sets out administrative rules to protect the plan administrator, but failure to pay the administrative fee does not affect the property right itself. The plan should transfer the spouse’s share to the spouse’s estate on payment by the personal representative of the necessary administrative fee, or deduct it from the benefits. See paras. 15.6 and 13.24.

15.13 In addition to the maximum administrative fee that can be charged to a spouse and a member, can additional expenses required to administer the routines surrounding “limited membership” be charged to the pension fund (provided the pension plan allows for this)?

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*Administrative
expenses
exceeding
the fee*

Commentary: the administrative fee referred to in the legislation and the Regulation represents the maximum amount that can be collected from the spouse and the member.

Additional costs incurred in dividing the benefits—such as actuarial fees—could not be charged to the spouse or member nor deducted from the member’s benefits. Similarly, the plan could not require member and spouse to carry out at their own expense duties that the legislation places on the administrator.

But the legislation in no way restricts arrangements made between sponsor and plan concerning how general administrative costs are borne by the whole of the pension fund.

- 15.14 Who is entitled to receive information from the plan administrator (and when) in connection with a member’s pension benefits?

*Obligation
to provide
information*

Commentary: a spouse who files a Form P1 but who is not yet a limited member is entitled to information on request. So is a spouse in the absence of a Form P1, where the agreement or court order authorizes the release of information to the spouse.

In contrast, an administrator is required to send specified information annually to a spouse who is registered as a limited member, whether or not a request is made. [FLA, Reg., ss. 10 and 11]

If a spouse files a Form P1 and requests information about the benefits, the administrator must provide the information within 60 days after receiving the written request. [Reg., s. 10(1)]

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- 15.15 Regulation, s. 19 deals with recalculating a limited member's proportionate share after a period of phased retirement. What kinds of issues is this addressing?

Phased retirement

Commentary: under a phased retirement option, the member may be allowed to continue working, and accrue pensionable service, while being paid a phased retirement benefit.

Or the member may have fully retired and started receiving a pension, and then be allowed to return to work. In that case, the pension is suspended, and a phased retirement benefit is paid to the member who is allowed to continue to accrue pensionable service.

In the first scenario, the phased retirement benefit is paid before pension commencement and, if the former spouse hasn't elected to take the share of the pension by a lump sum transfer or a separate pension, the former spouse is entitled to receive a share of the phased retirement benefit. In that case, Reg., s. 17 will be used to determine the former spouse's proportionate share of the phased retirement benefit.

In the second scenario, dealing with the suspended pension, the former spouse's proportionate share of the matured pension will have been calculated when the matured pension was originally divided.

During the suspension, the former spouse is entitled to receive the spouse's proportionate share of the phased retirement benefit (no need to recalculate at this point, because there is no change in the pensionable service of the member).

In the first scenario, eventually the former spouse will be entitled to receive a share of the pension benefits (by a transfer, a separate pension, or payment to the spouse's estate if the spouse dies). In any of these cases, the spouse's entitlement is not calculated by the proportionate share calculation determined before the phased retirement began. The share is recalculated taking into account the member's increased service accumulated through the phased retirement as part of the denominator of the formula in Reg., s. 17, and the revised proportionate share is applied to determine the portion the former spouse then receives (by transfer, separate pension, or payment to the spouse's estate).

In the second scenario (the suspended division of a matured pension), even-

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tually the member will cease working under the phased retirement option, and the member's pension will be recalculated, taking into account the additional service accrued during the phased retirement. At that point, the spouse's share will be applied to this increased pension, but again the spouse's proportionate share must be recalculated, taking into account the member's increased service, by including the increased service in the denominator of the formula in Reg., s. 17. [Reg., s. 19]

- 15.16 I filed a Form P1 with the plan, but the administrator has refused to accept the Form until I produce the court order or agreement that provides for pension division. Are these necessary?

*Filing a
Form P1
without an
agreement or
court order*

Commentary: no.

As a practical matter, no agreement or court order will be available until the parties have sufficient information to value the pension benefits. The plan administrator should be advised that if a court application is necessary to compel the plan to accept the Form P1 and provide information, the court will likely award costs against the administrator.

Regulation, s. 10 requires the plan administrator to provide the spouse with requested information once a Form P1 is filed. Under the law predating B.C. adopting pension division legislation, a plan administrator could not provide the spouse with information without the member's consent.

- 15.17 I filed Form P1 and asked the plan administrator to value the member's pension benefits, but the administrator declined to do so.

*Valuing the
member's
pension*

Commentary: Part 6 does not require the administrator to value the benefits. The only obligation on the plan administrator is to provide a spouse

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with the information specified in Regulation, s. 10. This information would allow the spouse to arrange for the member's pension benefits to be valued. However, when it comes time to transfer the spouse's share, the administrator will have to do its own valuation.

- 15.18 The spouse has asked us (the plan) to place a value on the pension benefits. We are not in a position to value the benefits assuming the member's continued employment, but we are able to place a value on it assuming the member leaves employment as of the valuation date. Can we provide the spouse with that information?

*Termination
value*

Commentary: nothing in the legislation prevents a plan administrator from providing any form of information (other than personal information about the member as specified in Reg., s.13).

If the administrator is able to provide a termination value, this may be of some use to spouse and member, but in many cases is probably likely to cause more harm than good in terms of misleading the parties and their professional advisors about each party's entitlement.

If you decide to provide such information, it is important to take steps to ensure that the parties are not misled. Consider adding caveats, such as

- **the value is based on the assumption that the member leaves employment as of the valuation date,**
- **the value differs from the value that would be placed on the benefits under Regulation, s. 23 or 24, and**
- **if greater accuracy is needed by the parties, they would have to have an actuary value the benefits.**

- 15.19 The plan administrator is receiving repeated requests for information about the same pension benefits. Does the legislation place any limits on when information may be requested?

*Repeated
requests for*

information

Commentary: the administrator is required to provide information only once in each calendar year. [FLA, Reg., s.10(3)] However, the former spouse can request an update on the information, but again only once in the calendar year. [FLA, s. 10(2)]

The legislation is designed to protect the plan administrator from being pestered. But an administrator should not insist upon strict compliance with this right where the protection is unnecessary.

For example, the spouses negotiate a settlement under which the member will make a compensation payment to the spouse and the spouse will waive all claims to the member's pension. The spouse received information from the plan 6 months before and would like an update to make sure the compensation payment is accurate.

The plan gains nothing from adhering to its right to provide information only once a calendar year. The Regulation should not be used to destroy sensible negotiations. The court can order that information be provided more than once in a year. [FLA, s. 133(2)]

Similarly, a follow-up request by a former spouse to explain information provided, or to request information that has not already been provided, would not be subject to the one-request-per-year limitation. It is perfectly acceptable for the spouse to request, for example, a copy of the plan member's most recent annual statement and then, at some later date, request a plan summary or other pertinent information not already provided by the administrator.

- 15.20 We have just received a Form P1 with a letter from the spouse's lawyer saying "we look forward to receiving information from you." The letter does not indicate what information is required. What information does the administrator have to give?

*Kinds of
Information*

Commentary: Regulation, s. 10(1) lists the required information.

The administrator must provide the spouse with a copy of the most recent annual statement about the member's pension benefits. If a copy of the an-

nual statement is not available, the administrator must prepare a current statement showing contributions to date and earned service.

If not included in the annual statement, the following information is also required:

- any additional information necessary to value the benefits or finalize the division of the benefits (this would include information about the average age of retirement the plan will use to value the benefits),
- whether the spouse is the beneficiary of the member's benefits,
- if the pension has commenced, information about survivor benefits payable under the pension, whether they are payable to the spouse, and whether a change of spousal status affects entitlement,
- if benefits are based on the member's income for a particular period, information about the member's income for that period,
- any information or notice provided to the member after the Form P1 was filed with the administrator,
- information about benefits transferred to the plan, or from the plan, on behalf of the member after the Form P1 was filed, or within 2 years before it was filed,
- information on options and elections available to the member, or a limited member, with respect to the benefits,

Including a copy of the most recent explanation or summary of the plan will often be very useful for the parties, and reduce the amount of follow up requests for information.

Regulation, s. 10(1) is helpful, but this is not a new issue. Pensions have been divisible in B.C. since 1979. Administrators have over 30 years of experience with this kind of issue. Also, in many cases, the spouse will retain an actuary, who will deal directly with the plan administrator and will indicate precisely what information is required.

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- 15.21 Does a plan administrator have to disclose purely personal information about the member such as, for example, whether additional pension entitlement has been purchased after the breakdown of a relationship, or whether the member has appointed a new beneficiary? Is an administrator even allowed to disclose this information?

*Information
purely
personal
to the
member*

Commentary: there is a distinction between (a) information about the member's benefits (which would have to be disclosed if relevant to determining or valuing the former spouse's share) and (b) the member's personal information.

Information about purchased entitlement would likely be relevant for determining the former spouse's proportionate share of the overall benefits.

But when providing information, the administrator must not, unless the member consents in writing, disclose the member's address, fax number, e-mail address, telephone number, spousal status, or the identity of any beneficiary nominated by the member (other than the former spouse). [Reg., s.13(1)] For the beneficiary designation, the administrator would confirm whether or not the former spouse is the beneficiary. [Reg., ss.10(1)(c), 13(1)(b)]

If documents required to be disclosed contain any of this information, the administrator must edit the document to remove it. [Reg., s.13(2)]

Information disclosed to a former spouse claiming an interest is subject to conditions of confidentiality in the hands of the spouse and can only be used or disclosed for the purpose of dividing the benefits. [Reg., s.13(4)] See para. 15.45.

- 15.22 Must an administrator send information sufficient to value the interest in the member's pension immediately on receiving Form P1?

*When to
provide the
information*

Commentary: no.

A spouse, by delivering to a plan a Form P1, becomes entitled to request the information, but the spouse may not need the information immediately or at all.

Some administrators may find it convenient to automate the process as much as possible and may choose to set up systems under which the necessary information is sent immediately upon receiving the Form P1. Technically, however, there is no obligation on the administrator to deliver the information until the spouse makes a formal request for it. [FLA, Reg., s.10(1)] Once there is a formal written request, however, the administrator must provide the information within 60 days of receiving the request. [Reg., s. 10(1)]

- 15.23 The benefits are in a defined benefit plan. Should the plan administrator send out the Form P4 (which the spouse uses to select between the options under s. 115) with the initial package of information? This might avoid diarizing problems.

*Obligation
to advise
about
options*

Commentary: there are two schools of thought on whether this is a good administrative practice.

Some administrators are concerned that providing a spouse with a Form P4 prematurely might produce unwelcome results.

An uninformed spouse might complete and deliver the Form years before the decision can be made. This might be confusing to the former spouse (who might think that benefits are available right away). It might also lead to decisions being made prematurely, and settling on an option that may not be in the former spouse's best interest at the date the benefits can be accessed.

On the other hand, there have been a surprising number of cases where the former spouse cannot be located when the member elects to have the pension commence. Without directions from the former spouse, the administrator may be concerned about whether the benefits should be segregated

and retained for the former spouse or paid to the member until the former spouse makes the necessary election. Having a signed Form P4 on hand, even one provided years before, would provide at least a partial solution to this dilemma.

- 15.24 Is it necessary for the information to show how the pension division affects the member's benefits, and what portion of the benefits the spouse will eventually receive?

*Obligation
to inform
about
separate
entitlement*

Commentary: no. Nothing in the *FLA* or the Regulation requires the administrator to show the separate interests of the member and the spouse before the benefits are actually divided.

An administrator that does not show the separate interests of the member and the spouse on the information it sends out would be wise to add to the information statement a warning or caution that

❑ the information provided relates to the benefits in their undivided form, and

❑ the member and the spouse will each receive a part of the benefits, as set out in the agreement or court order they filed with the plan.

A warning containing this information will make sure that the spouse and member are not misled concerning the dimensions of their pension entitlement.

- 15.25 The member has terminated employment and requested a transfer of the benefits to another plan. The member's former spouse is registered as a limited member with our plan. What are our duties to the limited member in this case?

*Obligation
to notify:*

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*advance notice
to limited member*

Commentary: the limited member must be given 30 days advance notice of the transfer. [FLA, Reg., s.9] If the member is eligible to have the pension commence, the limited member can choose between receiving the benefits by a lump sum transfer or a separate pension. [FLA, s. 115] If the member is not eligible to have the pension commence, the limited member is entitled to a proportionate share of the commuted value being transferred. [FLA, s. 115(6)] See also para. 2.10.

- 15.26 The spouse sent in a Form P1, but is not yet a limited member of the plan. The employee has now quit and directed that pension entitlement be transferred from the plan. What are the plan's obligations?

*Obligation
to notify:
advance notice
to spouse*

Commentary: basically the same as described in para. 15.25. Notice must be sent to the spouse 30 days before the member's direction can be acted upon. [FLA, Reg., s.9]

Be careful about how you calculate the 30 days. Under s. 25(4) of the B.C. *Interpretation Act*, the first and last days are excluded. Also, if the last day occurs on a non-business day, it is extended to the next business day.

Reg., s.3 sets out when notice is deemed to be received. If sent by ordinary mail notice is deemed to be received 5 days after the date of mailing. If by e-mail or fax, notice is deemed to be received on the day it was sent.

- 15.27 The member and spouse have an agreement dividing the pension benefits that was made before July 1, 1995. It provides that the member must sever the spouse's interest when that becomes possible. The spouse has exercised rights under FLA, s. 112 (5) to opt in to Part 6 by delivering a Form P2 to the plan, together with the agreement. Is the plan under an obligation to notify the member?

*Obligation
to notify:*

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*advance notice
to member*

Commentary: yes. The member should be sent a Form P6 advising that the plan has received a Form P2 from the spouse (although, if s. 112(5) applies, the member has no right to object to the severance without a court order).

- 15.28 What if the member terminates employment and requests a transfer of the commuted value of the pension benefits, but the limited member doesn't provide the plan with directions for transferring the limited member's share?

*Retaining
the limited
member's
share*

Commentary: the administrator protects itself by sending the limited member advance notice of the member's request. If the limited member does not communicate with the plan, the limited member's share would be retained until the directions are received. [See para. 2.10-2.12]

- 15.29 In our plan the member can make certain decisions respecting how the member's benefits are invested. How does filing a Form P1 affect that right?

*Investment
directions*

Commentary: the administrator must give the spouse notice of an investment direction and wait 30 days before acting on the direction. The 30 day notice requirement applies for any direction given to the plan administrator by a member. [FLA, Reg., s.9(c)]

Obviously, in some cases it will be important to be able to respond to the investment direction more promptly than that. It would be open to the member to ask for the spouse to waive notice in these cases. The spouse might be prepared to give the administrator a general waiver concerning notice for all investment directions. It might simplify things for the administrator to develop a form for this purpose.

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- 15.30 If the spouse takes a transfer of the commuted value of the benefits before the member's pension commences, will the member pay the price by having too much deducted when adjusting the member's share?

*Adjusting
the member's
pension (1)*

Commentary: no. The legislation sets out rules for adjusting the member's share which the administrator must follow. [FLA, Reg., s.21]

- 15.31 How are the member's remaining benefits adjusted after there has been a division?

*Adjusting
the member's
pension (2)*

Commentary: the adjustment is made by reducing pensionable service. In the usual case, the reduction will be half the pensionable service acquired during the dates used to specify the portion of the benefits that are subject to division. [FLA, Reg., s.21(3) and (4)] But see para. 15.32.

- 15.32 How are the member's benefits adjusted if the division is of a matured pension or a transfer from a defined contribution account?

*Adjusting
member's benefits
in other cases*

Commentary: the member keeps the balance of the monthly payment, or of the defined contribution account, as the case may be. There is no other adjustment required, and no rule for this is set out under Part 6 or the Regulation.

- 15.33 How are the member's pension benefits adjusted when there is more than one breakdown of a relationship and more than one division? If service is adjusted immediately, then the order in which the pension benefits are divided might affect the value of a spouse's share.

Adjustment

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*when more than
one division*

Commentary: the Regulation does not provide a rule for adjusting the member's benefits when there is more than one division of them. However, the approach that appears to work best, if there is no overlap in the periods being divided, is to calculate each spouse's share assuming that there has been no prior division (by notionally retaining the value and service allocated in the earlier division).

15.34 Will the adjustment be neutral to the plan?

*Effect on
the plan*

Commentary: in principle, the adjustment is supposed to be neutral. But with the rules that provide for determining the former spouse's share of unmatured benefits in a defined benefit plan based on the average age of retirement for the plan, and those that provide for adjusting the member's benefits by reducing service, this may not always be the case. [See para. 15.31]

15.35 The member filed the forms with our plan to have the pension commence next month. The member has now requested that the commencement date be put on hold to give the member and former spouse time to finalize pension division arrangements. Once finalized, they want the pension division arrangements completed as of the preserved pension commencement date. They have now provided us with an agreement spelling this out. What are our obligations?

*Retroactive
Arrangements*

Commentary: the parties can preserve a pension commencement date in these circumstances so that the pension division arrangements can be carried out retroactive to that date. [FLA, s. 132; see also BCLI Report, recommendation 12] This allows the parties to preserve pension division options (since the rules change once a pension has commenced) and also protects the parties because delay in finalizing pension division arrangements will not result in losing any of the pension income. The FLA requires the plan administrator to implement a retroactive division in these circumstances.

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- 15.36 We relied upon s. 23(5) of the Regulation to specify an average age of retirement. Our actuaries have reconsidered matters and suggest that it would make more sense for our plan to select a different age for this purpose.

*Changing
average age
of retirement*

Commentary: the policy adopted under the *FLA* is to ensure that the average age of retirement is selected carefully, and not changed without good reason. The concern is that if the issue is decided from file to file, an unconscious bias may creep in. An administrator may elect an average age of retirement that differs from the age required under the Reg. (or if the plan has no average age of retirement), but cannot change that election at a later date without the permission of the Superintendent. This applies equally to plans that are subject to B.C. law, but not registered in B.C. [*PBSA*, s. 23(5)]

- 15.37 Can the plan take the spouse or the member's sex into account when valuing and adjusting pension entitlement?

*Sex
neutral*

Commentary: no. The *PBSA* requires that these calculations be carried out on a sex neutral basis. [*PBSA*, s. 24 (2)(b)]

- 15.38 The plan received Form P2 and the court order and the benefits were divided in accordance with them. After receiving Form P6, the member has written disagreeing with the approach to division. What are our obligations?

*Member objects
to method
adopted
by plan*

Commentary: if the calculations are checked and are accurate, the administrator must continue to pay the member and limited member their shares. The member will require a court order directing a different result. It would make sense, however, to make sure

(a) the member's objection is understood, and

(b) the parties understand how the shares were determined.

If the member and spouse are in agreement on the point, then the administrator can rely on their joint direction. If the member and spouse cannot reach agreement, and court proceedings are commenced, the administrator should consider making such payments as are called for (or, at least, the amount in dispute) into court. See para. 8.6. This protects the plan from liability.

- 15.39 If the administrator is required to send a spouse, limited member or member a notice, does it have to be by mail?

*Do notices have
to be sent by
mail?*

Commentary: notices may be sent by ordinary mail. If the intended recipient provided you with an e-mail address or fax number for the purpose of delivery (by including it on a form filed with the plan, for example) then the administrator can deliver the notice by e-mail or fax, as the case may be: Reg., s.2(2). E-mail and faxes are deemed to be received on the day they are sent. Mail is deemed to be received 5 days after mailing: Reg., s.2(3). See para. 3.2, 13.2 and 15.26.

Although e-mail and fax may be convenient in many cases, in many cases the administrator will want to ensure there is confirmation that notice was given, which generally would mean using registered mail, or a courier service.

- 15.40 We have on file an order dividing the benefits between the parties, and the former spouse is a limited member of our plan. The parties have now decided not to divide the pension benefits (the member is going to pay a lump sum to the former spouse in compensation). Can they withdraw the order and the limited member filing? If so, how should they do that?

*Parties have
decided not*

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*to divide
the benefits*

Commentary: the parties can agree to waive a division of benefits at any time, provided the pension division arrangements have not yet been implemented. [FLA, s. 126(1)] Form P7, "Withdrawal of Notice/Waiver of Claim" would be used. This needs to be signed by the former spouse (or, if the former spouse is deceased, by the former spouse's personal representative).

- 15.41 The member has advised us that all outstanding issues have been resolved with the former spouse and the former spouse has waived any claim to the member's pension benefits. We have on file a Form P1 which requires us to give the former spouse advance notice. Can we ignore that now?

*Withdrawing
Form P1*

Commentary: the obligation to provide advance notice to a former spouse continues until the administrator receives either (a) a Form P7 signed by the former spouse withdrawing the Form P1, or (b) a copy of the agreement, or court order, confirming that the spouse no longer has any claim to the member's benefits. See para. 5.6 and 13.10.

- 15.42 The limited member has sent us a fax with updated contact information (a new mailing address and telephone number). Do we have to require the limited member to send us a Form P8, "Change of Information"?

*Updating
contact
information*

Commentary: no. In most cases, there is no substitute for using a prescribed form. But Form P8 is included as a convenient way for parties to update personal information. It is recognized, however, that people can provide updated information in other reasonable ways. Using Form P8 is permissive, not mandatory. [Reg., s. 6]

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- 15.43 We have on file a Form P5, "Waiver of Survivor Benefits After Pension Commencement" signed by the member's former spouse. We have now received a Form P7 signed by the former spouse, to withdraw the Form P5. Is this acceptable?

*Form P7 and
Waiver of Survivor
Benefits*

Commentary: no. It is expected that few well-advised former spouses will use Form P5 to waive survivor benefits: see para. 5.6. But in those rare circumstances where a Form P5 has been signed by a former spouse, it cannot be withdrawn by the former spouse by filing a Form P7, "Withdrawal of Notice/Waiver of Claim".

The Form P7 is used by a former spouse to waive any claim to entitlement that would otherwise belong *to the former spouse*. A former spouse who signed a Form P5 agreed to hold that entitlement for a specified third party. Only the specified third party would be able to waive a claim to it.

- 15.44 The former spouse filed a Form P1 with the plan. In responding to the former spouse's request for information, we seem to have included forms with some of the member's personal information. What is our liability?

*Accidentally
disclosed
personal
information*

Commentary: protecting personal information is a serious obligation. [FLA, s. 13(1)] However, there is no liability for accidental disclosure if the administrator was acting in good faith.

- 15.45 We provided information about pension benefits to a former spouse who had filed a Form P1. We are concerned, however, that the information is being improperly used. The member says that it has been posted on the former spouse's Facebook page.

*Confidentiality
of information
provided by*

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plan

Commentary: anyone receiving information under the Regulation is under an obligation to keep the information confidential. [Reg., s. 13(4)] It may only be used for the purpose of dividing the benefits (which means it can be disclosed to professional advisors), or introduced in evidence in legal proceedings involving the benefits.

The member would be entitled to various remedies against the former spouse and should seek legal advice.

A plan administrator might consider adding a warning to information provided pursuant to a Form P1 that the information is confidential and there are legal consequences to a person who discloses the information other than for the purposes of dividing the benefits.

- 15.46 We have received an agreement dividing the benefits under our plan, but it is so garbled, we can't figure out what the parties really intend for us to do. What are our obligations?

*Pension div.
arrangements
don't make sense*

Commentary: notify the parties, explain the problem and request directions. [Regulation, s. 7(2)] If they cannot agree, either party can apply to court for directions. [FLA, s. 130, 131]

- 15.47 We have a Form P1 on file. The member has applied for pension commencement. The lawyer for the former spouse says we can't do anything until they finalize the pension division arrangements. Is that correct?

*Form P1 and
application for
pension
commencement*

Commentary: no. The P1 places a notice obligation on the administrator and the former spouse is entitled to request information about the benefits. But once the administrator gives the former spouse 30 days' advance notice about the member's application for pension commencement, the adminis-

trator is required to start paying the pension. [FLA, s. 142(1)] This rule applies even if the administrator has received a copy of an agreement or court order dividing the benefits, but the former spouse has not yet applied to become a limited member. [FLA, s. 142(2)] If the former spouse needs more time to finalize the pension division arrangements, the parties can agree on preserving the pension commencement date: see para. 15.35. Otherwise, the former spouse will need to obtain a restraining order to preserve pension division options. See para. 15.48.

- 15.48 We have received an agreement dividing the benefits under our plan, but no forms have been filed. The member has applied for pension commencement. What are our obligations?

No forms filed

Commentary: in any situation where there has been an incomplete application by a former spouse with respect to perfecting a claim to pension benefits, including just sending in a court order or agreement, the administrator is protected from any liability by giving the spouse the same notice that would have been given if the spouse had filed a Form P1, or become a limited member. [FLA, s. 143]

APPENDIX A

Selected Portions of the FAMILY LAW ACTS .B.C. 2011, Chapter 25

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Spouses and relationships between spouses

- 3** (1) A person is a spouse for the purposes of this Act if the person
- (a) is married to another person, or
 - (b) has lived with another person in a marriage-like relationship,
and
 - (i) has done so for a continuous period of at least 2 years, or

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- (i) except in Parts 5 [Property Division] and 6 [Pension Division], has a child with the other person.
- (2) A spouse includes a former spouse.
- (3) A relationship between spouses begins on the earlier of the following:
 - (a) the date on which they began to live together in a marriage-like relationship;
 - (b) the date of their marriage.
- (4) For the purposes of this Act,
 - (a) spouses may be separated despite continuing to live in the same residence, and
 - (b) the court may consider, as evidence of separation,
 - (i) communication, by one spouse to the other spouse, of an intention to separate permanently, and
 - (ii) an action, taken by a spouse, that demonstrates the spouse's intention to separate permanently.

Part 6 – Pension Division

Division 1 – General Matters

Definitions

110 In this Part and the regulations made under section 246 [regulations respecting pension division]:

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"administrator" means a person responsible for administering a plan

(a) under the terms of the plan, or

(b) as required by the *Pension Benefits Standards Act* or equivalent legislation in another jurisdiction,

and includes the administrator of a supplemental pension plan and the issuer of an annuity;

"beneficiary" means a person entitled under the terms of a plan to receive preretirement survivor benefits or postretirement survivor benefits on the death of a member;

"benefit" means a pension or any other benefit under a plan, and includes a return of contributions;

"commuted value" means the value of a benefit, determined in accordance with the *Pension Benefits Standards Act*;

"defined benefit plan", subject to the regulations, means

(a) a plan under which benefits are determined by a defined benefit provision, and

(b) a prescribed plan,

but does not include a hybrid plan;

"defined benefit provision" means a provision of a plan under which benefits are determined in any way other than as described in the definition of "defined contribution provision";

"defined contribution plan", subject to the regulations, means

(a) a plan under which benefits are determined solely by reference to a defined contribution provision, and

(b) a prescribed plan;

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"defined contribution provision" means a provision of a plan under which benefits are determined solely by reference to what is provided by

- (a) contributions made by an employer on a member's behalf,
- (b) contributions made by a member, and
- (c) interest and any other amounts applied respecting a member or former member;

"extraprovincial plan", subject to the regulations, means a plan that is not a local plan but is registered under legislation, equivalent to the *Pension Benefits Standards Act*, of another jurisdiction, and includes a supplemental pension plan to an extraprovincial plan;

"former Act" means the *Family Relations Act*, R.S.B.C. 1996, c. 128;

"hybrid plan", subject to the regulations, means any of the following:

- (a) a plan under which some benefits are determined by a defined contribution provision and other benefits are determined by a defined benefit provision;
- (b) a plan under which the member, when the pension commences, may choose whether benefits are determined by a defined contribution provision or a defined benefit provision;
- (c) a prescribed plan;

"joint pension" means a pension that is payable during the joint lives of the member and another person and that continues, after the death of either, to be payable to the survivor for life;

"limited member" means a person designated under section 113 [designation of limited members] as a limited member of a local plan;

"local plan", subject to the regulations, means any of the following:

- (a) a plan that is established by the government;

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(b) a plan that

- (i) is registered under the *Pension Benefits Standards Act* or equivalent legislation in another jurisdiction, and
- (ii) has members who accrue, or have accrued, entitlement to benefits under the plan from employment in British Columbia;

(c) a plan that is subject to this Part

- (i) by the terms of the plan,
- (ii) by the operation of legislation, in British Columbia or another jurisdiction, that regulates the plan, or
- (iii) by reason of the requirements of the *Pension Benefits Standards Act* and a reciprocal agreement between governments;

(d) a prescribed plan,

but does not include a plan for specified individuals within the meaning of the *Income Tax Act* (Canada);

"member", in relation to a plan, means a person, other than a limited member, who

- (a) has made contributions to the plan or on whose behalf an employer was required by the plan to make contributions, and who has not terminated membership or begun receiving a pension,
- (b) retains a present or future entitlement to receive a benefit under the plan, or
- (c) has begun receiving a pension;

"pension" means a series of payments that continue for the life of a member, or for a shorter period, whether or not it is afterward continued to any other person;

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"phased retirement benefit" means periodic amounts that are

- (a) payable to a person who is eligible for a phased retirement benefit under the *Pension Benefits Standards Act*, and
- (b) each equal to a portion of the periodic amounts that would be payable as a pension to which the person is entitled on reaching pensionable age;

"phased retirement period" means the period respecting which phased retirement benefits are to be paid to a person who is eligible to receive them;

"plan" means a plan, a scheme or an arrangement, other than a prescribed plan, scheme or arrangement, organized and administered to provide pensions for members;

"postretirement survivor benefits" means lump-sum or periodic benefits paid under a plan to a beneficiary when a member dies after the member's pension commences;

"preretirement survivor benefits" means lump-sum or periodic benefits paid under a plan to a beneficiary when a member dies before the member's pension commences;

"proportionate share" means a fraction calculated in accordance with the regulations, an agreement or an order;

"separate pension" means the share of a member's benefits, determined in accordance with the regulations, that is

- (a) payable to a limited member until the earlier of the death of the limited member and the termination of benefits under the plan, and
- (b) separate from the benefits payable to the member;

"supplemental pension plan", subject to the regulations, means a plan

- (a) under which initial and continuing membership is subject first having membership in another plan, and

- (b) that provides benefits that supplement those provided under the other plan;

"transfer" means a transfer made in accordance with the regulations.

Benefits to be determined in accordance with this Part

- 111** (1) If a spouse is entitled under Part 5 [Property Division] to an interest in benefits, the spouse's share of the benefits and the manner in which the spouse's entitlement to benefits is to be satisfied must be determined in accordance with this Part, unless an agreement or order provides otherwise.
- (2) For the purposes of this Part, all of a member's benefits are deemed to be allocated to the member if an agreement between that member and that member's spouse, or if an order,
- (a) is silent on entitlement to benefits, and
 - (b) represents a final settlement and separation of the financial affairs of the member and the spouse in recognition of the end of the relationship between the spouses.
- (3) Nothing in subsection (2) affects a court's jurisdiction under Part 5 in relation to an agreement or order.

Original agreements and orders

- 112** (1) In this section, "original agreement or order" means an agreement or order, made at any time, that provides for the division of benefits, under a local plan, other than in accordance with this Part.
- (2) If an original agreement or order provides that benefits are not divisible, provides for a method of division other than in accordance with this Part, or is silent on entitlement to benefits, a member and a spouse

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may agree to have benefits divided under this Part at any time before the earliest of the following:

- (a) benefits are divided under the original agreement or order;
 - (b) the member or spouse dies;
 - (c) benefits are terminated under the plan.
- (3) If the original agreement or order provides that the member must pay the spouse a proportionate share of benefits under a plan when the member's pension commences,
- (a) if the member's pension has not commenced,
 - (i) the member and spouse may agree, by the spouse giving notice under Division 2 [Division of Benefits in Local Plans] of this Part, to divide benefits in accordance with this Part, and
 - (ii) unless the member and spouse agree otherwise, the original agreement or order must be administered in accordance with the regulations, or
 - (b) regardless of whether the member's pension has commenced, the spouse may choose to have benefits divided in accordance with section 117 [local plans after pension commencement].
- (4) Subsection (3) (b) does not apply if the original agreement or order expressly prohibits the division of benefits under Part 6 of the former Act or under this Part.
- (5) Unless an agreement or order provides otherwise, a term in the agreement or order that requires a member to sever, or to assist a spouse in severing, the spouse's share from the member's benefits under a plan as soon as it becomes possible to do so is conclusively deemed to be an agreement referred to in subsection (3) (a) (i) of this section, made as of the date the administrator receives notice that the spouse is to be designated as a limited member or is entitled to benefits under section 114 [local defined contribution plans].

Designation of limited members

- 113** (1) This section applies if benefits to be divided are in a local plan and
- (a) the pension has commenced, or
 - (b) the pension has not commenced but is in
 - (i) a defined contribution plan to which section 114 (2) (b) [local defined contribution plans] applies,
 - (ii) a defined benefit plan,
 - (iii) the defined benefit portion of a hybrid plan,
 - (iv) a supplemental pension plan to which section 119 (3) (d) [supplemental pension plans] applies, or
 - (v) a plan to which section 121 (3) [benefits for specified individuals] applies.
- (2) A spouse may be designated as a limited member of the local plan by either the member or the spouse giving notice in accordance with section 136 [notice or waiver].
- (3) A limited member has the following rights:
- (a) to receive from the administrator benefits as determined under section 115 [local defined benefit plans] or 117 [local plans after pension commencement], as applicable;
 - (b) to enforce rights under the plan and recover damages for losses suffered as a result of a breach of a duty owed by the administrator to the limited member;

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- (c) except as modified by this Part and the regulations made under it, all of the rights that a member, within the meaning of this Act, has under the *Pension Benefits Standards Act*;
 - (d) the additional rights that are set out in this Part.
- (4) A spouse ceases to be a limited member if the commuted value of the spouse's proportionate share of benefits is transferred under this Part to the credit of the spouse.

Division 2 – Division of Benefits in Local Plans

Local defined contribution plans

- 114** (1) This section applies, even if a member is receiving benefits by withdrawals, if
- (a) the benefits to be divided are in a local plan that is a defined contribution plan, and
 - (b) the pension has not commenced.
- (2) A spouse is entitled, by giving notice in accordance with section 136 [notice or waiver],
- (a) to have a prescribed portion of the member's account balance transferred from the plan to the credit of the spouse, or
 - (b) if the administrator consents, to have the spouse's proportionate share administered in the plan subject to the same terms and conditions that apply to members.

Local defined benefit plans

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- 115** (1) This section applies if
- (a) the benefits to be divided are in a local plan that is a defined benefit plan, and
 - (b) the pension has not commenced.
- (2) Subject to subsection (3), a limited member is entitled, on giving notice in accordance with section 136 [notice or waiver],
- (a) to receive the limited member's proportionate share of the benefits by a separate pension, or
 - (b) to have the limited member's proportionate share of the commuted value of the benefits transferred from the plan to the credit of the limited member.
- (3) A separate pension under subsection (2) (a) may commence, or a transfer under subsection (2) (b) may be made, no earlier than the earliest date that the member could elect to have the member's pension commence.
- (4) A limited member who chooses to receive a separate pension under subsection (2) (a) may choose, in the notice referred to in subsection (2), to receive benefits by any method the member could receive benefits.
- (5) A limited member is entitled, before his or her separate pension commences and during any applicable phased retirement period, to receive a proportionate share of the phased retirement benefit paid to the member under and in accordance with section 38.1 of the *Pension Benefits Standards Act*.
- (6) If a member terminates membership in the plan and chooses to have his or her share of the benefits transferred from the plan, the limited member's proportionate share must be transferred from the plan to the credit of the limited member unless

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- (a) the administrator consents to continue administering the limited member's proportionate share in the plan, or
- (b) the limited member has commenced receiving a separate pension before the member terminates membership in the plan.

Local hybrid plans

- 116 (1) This section applies if
- (a) the benefits to be divided are in a local plan that is a hybrid plan, and
 - (b) the pension has not commenced.
- (2) A spouse is entitled, by giving notice in accordance with section 136 [notice or waiver], to a division of benefits as follows:
- (a) if the member may choose to receive benefits as if the benefits were in either a defined contribution plan or a defined benefit plan, that choice is available to the spouse also;
 - (b) if the administrator consents, the spouse may choose to receive benefits as if all of the benefits were in either
 - (i) a defined contribution plan, or
 - (ii) a defined benefit plan;
 - (c) in any other case,
 - (i) to the extent that benefits are determined by a defined contribution provision, as if the benefits were in a defined contribution plan, and
 - (ii) the remainder divided as if the benefits were in a defined benefit plan.
-

Local plans after pension commencement

- 117** (1) This section applies if
- (a) the benefits to be divided are in a local plan, and
 - (b) the pension has commenced.
- (2) A spouse is entitled, by giving notice in accordance with section 136 [notice or waiver], to receive a proportionate share of benefits paid under the plan during the member's lifetime until the earlier of
- (a) the death of the spouse, and
 - (b) the termination of benefits under the plan.
- (3) The references in subsection (2) to "benefits" do not include a member's phased retirement benefit if the condition in section 38.1 (4) (e) (i) of the *Pension Benefits Standards Act* has been met.
- (4) If the member dies before the limited member and the limited member is entitled to postretirement survivor benefits under the plan, the limited member's entitlement is to be determined in accordance with section 124 (5) [death of member or limited member].

Division 3 – Division of Other Benefits

Annuities

- 118** Unless an agreement or order provides otherwise, if a member receives benefits under an annuity that is purchased by the member rather than by an administrator on behalf of the member, the provisions under this Part

that apply to the division of benefits after pension commencement apply to the division of the annuity.

Supplemental pension plans

- 119** (1) This section applies if a member has or may acquire benefits under a supplemental pension plan to a local plan.
- (2) A spouse who is entitled to a proportionate share of a member's benefits in a local plan is entitled, by giving notice in accordance with section 136 [notice or waiver],
- (a) to be designated as a limited member of the plan, and
 - (b) to receive a proportionate share of benefits under the supplemental pension plan.
- (3) The division of benefits under a supplemental pension plan is as follows:
- (a) if the benefits are determined by a defined contribution provision, the pension has not commenced and the administrator consents, section 114 [local defined contribution plans] applies;
 - (b) if the supplemental pension plan is structured as a hybrid plan, the pension has not commenced and the administrator consents, section 116 [local hybrid plans] applies;
 - (c) if the supplemental pension plan has commenced, section 117 [local plans after pension commencement] applies;
 - (d) in any other case, a spouse who has become a limited member is entitled to receive a proportionate share of benefits by a separate pension when the member elects to have the member's pension commence, unless the administrator consents to having the limited member choose to receive the proportionate share of benefits by

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another method available under this Part for dividing benefits under a local plan.

- (4) Despite any other provision, payment of a spouse's proportionate share of benefits under a supplemental pension plan
- (a) is subject to the same terms and conditions that apply to the payment of benefits to members of the plan, and
 - (b) is adjusted, suspended or ends if the member's benefits are adjusted, suspended or end because the member violated a condition of the plan.

Compensation for lost supplemental benefits

- 120** (1) If an act or omission by a member of a supplemental pension plan causes a loss to a spouse respecting the spouse's proportionate share of benefits under the supplemental pension plan, the Supreme Court, on application by that spouse, may order the member to pay compensation to that spouse.
- (2) In determining whether to make an order under subsection (1) and the amount of compensation to award if an order is made, the court must consider
- (a) whether the member acted unreasonably or in bad faith,
 - (b) whether the member obtained an advantage as a result of the act or omission, and
 - (c) the financial arrangements and division of property respecting the member and the spouse when the relationship between the spouses ended.

Benefits for specified individuals

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- 121** (1) This section applies if a member has benefits under a plan whose only members are specified individuals within the meaning of the *Income Tax Act* (Canada).
- (2) A spouse is entitled, by giving notice in accordance with section 136 [notice or waiver],
- (a) to be designated as a limited member of the plan, and
 - (b) to a proportionate share of benefits under the plan.
- (3) A spouse who has become a limited member is entitled to receive a proportionate share of benefits by a separate pension when the member elects to have the member's pension commence, unless the administrator consents to having the limited member choose to receive the proportionate share of benefits by another method available under this Part for dividing benefits under a local plan.

Disability benefits

- 122** (1) This section applies if benefits are paid to a member under a plan as a consequence of the member's disability.
- (2) If a spouse is entitled under an agreement or order to receive a proportionate share of disability benefits paid under the plan,
- (a) the disability benefits are to be divided by giving notice in accordance with section 136 [notice or waiver],
 - (b) the provisions under this Part that apply to the division of benefits after pension commencement apply to the division of the disability benefits, and
 - (c) the division of the disability benefits continues until the earlier of
 - (i) the death of the spouse, and

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- (ii) the termination of disability benefits under the plan.
- (3) If an agreement or order dividing benefits is silent on entitlement to disability benefits, all of a member's disability benefits are deemed to be allocated to the member.
- (4) A member's entitlement to disability benefits does not affect how other benefits under a plan are divided between the member and the member's spouse.
- (5) Nothing in subsection (3) affects a court's jurisdiction under Part 5 [Property Division] in relation to an agreement or order.

Extraprovincial plans

- 123** (1) This section applies if the benefits to be divided are in an extraprovincial plan.
- (2) A spouse is entitled to a division of benefits in an extraprovincial plan as follows:
- (a) subject to subsection (3), if the plan, or the legislation of any jurisdiction establishing or regulating the plan, provides a method of satisfying the interest of the spouse in the benefits, by that method;
 - (b) in any other case, to receive from the administrator during the member's lifetime a proportionate share of benefits paid under the plan until the earlier of
 - (i) the death of the spouse, and
 - (ii) the termination of benefits under the plan.
- (3) If, having regard to the rules respecting the division of benefits under this Part, the method under subsection (2) (a) would operate unfairly,

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the Supreme Court may order that the spouse's share in the benefits be satisfied in accordance with subsection (2) (b) instead.

- (4) If subsection (2) (b) applies,
- (a) the member must designate the spouse as the member's beneficiary under the plan to the extent of the spouse's interest in the benefits, unless the designation is not possible,
 - (b) if the member's pension is in the form of a joint pension with a spouse, the spouse is the owner of the postretirement survivor benefits, and
 - (c) subject to the entitlement, if any, of another spouse, a spouse who is a beneficiary of postretirement survivor benefits is entitled to all of the postretirement survivor benefits.

Division 4 – Death of Member or Limited Member

Death of member or limited member

- 124** (1) This section applies if a limited member is entitled to a proportionate share of benefits under
- (a) a defined benefit plan, or
 - (b) a supplemental pension plan
 - (i) to a local plan, and
 - (ii) under which preretirement survivor benefits are payable.
- (2) If a member dies before
- (a) the member's pension commences, and

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- (b) the limited member receives the limited member's proportionate share of the benefits,

the limited member is entitled to receive that proportionate share as if the member had not died, in an amount equal to the commuted value of the limited member's proportionate share as calculated on the day before the death of the member.
- (3) If a member dies after the limited member receives all of the limited member's share of benefits under sections 115 [local defined benefit plans] and 119 [supplemental pension plans], the limited member is entitled to no further share of the member's benefits except to the extent that the member has designated the limited member as a beneficiary of the benefits.
- (4) If a limited member dies before the member, before the member's pension commences and before receiving all of the limited member's share of benefits under sections 115 and 119, the administrator must transfer to the credit of the limited member's estate the remaining proportionate share of the commuted value of the benefits.
- (5) Despite the division of benefits under this Part,
 - (a) if a member's pension is in the form of a joint pension with a spouse, the spouse is the owner of the postretirement survivor benefits, and
 - (b) a limited member who is a beneficiary of postretirement survivor benefits is entitled to all of the postretirement survivor benefits, subject to the entitlement, if any, of another limited member.

Entitlement to preretirement survivor benefits

- 125** Entitlement to any portion of preretirement survivor benefits under a plan that exceeds a limited member's proportionate share is to be determined in accordance with the law that governs the designation of beneficiaries,
-

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or the law that governs if there is no beneficiary designation, as applicable.

Waiving pension or postretirement survivor benefits

- 126** (1) Before an administrator implements the division of benefits under a plan, a limited member or the personal representative of his or her estate may waive the division of benefits by giving notice in accordance with section 136 [notice or waiver].
- (2) If a spouse is entitled to receive, or is receiving, postretirement survivor benefits, a waiver or an order does not affect that entitlement unless
- (a) the spouse waives his or her entitlement by giving notice in accordance with section 136, or
 - (b) the Supreme Court, in allocating all or part of the postretirement survivor benefits to a person other than the spouse, refers expressly to this subsection in the order making the allocation.
- (3) If a waiver or an order is made in accordance with subsection (2),
- (a) the administrator may consent to pay postretirement survivor benefits to a person other than the spouse, but is not required to do so, and
 - (b) if a person becomes entitled to postretirement survivor benefits as a result of the waiver or order and receives an overpayment of the postretirement survivor benefits, the person is liable to the administrator to repay the overpayment.

Division 5 – Other Matters Respecting Pension Division

Agreements respecting division

- 127** (1) Despite any provision of this Part but subject to section 93 [setting aside agreements respecting property division], spouses may make a written agreement respecting the division of benefits under a plan, including a written agreement doing one or more the following:
- (a) determining the spouse's proportionate share of benefits in a manner that would leave the member with less than half, or none, of the member's benefits;
 - (b) providing for the satisfaction of all or part of the spouse's interest in the benefits by the member providing compensation to the spouse.
- (2) An agreement may provide that, despite the Canada Pension Plan, unadjusted pensionable earnings under that Act will not be divided between the spouses.

Determining compensation

- 128** (1) If, by an agreement or order, a member must provide compensation to a spouse in satisfaction of all or part of the spouse's interest in benefits under a plan, the compensation must be determined in accordance with the regulations unless the agreement or order provides otherwise.
- (2) If an administrator and a spouse enter into an agreement under which the spouse accepts from the administrator compensation or a transfer of a share of benefits, in satisfaction of the spouse's interest in any circumstance not specifically dealt with under this Part, the compensation or transfer must be calculated in accordance with the regulations unless the Supreme Court orders otherwise.

Reapportioning benefits

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- 129** The Supreme Court may reapportion to a spouse entitlement to all or part of a member's benefits under a plan for the purpose of providing the spouse with an independent source of income if
- (a) it is necessary, appropriate or convenient in the circumstances, and
 - (b) the financial and property arrangements between the member and spouse to address the spouse's need to become or remain economically independent and self-sufficient would otherwise require an order
 - (i) respecting spousal support, or
 - (ii) requiring the member, after pension commencement, to pay the spouse a share of the benefits under the plan, or under another plan, as they are received.

Clarifying division of benefits

- 130** Despite section 215 (2) [changing, suspending or terminating orders generally], on application by a member or spouse, the Supreme Court may at any time give directions or make orders to facilitate or enforce the division of benefits in accordance with an agreement or order.

Changing division of benefits in unusual circumstances

- 131** (1) This section applies if the method of dividing benefits under this Part will operate in a manner that is inappropriate given
- (a) the terms of the plan, or
 - (b) any change to the terms of the plan after the date an agreement or order is made to divide the benefits.
- (2) Despite section 215 (2) [changing, suspending or terminating orders generally], on application by a member or spouse, the Supreme Court

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may direct by order an appropriate method of dividing benefits, and the order is binding on the administrator.

- (3) An application under this section
 - (a) may be made at any time before benefits are divided, and
 - (b) must be served on the administrator at least 30 days before the date set for the hearing of the application.
- (4) The administrator may attend and make representations respecting the effect on the plan of any proposed division of benefits under this section.

Retroactive division of benefits

- 132** (1) In this section, "pension commencement date" means the date chosen by a member, in accordance with the requirements of a plan, to have the member's pension commence.
- (2) If commencement of a member's pension is delayed beyond the pension commencement date because the member and the member's spouse, or either of them, are seeking an agreement or order respecting the division of benefits, both the member and the spouse are entitled to receive their respective shares of benefits retroactive to the pension commencement date if all of the following conditions are met:
- (a) before the pension commencement date, the member or spouse gives to the administrator a copy of an agreement or order that prohibits the member from dealing with benefits under the plan or with family property generally;
 - (b) on or before December 1 of the year following the year in which the pension commencement date falls, the member or spouse gives to the administrator a copy of an agreement or order
 - (i) setting out the final terms of the division of benefits, and

- (ii) lifting the prohibition referred to in paragraph (a);
- (c) if approval from the Canada Revenue Agency is required to divide the benefits as of the pension commencement date, the administrator, before dividing the benefits, obtains that approval.
- (3) For the purposes of subsection (2), the rules respecting the division of benefits before pension commencement, as set out in sections 114 [local defined contribution plans], 115 [local defined benefit plans] and 116 [local hybrid plans], apply.
- (4) Nothing in this section limits the discretion of an administrator to consent to, or the jurisdiction of a court to order, the retroactive division of benefits in circumstances other than those set out in subsection (2).

Division 6 – Administrative Matters

Information from plan

- 133** (1) A spouse who claims to be entitled to benefits and who has given notice under section 136 [notice or waiver] has a right to request and receive, from the administrator, prescribed information respecting the plan
- (a) after the notice is given, and
 - (b) annually afterwards.
- (2) Despite subsection (1), the Supreme Court may order that an administrator provide, at any time, some or all of the information required under subsection (1).
- (3) An administrator must not disclose prescribed information respecting a member without the member's written consent.

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- (4) If there is a conflict between this section and a provision of the *Freedom of Information and Protection of Privacy Act* or the *Personal Information Protection Act*, this section prevails.

Agreement or order required for division of benefits

- 134** An administrator may administer the division of a member's benefits under this Part only if the administrator has first received a copy of an agreement or order respecting the division of benefits between the member and the member's spouse.

Information required by plan

- 135** (1) An administrator is not required to take any action under this Part until the administrator has sufficient information to identify the plan.
- (2) If the plan is not identified by name in an agreement or order, information respecting the employment under which a member accrued the benefits is sufficient information to identify the plan.
- (3) A person claiming to be entitled to receive a benefit under a plan must prove to the satisfaction of the administrator that the person is entitled to the benefit and, for this purpose, the administrator may require that person to provide evidence to establish the claim.

Notice or waiver

- 136** If a person is required to give notice or a waiver under this Part, the notice or waiver must be given to the administrator in the prescribed form and manner, if any.

Implementing division of benefits

- 137** (1) This section applies if an administrator must divide benefits in a local plan.
- (2) Subject to section 132 [retroactive division of benefits] and subsection (3) of this section, an administrator is required to divide only those benefits that become payable within the prescribed period after the administrator receives all of the following:
- (a) the documents required under section 134 [agreement or order required for division of benefits];
 - (b) the notice required under Division 2 [Division of Benefits in Local Plans] of this Part;
 - (c) the information required, if any, under section 135 [information required by plan];
 - (d) any documents required under any other enactment, or reasonably required by the administrator, to implement the division.
- (3) An administrator may delay the division of benefits
- (a) if delay is necessary until net investment returns affecting the spouse's share are allocated,
 - (b) if delay may avoid or reduce transaction costs associated with dividing benefits, or
 - (c) for any other reason that is reasonably likely to be advantageous to the spouse.
- (4) Nothing in this section relieves the administrator from an obligation to pay benefits, or compensation for benefits, that were not paid through the fault of the administrator.
- (5) Nothing in this section limits a member's duty to compensate a spouse under Part 5 [Property Division] for the spouse's share of benefits paid

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to the member before the date the administrator implements the division of benefits.

Adjustment of member's pension

138 If, under this Act, a spouse or the spouse's estate receives a share of a member's benefits directly from the administrator, the administrator must adjust, in accordance with the regulations,

- (a) the member's interest in the benefits, or
- (b) the interest of any person claiming an interest through the member.

Transfer of commuted value of separate pension or share

139 If a limited member is entitled to a separate pension or a proportionate share of benefits paid under the plan,

- (a) the limited member may apply for a transfer of the commuted value of the separate pension or of the proportionate share, as applicable, in the same circumstances that a member may do so under the *Pension Benefits Standards Act*, and
- (b) an administrator may require the limited member to accept a transfer of the commuted value of the separate pension or of the proportionate share, as applicable, in the same circumstances that an administrator may require a member to do so under the *Pension Benefits Standards Act*.

Administrative costs

140 (1) If the administrator requires a fee to be paid to offset administrative costs incurred in dividing benefits under this Part,

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- (a) the fee may be no more than the prescribed amount, and
 - (b) a member and spouse are each responsible for paying the fee.
- (2) Unless the parties agree otherwise, a member or spouse who pays more than a half share of a fee under subsection (1) may recover from the other the additional amount paid.
- (3) An administrator may deduct a fee under subsection (1) from the payment of benefits.

Income tax

- 141** (1) A member and spouse are each responsible for paying income tax on his or her own share of divided benefits.
- (2) If, under the *Income Tax Act* (Canada), a member or spouse is required to pay income tax on the other person's share of divided benefits, the person who is required to pay the income tax on the other person's share must be reimbursed by the other person for the amount paid.
- (3) An administrator who pays benefits to a spouse under this Part must make, with respect to a deduction required under the *Income Tax Act* (Canada), separate source deductions for each of the spouse's and member's shares of the benefits.
- (4) An agreement or order may require a member to compensate a spouse for the spouse's property interest in benefits paid before the division of benefits is implemented by an administrator on a basis different from that required under subsection (1), if the different basis otherwise complies with applicable law.

Claim does not relieve duty to administer benefits

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- 142** (1) An administrator is not relieved of the duty to administer benefits only because the administrator receives from a spouse a claim to an interest in the benefits.
- (2) A claim under subsection (1) includes receipt, without a full application being made under this Part, of a copy of an agreement or order under which the spouse acquires an interest in the benefits or property under Part 5 [Property Division].

Administrator's duties

- 143** (1) Subsection (2) applies if an administrator
- (a) has
- (i) been given notice under Division 2 [Division of Benefits in Local Plans] or 3 [Division of Other Benefits] respecting a spouse's claim to an interest in benefits, or
- (ii) received an incomplete or otherwise insufficient application for a spouse to become a limited member or to divide benefits, including receiving, without a full application being made, a copy of an agreement or order under which a spouse acquires an interest in benefits, and
- (b) is required to administer the benefits.
- (2) In a circumstance described in subsection (1), the administrator must not take any action, or omit to take an action, in relation to the benefits unless the administrator first gives notice to the spouse in accordance with the regulations.
- (3) Subject to subsection (4), no legal proceeding for damages or other relief lies or may be commenced or maintained against an administrator by or on behalf of a spouse because of anything done or omitted to be done by the administrator if

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- (a) the thing done or omitted was the subject of the notice given under subsection (2), or
 - (b) notice is not required under this section for the administrator to do, or omit to do, the thing.
- (4) Subsection (3) does not apply to an administrator in relation to anything done or omitted by the administrator in bad faith.

Trust of survivor and pension benefits

- 144** (1) If a spouse is entitled to a proportionate share of preretirement survivor benefits or postretirement survivor benefits paid to another person, the other person holds them in trust for the spouse.
- (2) If a spouse is entitled to a proportionate share of a member's benefits and the spouse's proportionate share is paid to the member or another person, the member or other person holds the spouse's proportionate share in trust for the spouse.
- (3) If a person waives, under section 126 [waiving pension or postretirement survivor benefits], entitlement to postretirement survivor benefits but receives postretirement survivor benefits after the waiver takes effect, the person who waived entitlement holds them in trust for the person in whose favour the waiver has been made.
- (4) A recipient holding benefits in trust under this section who has information respecting a person's interest in the benefits must immediately pay the benefits to the person.
- (5) If a spouse receives benefits in an amount that exceeds the spouse's entitlement, the spouse holds the excess amount in trust for, and must immediately pay the excess amount to, the member or the person who is otherwise entitled to the amount.

No further entitlement after division of benefits

- 145** (1) This section applies
- (a) to benefits regulated under the *Pension Benefits Standards Act*, and
 - (b) despite any provision to the contrary in the *Pension Benefits Standards Act* or any other Act.
- (2) If
- (a) a spouse has become a limited member with respect to benefits, or
 - (b) the benefits have been otherwise subject to division with a spouse under this Part,
- the spouse has no further rights, arising solely from that spouse's status as a spouse, to a share of the benefits.
- (3) If a spouse qualifies as a spouse under the *Pension Benefits Standards Act*, a member is not required to choose postretirement survivor benefits with the spouse or have the spouse waive the benefits if
- (a) an agreement or order provides that a division of benefits with the spouse is to be in accordance with this Part, or
 - (b) the spouse is a limited member, regardless of whether benefits have been divided.
- (4) An agreement or order that provides that
- (a) a spouse has no share of benefits, or
 - (b) a spouse's share is satisfied by a means other than by dividing benefits under this Part

is to be treated for the purposes of this section as if the agreement or order divides benefits under this Part, unless the agreement or order provides otherwise.

Time limits

- 198** (1) Subject to this Act, a proceeding under this Act may be started at any time.
- (2) A spouse may start a proceeding for an order under Part 5 [Property Division] to divide property or family debt, Part 6 [Pension Division] to divide a pension, or Part 7 [Child and Spousal Support] for spousal support, no later than 2 years after,
- (a) in the case of spouses who were married, the date
 - (i) a judgment granting a divorce of the spouses is made, or
 - (ii) an order is made declaring the marriage of the spouses to be a nullity, or
 - (b) in the case of spouses who were living in a marriage-like relationship, the date the spouses separated.
- (3) Despite subsection (2), a spouse may make an application for an order to set aside or replace with an order made under Part 5, 6 or 7, as applicable, all or part of an agreement respecting property or spousal support no later than 2 years after the spouse first discovered, or reasonably ought to have discovered, the grounds for making the application.
- (4) The time limits set out in subsection (2) do not apply to a review under section 168 [review of spousal support] or 169 [review of spousal support if pension benefits].

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- (5) The running of the time limits set out in subsection (2) is suspended during any period in which persons are engaged in family dispute resolution with a family dispute resolution professional.

Transition – proceeding respecting property division

- 252** (1) This section applies despite the repeal of the former Act and the enactment of Part 5 [Property Division] of this Act.

- (2) Unless the spouses agree otherwise,

(a) a proceeding to enforce, set aside or replace an agreement respecting property division made before the coming into force of this section, or

(b) a proceeding respecting property division started under the former Act

must be started or continued, as applicable, under the former Act as if the former Act had not been repealed.

Transition – pension benefits

- 253** (1) Subject to subsections (2) and (3), if forms prescribed under the former Act were delivered to the administrator before Part 6 [Pension Division] of this Act comes into force, the former Act continues to apply to the division of benefits between a member and spouse.

- (2) If a spouse became a limited member under the former Act but benefits have not been divided as of the date Part 6 of this Act comes into force, Part 6 of this Act applies to the division of benefits.

- (3) If, after an application was made under the former Act for the spouse to become a limited member, the administrator consulted with the member and spouse respecting how the former Act would apply to an

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agreement or order dividing benefits between the member and spouse, the former Act continues to apply to the extent of, and in accordance with, that consultation.

- (4) If forms prescribed under the former Act are delivered to an administrator after Part 6 of this Act comes into force, the administrator may
- (a) accept the forms as compliance with the requirements of Part 6 of this Act, or
 - (b) require the parties to give notice in accordance with section 136 [notice or waiver] of this Act.

APPENDIX B

DIVISION OF PENSIONS REGULATION

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Part 1 — Interpretation

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Definitions

1 (1) In this regulation:

"Act" means the *Family Law Act*;

"average retirement age", in relation to a plan, means

(a) the average age of retirement for the plan assumed in the most recent actuarial valuation report filed in relation to the plan with the superintendent, or

(b) if a specified age is adopted under section 23 (5), the specified age;

"commencement date" means

(a) the date that, in a section 127 agreement or a Part 6 order, is specified as the date on which the relationship between the member and the spouse began within the meaning of section 3 of the Act, or

(b) if another date is specified in a section 127 agreement or a Part 6 order as the beginning date of the period in relation to which the spouse's proportionate share of the member's benefits is to be calculated under the Act, that specified date;

"defined contribution account", in relation to a plan, means,

(a) in the case of a member of the plan, the money referred to in paragraphs (a) to (c) of the definition of "defined contribution provision" in section 110 of the Act, or

(b) in the case of a limited member of the plan, the money administered for him or her under section 114 (2) (b) of the Act;

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"entitlement date" means

(a) the date that, in a section 127 agreement or a Part 6 order, is specified as the date on which the spouse became entitled under section 81 (b) of the Act to an interest in the member's benefits under the plan, or

(b) if another date is specified in a section 127 agreement or a Part 6 order as the end date of the period in relation to which the spouse's proportionate share of the member's benefits is to be calculated under the Act, that specified date;

"entitlement period" means the period that begins on the commencement date and ends on the entitlement date;

"former Act" means the *Family Relations Act*, R.S.B.C. 1996, c. 128;

"former regulation" means the Division of Pensions Regulation, B.C. Reg. 77/95;

"investment returns" , in relation to money, means interest earned on, and other gains and losses accrued in relation to, the money, less related investment expenses;

"Part 6 order" means an order of the Supreme Court or of a superior court of another jurisdiction made, or enforceable in British Columbia, under Part 6 of the Act;

"pensionable service" , in relation to a member of a plan, means the quantity of time, expressed in terms of months, parts of months or other units of time,

(a) in relation to which the member accrues an entitlement to benefits under the plan, and

(b) that is to be used by the administrator to calculate the benefits;

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"plan text document", in relation to a plan, means the document that sets out the rights, obligations and entitlements under the plan;

"proportionate share", when used in relation to a reference in the Act to a proportionate share, includes a reference in the Act to a portion;

"section 127 agreement" means an agreement under section 127 of the Act between the member and the spouse, which agreement may be in Form P9;

"superintendent" means the person appointed as the Superintendent of Pensions under section 2 of the *Pension Benefits Standards Act*, or, if the plan is registered outside of British Columbia, the person in the jurisdiction in which the plan is registered whose role in that jurisdiction is similar to the role of the Superintendent of Pensions in British Columbia.

- (2) A reference in this regulation to the spouse includes, if the spouse is a limited member of the plan, a reference to the spouse as limited member, and a reference in this regulation to the limited member is a reference to the spouse in his or her capacity as limited member only.
- (3) If the Act applies to an agreement or order made under the former Act, the commencement date and the entitlement date to be used in respect of the agreement or order are
- (a) the dates specified under that agreement or order for the same purposes as commencement dates and entitlement dates are specified under this Act, or
 - (b) if no dates are specified, the dates that were required to be used under the former Act for the same purposes as commencement dates and entitlement dates are used under this Act.

Delivery

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- 2 (1) Without limiting any other means by which a record may be delivered under this regulation, a record may be delivered to a person under this regulation by faxing or emailing the record to a fax address or an email address provided by the person for that purpose.
- (2) A record that is mailed or sent by fax or email is effectively delivered under this regulation as follows:
- (a) if the record is mailed to the most recent mailing address provided by the intended recipient to the sender;
 - (b) if the intended recipient provided to the sender a fax address or an email address for the purposes of deliveries under this regulation and the record is faxed or emailed to the most recent fax address or email address provided by the intended recipient for that purpose.
- (3) Notice sent by ordinary mail is deemed to have been received 5 days after the date of mailing, and notice sent by fax or email is deemed to have been received on the day on which it was sent.

Application of regulation

- 3 (1) Subject to subsection (2), this regulation applies to
- (a) a member of a plan,
 - (b) the member's spouse,
 - (c) if the member's spouse has become a limited member of the plan, the limited member, and
 - (d) the division, under Part 6 of the Act, of the member's benefits under the plan.
- (2) The division referred to in subsection (1) (d) may be modified by
- (a) a waiver under section 126 of the Act or a section 127 agreement, or

(b) a Part 6 order.

Part 2 — Requirements for Notice

Notices and other documents

- 4 (1) For the purposes of section 136 of the Act,
- (a) notice referred to in section 133 of the Act must be given in Form P1 (Claim and Request for Information and Notice),
 - (b) notice referred to in section 112 (5), 113 (2), 114 (2) (b), 116 (2) as that section relates to a defined benefit provision, 117 (2), 119 (2), 121 (2) or 122 (2) of the Act must be given in Form P2 (Request for Designation as Limited Member),
 - (c) notice referred to in section 114 (2) (a) of the Act, or in section 116 (2) of the Act as that section relates to a defined contribution account, must be given in Form P3 (Request for Transfer from Defined Contribution Account),
 - (d) notice referred to in section 115 (2) of the Act must be given in Form P4 (Request by Limited Member for Transfer or Separate Pension),
 - (e) the waiver referred to in section 126 (2) (a) of the Act must be given in Form P5 (Waiver of Survivor Benefits after Pension Commencement), and
 - (f) the waiver referred to in section 126 (1) of the Act must be given in Form P7 (Withdrawal of Notice/Waiver of Claim).

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(2) A notice or other document delivered under the Act, including under this regulation,

(a) is not defective or ineffective,

(b) is not incomplete, and

(c) does not fail to provide sufficient information

merely because it omits information referred to in section 13 (1) (a) or (b) or the information referred to in section 13 (1) (a) or (b) that is contained in the document is incomplete or incorrect.

Withdrawal of notice

5 (1) A person may, in accordance with subsection (2) of this section, withdraw a notice delivered to the administrator under section 4 of this regulation as follows:

(a) in the case of a notice in Form P1, at any time;

(b) in the case of any other notice, at any time before the spouse's proportionate share of the benefits to which the notice relates

(i) is transferred to the spouse,

(ii) is converted into a separate pension, or

(iii) becomes a separate defined contribution account in the plan for the spouse.

(2) To withdraw one or more notices and other documents, a person must deliver to the administrator a notice in Form P7.

(3) If a notice or document is withdrawn under this section, the entitlement of the member and the spouse or their estates to the benefits must be calculated as if the notices and documents with-

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drawn under subsection (2) had never been delivered to the administrator.

- (4) Despite subsections (1) and (2), a Form P7 must not be used to withdraw a Form P5 or a Form P7.

Change of information

- 6 If personal information contained in a notice delivered under section 4 changes, the person who gave that notice must deliver to the administrator a document that provides notice of that change, which document may be in Form P8 (Change of Information).

Administrator must give notice

- 7 (1) Within 30 days after receiving a document referred to in section 4 or 5, the administrator must advise the member of the administrator's receipt of that document by delivering to the member a notice in Form P6 (Administrator/Annuity Issuer Response).
- (2) Without limiting subsection (1), if the administrator cannot act on a document delivered under section 4 or 5 because the document is incomplete or otherwise fails to provide sufficient information, the administrator must, within 30 days after receipt of that document, deliver a notice in Form P6 to the member and the spouse indicating one or both of the following:
- (a) why the administrator cannot act on the document;
 - (b) what must be provided before the administrator can act on the document.

Failure of administrator to act on notice

- 8 (1) If a document referred to in section 4 or 5 is delivered to the administrator, the member or the spouse may apply to the Supreme Court for an order referred to in subsection (2) of this section if

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- (a) the administrator does not, within 30 days after receipt of the document, do one of the following:
 - (i) give, or give effect to, the benefits, entitlements or other rights that under the Act ought to follow on the receipt of such document;
 - (ii) provide a notice under section 7 (2) to explain why the administrator has not acted on the document, or
 - (b) the administrator provides a notice in accordance with section 7 (2) but the applicant disputes the reasons given by the administrator in that notice as to why the administrator has not acted on the document.
- (2) On an application referred to in subsection (1), the Supreme Court may make one or more of the following orders:
- (a) an order requiring compliance with the Act;
 - (b) any other order the court may make under the Act respecting the division of the benefits between the member and the spouse.
- (3) The administrator is a party to the proceedings in which the application referred to in subsection (1) is brought.

Administrator must give notice to spouse if member's interest may be affected

- 9 (1) If the spouse is entitled to information under section 133 of the Act or to notice under section 143 of the Act or is otherwise entitled to information or notice as a limited member, the administrator must deliver to the spouse written notice of any action that the administrator intends to take as a result of any of the following:
- (a) the death of the member;

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- (b) any direction given to the administrator by the member with respect to the benefits, including an election by the member to have his or her pension commence and a change in a beneficiary designation.
- (2) If a direction referred to in subsection (1) (b) is a change in a beneficiary designation, the administrator must advise the spouse whether the spouse will become or will cease to be a beneficiary as a result of that direction.
- (3) Notice under subsection (1) must be given in Form P6.
- (4) The administrator must deliver the notice required under subsection (1) to the spouse at least 30 days before the date on which the administrator's intended action is taken.
- (5) Nothing in this section changes or otherwise affects the effective date of
 - (a) rights arising on the death of the member, or
 - (b) a direction referred to in subsection (1) (b).
- (6) Neither the effective date of the member's direction nor the death of the member
 - (a) prejudices rights the spouse may have or acquire under the *Family Law Act*, or otherwise, before or within the notice period referred to in subsection (4), or
 - (b) prevents a court from granting an order restraining any action that is to be, or may be, taken as a result of any matter referred to in paragraph (a) or (b) of subsection (1).

Part 3 — Administrator's Duty to Provide Information

Information to be provided by administrator to spouse who has filed Form P1

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10 (1) Subject to subsection (3) and section 13, if the spouse has delivered to the administrator a notice in Form P1, the administrator must, within 60 days after receiving a written request for information under section 133 of the Act from the spouse, deliver the following information to the spouse:

- (a) a copy of the most recent annual statement provided to the member, or, if no annual statement is available, the same information that, under the Pension Benefits Standards Act, was to have been contained in the member's annual statement;
- (b) any additional information that is necessary to value the benefits of the member or to finalize the division of the benefits under the Act;
- (c) information as to whether or not the spouse is the beneficiary of the member's benefits;
- (d) if the member is receiving a pension, whether benefits are payable on the death of the member and, if so,
 - (i) information about those benefits,
 - (ii) whether the spouse is entitled to any of those benefits, and
 - (iii) confirmation whether a change of spousal status affects entitlement to those benefits;
- (e) if benefits are based on the member's income for any period, information as to the member's income for that period;
- (f) any information or notice that had been provided to the member after the Form P1 was filed;
- (g) if benefits are transferred to the plan by or on behalf of the member after the Form P1 was filed, or within 2

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years before it was filed, information about what has been transferred;

(h) if benefits are transferred from the plan by or on behalf of the member after the Form P1 was filed, or within 2 years before it was filed, information about what has been transferred and to where it was transferred;

(i) to the extent that it is not provided under paragraphs (a) to (h),

(i) information on options available to and elections that may be made by the member with respect to receiving the benefits, and

(ii) information on options available to and elections that may be made by a limited member with respect to receiving the benefits.

(2) Subject to subsection (3) and section 13, if the spouse delivers to the administrator a written request for an update of the information provided to the spouse under subsection (1) of this section, the administrator must deliver that update within 30 days after receiving that request.

(3) Unless the Supreme Court otherwise orders under section 133 (2) of the Act, the administrator need not deliver to the spouse information under subsection (1) more than once in each calendar year and need not provide to the spouse an update under subsection (2) of this section more than once in each calendar year.

Information to be provided by administrator to limited member

11 (1) Subject to subsection (2), after the spouse becomes a limited member of a plan, section 10 no longer applies to the limited member and at least once in each calendar year, the administrator must provide the following information to the limited member:

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- (a) any information or notice available to members of the plan;
 - (b) to the extent that it is not provided under paragraph (a), information on options available to and elections that may be made by the member with respect to the benefits;
 - (c) to the extent that it is not provided under paragraph (a), information on options available to and elections that may be made by a limited member with respect to the benefits;
 - (d) confirmation of whether the limited member is the beneficiary of the member's benefits.
- (2) After the limited member is in receipt of a separate pension or begins to have his or her proportionate share of the benefits administered in a defined contribution account for the limited member in the plan under section 114 (2) (b) of the Act, the only information the limited member is entitled to receive from the administrator is information relating to the separate pension or the limited member's defined contribution account.

Authorizing representative

- 12** (1) A person entitled to receive information under section 10 or 11 of this regulation may, in writing, authorize a representative to request and receive from the administrator information that the person is entitled to receive under this regulation, and, subject to section 13 and subsection (2) of this section, the administrator must, after receiving such a request, provide that information to both the person and the representative.
- (2) An authorization referred to in subsection (1) ceases on the earliest of
- (a) the date, if any, specified in the authorization,

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- (b) if no date is specified in the authorization, the date that is one year after the date of the authorization,
- (c) the date on which the administrator receives a written revocation of the authorization from the person who issued it, and
- (d) the date on which the administrator receives a written revocation of the authorization from the representative,

and on and after that date, the administrator must cease providing to the representative any of the information that the person is entitled to receive under this regulation until a further authorization is provided.

Confidentiality and non-disclosure of personal information

- 13 (1) When providing information under this regulation, the administrator must not, unless the member consents in writing, provide the spouse with
 - (a) the member's address, fax number, email address, telephone number or marital status, or
 - (b) the identity of any beneficiary nominated by the member other than the spouse.
- (2) Without limiting subsection (1), the administrator must edit any information provided by the administrator to the spouse to remove any of the information that the administrator is, under subsection (1), restricted from providing to the spouse.
- (3) An administrator acting in good faith who accidentally discloses any information listed in subsection (1) is not liable to the member or any other person to pay damages arising from the disclosure.
- (4) A person who receives any documents or information from an administrator under this regulation must keep the information in

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confidence and, without limiting this obligation, must not disclose the documents or information to anyone other than

- (a) for the purposes of dividing benefits under Part 6 of the Act, or determining compensation for those benefits, or
- (b) in the course of permitting the documents to be introduced into evidence in proceedings involving the benefits.

Administrator to provide equal rights to spouse

- 14** If, under the plan text document of the plan, a member may, with the consent of the administrator, have his or her benefits valued, calculated or provided in a particular way or exercise or obtain certain rights in relation to the member's benefits, the limited member may also seek that consent in relation to his or her proportionate share of those benefits and the administrator must not withhold consent in response to the limited member's request for that consent unless consent would have been withheld had the member applied for that consent.

Part 4 — Division of Benefits

Period for division of benefits under section 137 of Act

- 15** The benefits that the administrator is, under section 137 of the Act, required to divide are, with reference to a pension that has commenced other than by withdrawals from a defined contribution account, or with reference to disability benefits under section 122 of the Act, those benefits that become payable within the period that
- (a) begins on the 30th day to follow the date on which the administrator has received
 - (i) all of the documents referred to in section 137 (2) of the Act, and

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- (ii) the payment of the fee permitted under section 28 of this regulation, if required by the administrator, and
- (b) ends on the earlier of the termination of the pension or disability benefits, as the case may be, and the death of the limited member.

Period for complying with division requirements of Act

16 Within 60 days after the date on which the administrator has received all of the documents referred to in section 137 (2) of the Act and the payment of the fee permitted under section 28 of this regulation, if required by the administrator,

- (a) if the spouse has filed a Form P2, the administrator must register the spouse as a limited member and deliver to the limited member and the member a notice in Form P6 confirming that registration,
- (b) if the spouse has filed a Form P3 in which he or she elected to have a portion of the member's defined contribution account transferred from the plan to the credit of the spouse, the administrator must effect that transfer,
- (c) if the limited member has filed a Form P4 in which he or she elected to receive his or her proportionate share of the benefits by a separate pension, the limited member's separate pension must commence, or
- (d) if the limited member has filed a Form P4 in which he or she elected to have the limited member's proportionate share of the commuted value of the benefits transferred from the plan to the credit of the limited member, the administrator must effect that transfer.

Calculation of proportionate share in relation to pensions, benefits under defined benefit provision, disability benefits and phased retirement benefits

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17 (1) If it is necessary, under the Act, including under this regulation, to calculate a proportionate share of the following:

- (a) payments under a pension that has commenced or the commuted value of those payments;
- (b) benefits under a defined benefit provision before pension commencement or the commuted value of those benefits;
- (c) disability benefits under a plan;
- (d) annuity payments;
- (e) phased retirement benefits;

this section applies to that calculation.

(2) The formula set out in subsection (3) applies to the calculation referred to in subsection (1) unless a section 127 agreement, a Part 6 order or an original agreement or order referred to in section 25 (1) of this regulation

- (a) supplants that formula, in which case the formula provided for in the agreement or order applies to the calculation, or
- (b) modifies that formula, in which case the formula as modified by the agreement or order applies to the calculation.

(3) Subject to sections 18 and 19, the proportionate share referred to in subsection (1) of this section must be calculated in accordance with the following formula:

proportionate share = $1/2$ (pensionable service during entitlement period ÷ total pensionable service)

where

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"pensionable service during entitlement period" means the pensionable service accumulated under the plan by the member in the entitlement period;

"total pensionable service" means the pensionable service accumulated by the member to the earliest of

- (a) the date that the limited member's share is transferred from the plan,
- (b) the beginning of the month in which the limited member begins to receive a separate pension,
- (c) the beginning of the month in which the limited member begins to receive a payment of benefits from the member or the administrator, and
- (d) the day immediately preceding the day of the member's death.

Application of purchased service and transferred service

18 For the purposes of accounting in section 17 for purchased service and transferred service, "pensionable service during entitlement period"

- (a) includes
 - (i) all pensionable service, regardless of the period to which it is allocated, that was purchased by or on behalf of the member during the entitlement period, and
 - (ii) all pensionable service, regardless of the period to which it is allocated, that was accumulated under another plan during the entitlement period and transferred to the member's plan, and

- (b) does not include pensionable service purchased by or on behalf of the member, or accumulated under another plan, before or after the entitlement period.

Phased retirement period and recalculation of proportionate share

19 If the member accumulates additional pensionable service after the calculation of the limited member's proportionate share of a phased retirement benefit under section 115 (5) of the Act or the calculation of the spouse's proportionate share of benefits paid under section 117 (2) of the Act, the proportionate share must, whenever any of the following occurs, be recalculated to take into account the additional pensionable service accumulated by the member:

- (a) the spouse is to receive
 - (i) a proportionate share of the commuted value of the benefits under section 115 (2) (b) of the Act,
 - (ii) a separate pension, or
 - (iii) a share of benefits under section 124 (2) of the Act on the death of the member;
- (b) the spouse's estate is to receive a proportionate share of the commuted value of the benefits under section 124 (4) of the Act;
- (c) payment of the member's pension resumes.

Calculation of proportionate share in relation to benefits under defined contribution provision

- 20** (1) If it is necessary, under the Act, including under this regulation, to calculate a proportionate share of the member's defined contribution account, this section applies to that calculation.
- (2) The formula set out in subsection (3) applies to the calculation referred to in subsection (1) unless a section 127 agreement, a Part

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6 order or an original agreement or order referred to in section 25 (1) of this regulation

- (a) supplants that formula, in which case the formula provided for in the agreement or order applies to the calculation, or
- (b) modifies that formula, in which case the formula as modified by the agreement or order applies to the calculation.

(3) The proportionate share referred to in subsection (1) must be calculated in accordance with the following formula:

transfer amount = $1/2$ (account balance - pre-relationship contributions)

where

"account balance" means the total of

- (a) the defined contribution account, before division, as at the entitlement date, and
- (b) the investment returns earned on the amount referred to in paragraph (a) after the entitlement date up to and including the date on which the spouse's proportionate share of the defined contribution account is transferred from the plan to the credit of the spouse or used to establish a defined contribution account in the plan for the spouse;

"pre-relationship contributions" means the total of

- (a) the defined contribution account as at the commencement date, and
- (b) the investment returns earned on the amount referred to in paragraph (a) after the commencement date up to and including the date on which the spouse's proportionate

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share of the defined contribution account is transferred from the plan to the credit of the spouse or used to establish a defined contribution account in the plan for the spouse.

Adjustment of member's benefits under defined benefit provision

- 21** (1) This section applies if the member's benefits under a defined benefit provision are divided under Part 6 of the Act.
- (2) The administrator must, in accordance with subsection (3), adjust the benefits to which the member is entitled and the basis on which they are calculated if
- (a) the division referred to in subsection (1) occurs before the member's pension commences, and
 - (b) the limited member or the limited member's estate has received
 - (i) the limited member's proportionate share of the benefits by a separate pension, or
 - (ii) a transfer of the limited member's proportionate share of the commuted value of the benefits.
- (3) For the purposes of subsection (2), if the member's benefits have vested, the member's pensionable service must be reduced by the amount of pensionable service reflected in the limited member's proportionate share of the benefits.
- (4) As an example of the application of subsection (3), if the proportionate share of the benefits to which a limited member is entitled is calculated under section 17 and the member's benefits have vested, the member's pensionable service is to be reduced by one-half of the pensionable service that, in section 17, constitutes the "pensionable service during entitlement period".
- (5) A reduction of pensionable service under subsection (3) of this section

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- (a) is only for the purpose of adjusting
 - (i) the portion of the benefits that the member is entitled to receive after the division referred to in subsection (1), or
 - (ii) if the member is deceased, the amount of survivor benefits, if any, and
- (b) is not to be taken into account in any determination of eligibility for those benefits under the plan.

Adjustment of member's benefits if divided on death of member

22 In a situation referred to in section 124 (2) of the Act,

- (a) the member's benefits must be adjusted, to reflect that division, in accordance with section 21 of this regulation, and
- (b) any survivor benefits payable under the plan must be calculated on the adjusted amount referred to in paragraph (a) of this section.

Calculation of commuted value

23 (1) In this section, "valuation date", in relation to a matter referred to in subsection (3) (a), (b), (c), (d) or (e), means the date that, under subsection (3), applies to that matter.

(2) This section applies if

- (a) the limited member is entitled under Part 6 of the Act to a proportionate share of the benefits under a defined benefit provision, and
- (b) it is necessary, under the Act, including under this regulation, to calculate the commuted value of the benefits.

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- (3) The commuted value of the benefits referred to in subsection (2) (b) must
- (a) when calculating the separate pension payable to the limited member for the purposes of section 115 (2) (a), 119 (3) (d) or 121 (3) of the Act, be calculated as at a date not earlier than the end of the month immediately preceding the commencement date of the separate pension,
 - (b) when calculating the amount to be transferred to the limited member for the purposes of section 115 (2) (b) or (6) of the Act, be calculated as at a date not earlier than the end of the month immediately preceding the date of the transfer,
 - (c) when calculating the commuted value of the benefits for the purposes of section 124 (2) of the Act, be calculated as at a date not earlier than the end of the month immediately preceding the day before the death of the member,
 - (d) when calculating the amount payable to the estate of the limited member for the purposes of section 124 (4) of the Act, be calculated as at a date not earlier than the end of the month immediately preceding the date of the limited member's death, and
 - (e) when calculating the amount required by the administrator to be transferred for the purposes of section 139 (b) of the Act, be calculated as at a date not earlier than the end of the month immediately preceding the date on which the administrator notifies the limited member that the transfer is required.
- (4) Subject to subsection (5) of this section, the limited member's proportionate share of the commuted value of benefits must be calculated as follows:
-

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- (a) the commuted value of the pension the member would have received must be calculated as if
 - (i) there had been no division under the Act,
 - (ii) the member's pension had been calculated by reference only to the benefits accrued to the valuation date, and
 - (iii) the member had elected a pension in the unadjusted normal form, applicable to the member, provided under the plan commencing at the later of
 - (A) the valuation date, and
 - (B) the date the member would reach the average retirement age for the plan;
 - (b) after that, the limited member's proportionate share of the amount referred to in paragraph (a) must be calculated.
- (5) For the purposes of subsection (4) (a) (iii) (B), the administrator may elect, as the average retirement age for the plan, a specific age that is younger than the actual average retirement age for the plan, and if that election is made, the administrator must not change the average retirement age for the plan without first applying for and obtaining the written consent of the superintendent.

Limited member's separate pension in a local defined benefit plan

- 24 (1)** If the limited member is entitled to receive a separate pension,
- (a) the separate pension must be calculated on the basis of his or her proportionate share of the commuted value of the benefits as calculated under section 23, and
 - (b) the separate pension must be provided in one of the following forms as elected by the limited member:

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- (i) in the form of a pension payable for the limited member's lifetime only;
- (ii) in any other form of pension, or any combination of forms of pension, that members of the plan may elect to receive

adjusted in accordance with actuarial principles.

- (2) If, in a situation referred to in section 124 (2) of the Act, the member was eligible at the date of his or her death to have his or her pension commence, the limited member may elect to receive the limited member's proportionate share of the commuted value of the benefits by a separate pension.

Original agreements and orders

- 25 (1) If, in a situation referred to in section 112 (2) of the Act, the member and the spouse agree under section 112 (3) (a) (i), or are deemed to agree under section 112 (5), to divide benefits in accordance with Part 6 of the Act, the following applies unless the member and spouse otherwise agree:

- (a) despite paragraph (b) of this subsection and subject to section 131 of the Act and to subsection (2) of this section, the spouse's proportionate share of the benefits is calculated by the share or formula set out in the original agreement or order;
- (b) provisions of the original agreement or order that are inconsistent with division of benefits under Part 6 of the Act cease to have effect;
- (c) provisions of the original agreement or order that clarify, supplement or are collateral to division of benefits under Part 6 of the Act continue in effect.

- (2) If subsection (1) applies and the benefits referred to in subsection (1) are in a defined contribution account, the spouse's share of

those benefits is calculated in accordance with section 20 of this regulation, using the commencement date and entitlement date specified in the original agreement or order.

Transfer from plan to locked in retirement plan

- 26** If the Act requires or authorizes an administrator of a plan to transfer from the plan an amount to the credit of the spouse, the transfer must be made in accordance with the provisions of the *Pension Benefits Standards Act* that would have applied had the transfer been made to the credit of the member.

Calculation of a compensation payment

- 27 (1)** This section applies if provision is made for satisfaction of the spouse's interest in benefits by any of the following:
- (a) a compensation payment under section 97 (2) (c) of the Act;
 - (b) a compensation payment under section 127 (1) (b) of the Act;
 - (c) a compensation payment or amount transferred under section 128 (2) of the Act.
- (2) A compensation payment or transfer referred to in subsection (1) must be equal to the spouse's proportionate share of the commuted value of the future benefits payable to the member.
- (3) Without limiting the contingencies that may be considered in calculating the amount of a compensation payment or transfer referred to in subsection (1), the calculation must make reasonable provision for the following contingencies:
- (a) the possibility that the member may terminate employment or die before commencement of the member's pension;

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- (b) the possibility that the member's pension may commence at a date that is earlier or later than the date at which he or she reaches the age at which a member is normally eligible to begin receiving a pension under the plan text document without reduction or increase to the pension;
 - (c) the possibility that benefits being divided and paid under the plan will increase in value, whether by an automatic formula or on an ad hoc basis, after the date of the calculation of the compensation payment or transfer;
 - (d) to the extent that benefits being divided are related to future salary levels, the possibility that salary levels will increase after the date of the calculation of the compensation payment or transfer.
- (4) If an entitlement to receive a pension has not vested in the member at the date of valuation, the spouse may elect to
- (a) postpone valuation until it is ascertained whether the entitlement vests, or
 - (b) have the valuation proceed assuming the entitlement will vest, but adjusting it to take into account the contingency that the member may die or leave employment before vesting.

Administrative costs

- 28** The amount to be paid to the administrator by the member and the spouse under section 140 of the Act must not exceed the following:
- (a) for registering the spouse as a limited member of the plan, \$750;
 - (b) for transferring a proportionate share of the member's defined contribution account to the credit of the spouse under section 114 (2) (a) of the Act, \$175.

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Transition

- 29** (1) In this section, "limited member" has the same meaning as in section 70 of the former Act.
- (2) If, before March 18, 2013, the administrator received written notice from a limited member seeking to have the limited member's proportionate share of the commuted value of benefits transferred from a plan to the credit of the limited member or seeking to receive the limited member's proportionate share of benefits by a separate pension, the former Act and the former regulation apply to the calculation of the limited member's proportionate share of the commuted value.
- (3) If, before March 18, 2013, the administrator delivered written notice to a limited member setting out options as to how the limited member's proportionate share of benefits could be provided to the limited member, the following applies:
- (a) the limited member may, after March 18, 2013, in accordance with paragraph (b), elect one of those options;
 - (b) to make an election under paragraph (a), the limited member must, within the period referred to in the notice, or, if no period is referred to in the notice, within 60 days after the date of the notice, deliver to the administrator a notice in Form P4 within which the limited member elects one of the options referred to in the administrator's notice;
 - (c) if the limited member makes an election in accordance with paragraph (b), the limited member is entitled to receive his or her share of benefits in accordance with that election and the former Act and the former regulation applies;
 - (d) if the limited member does not make an election in accordance with paragraphs (a) and (b), the Act applies.

APPENDIX C

Checklist for Plan Administrators

Overview of Pension Division Under Part 6 of the Family Law Act

Section references are to the *Family Law Act* S.B.C. 2011, c. 25.

Regulation references are to the *Division of Pensions Regulation*, B.C. Reg. 348/2012.

References to forms are to the Forms set out in the *Division of Pensions Regulation*.

Unless clearly indicated, the word “member” is consistently used to refer to the person who has pension entitlement and the word “spouse” is used to refer to the person who claims a share of the benefits.

Note: These materials have been prepared on the assumption that users will exercise their professional judgment regarding the correctness and applicability of the material. Checklists and forms should be used only as an initial reference point. Reliance on them to the exclusion of other resources is imprudent. These materials should be regarded as a secondary reference. For definitive answers refer to applicable statutes, regulations and practice notes.

Plan administrators will find it saves them time and expense if they prepare information brochures to hand out to spouse and member on first inquiry concerning pension division. These brochures should provide information on:

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- what the spouse is entitled to
- what the administrator will do
- what the spouse must do to come within Part 6 of the *FLA*: which forms to file and what else the administrator requires

Have a supply of the forms handy.

- Administrator
Checklist1: **If Form P1 is received.**
- Administrator
Checklist2: **If Form P2 is received.**
- Administrator
Checklist3: **If Form P3 is received**

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Administrator Checklist 1: Form P1 is Received

The administrator receives Form P1: Claim and Request for Information and Notice: What is the administrator supposed to do?

1. The form does not request the administrator to divide the benefits.
2. The benefits may end up being divided without the administrator's involvement at all (*for example*, by the member transferring other property to satisfy the spouse's share).
3. Form P1 simply places the administrator on notice that the spouse is claiming an interest. An administrator can charge a fee for dividing the benefits, but the administrative fee can't be charged at this point (not until the administrator receives a Form P2 or P3).
4. Filing a Form P1 with an administrator places two responsibilities on the Administrator:
 - the administrator must provide the spouse with information about the member's benefits within 60 days of a request by the spouse. The spouse cannot request information more often than once in each calendar year. [Reg., s.10]
 - the administrator must not act upon a direction about the member's benefits (*for example*, by reason of death, employment termination, pension commencement, change of beneficiary designation) that will prejudice the spouse's interest without first giving the spouse 30 days notice that the transaction is going to take place. [Reg., s. 9]
5. Notice to the spouse is given using Form P6. [Reg., s. 9(3)]
6. The notice to the spouse is sent to the address the spouse provides on Form P1, unless the spouse has provided the administrator

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with a change of address. [Reg., s. 2(2)] If the spouse provided an e-mail address or a fax number, the notice can be e-mailed or faxed. [Reg., s. 2(2)]

7. the administrator must
 - within 30 days of receiving Form P1 notify the member that it was received, using Form P6. [Reg., s. 7(1)]
 - be able to track a Form P1 by reference to the member's benefits, so that when any instruction is received with respect to the benefits, notice can be given to the spouse.

Administrator Checklist 2: Form P2 is Received

The administrator Receives Form P2: Request for Designation as Limited Member: What is the administrator supposed to do?

1. Form P2 is a request by the spouse to be designated a "limited member" of the plan. It must be accompanied by the agreement or court order that gives the spouse an interest in the benefits.

Form P2 is used if the benefits are determined by a defined benefit provision, if the member's pension has already commenced, if the benefits are in a supplementary pension plan or an individual pension plan, for annuities and disability benefits, basically, any situation where the former spouse must wait to receive a share, or it will be paid out over a period of time.

(If the benefits are in a defined contribution account, however, even if the member is making withdrawals or receiving a variable pension, see Administrator Checklist 3).

2. *If the member's pension has not yet commenced*, the administrator must

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- (a) give notice to the member in Form P6 that the Form P2 has been received. [Reg., s. 7(1)]
- (b) record the spouse's interest in the member's benefits [s. 113(2)] so that when anything takes place with respect to the member's benefits the limited member's interest is not overlooked. Paying out the limited member's share in the benefits is deferred. [See 2(d) of this Checklist]
- (c) be able to give the limited member once a year the same information or notices given to members, including information about options and elections that can be made by members and limited members, and confirmation whether the limited member is the beneficiary of the member's benefits. [Reg., s. 11(1)]
- (d) pay out the limited member's share when one of the following events takes place:
 - the limited member dies before receiving the limited member's proportionate share: the proportionate share is transferred to the limited member's estate. [s. 124(4), Reg., s. 23(3)(d)]
 - the member dies before the limited member receives the limited member's proportionate share: the limited member receives the proportionate share of the benefits determined the day before the member's death. [s. 124(2), Reg., s. 23(3)(c)]
 - the member is eligible for pension commencement or elects to have the pension commence: the limited member can elect to receive the proportionate share by a separate pension payable for the limited member's lifetime. [s. 115(2)(a); Form P4]

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Or, the limited member can elect to have the proportionate share transferred to a pension vehicle, such as an RRSP. [s. 115(2)(b); Form P4]

Reg., s. 26 provides that the transfer options are the same as those that apply had the transfer been made to the credit of the member: *for example*, to purchase an annuity, to transfer to an RRSP, RRIF or LIF, or to transfer to another pension plan, or an account in the same plan, with the consent of the administrator.

If the benefits are vested, the funds are transferred on a locked-in basis.

- (e) when the limited member's share is paid out, adjust the member's remaining interest in the benefits. [Reg., s. 21]

3. *If the member's pension has commenced*, the administrator must:

- (a) give the member Notice in Form P6 that the Form P2 was received. [Reg., s. 7(2)]
- (b) record the spouse as a limited member.
- (c) pay directly to the limited member a share of each payment made to the member starting with the payment due after 30 days from all required documents being received, making appropriate withholding deductions. [s. 117(2); s. 141(3), Reg., s. 15]

Administrator Checklist 3: Form P3 is Received

Benefits in Defined Contribution Account

**Questions and Answers About
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**The administrator Receives a Form P3: Request for Transfer From Defined Contribution Account and agreement or court order dividing the benefits.
What is the administrator supposed to do?**

1. Form P3 is a request by the spouse for the spouse's proportionate share to be transferred from a defined contribution account to a prescribed pension vehicle. It must be accompanied by the agreement or court order that gives the spouse an interest in the benefits.
2. *If there are benefits in the defined contribution account, even if the member is making withdrawals (or receiving a variable pension):* the administrator must:
 - (a) give the member Notice in Form P6 that the Form P3 was received. [Reg., s. 7(2)]
 - (b) request directions from the spouse concerning where the spouse's proportionate share is to be paid (*for example*, to purchase an annuity, to transfer to an RRSP, RRIF or LIF, or to transfer to another pension plan or an account in the same plan with the consent of the plan administrator). [Reg., s. 26, FLA, s. 114(2)(b)]

If the benefits are vested, the funds are transferred on a locked-in basis.

If the administrator consents to the spouse keeping the proportionate share in a separate account in the plan, the spouse must file a Form P2 with the plan and become a limited member.
 - (c) pay out the spouse's proportionate share as directed.
3. *If the member's benefits have been used to purchase an annuity, the administrator of the annuity must:*

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- (a) require a Form P2. (Form P3 would not be used. The pension has matured. The transfer option is no longer available if there are no funds left in the defined contribution account. The pension is divided exactly the same as a matured pension in a defined benefit plan: *See Administrator Checklist 2, s. 3*)
- (b) when a Form P2 is received, give the member Notice in Form P6 that the Form P2 was received. [Reg., s. 7(2)]
- (c) record the spouse as a limited member.
- (d) pay directly to the limited member a share of each payment made to the member starting with the payment due after 30 days from all required documents being received, making appropriate withholding deductions. [s. 117(2); s. 141(3), Reg., s. 15]

APPENDIX D

Checklists for Lawyers

Pension Division Under Part 6 of the Family Law Act

Overview:

Section references are to the *Family Law Act* S.B.C. 2011, c. 25.

Regulation references are to the *Division of Pensions Regulation*, B.C. Reg. 348/2012.

References to forms are to the Forms set out in the *Division of Pensions Regulation*.

Unless clearly indicated, the word “member” is consistently used to refer to the person who has pension entitlement and the word “spouse” is used to refer to the person who claims a share of the benefits.

Note: These materials have been prepared on the assumption that users will exercise their professional judgment regarding the correctness and applicability of the material. Checklists and forms should be used only as an initial reference point. Reliance on them to the exclusion of other resources is imprudent. These materials should be regarded as a secondary reference. For definitive answers refer to applicable statutes, regulations and practice notes.

- Lawyer

Checklist1: Dividing a Matured Pension under Part 6 of the *FLA*

- Lawyer

Checklist2: Dividing benefits in a Defined Contribution Account under Part 6 of the *FLA*

- Lawyer

Checklist3: Dividing unmatured benefits determined by a defined benefit provision under Part 6 of the *FLA*

**Questions and Answers About
Pension Division on the Breakdown of a Relationship in British Columbia**

Lawyer Checklist 1: Dividing a Matured Pension (that is, the member's pension has commenced)

(Note: if the benefits are in a defined contribution account, even if the member is making withdrawals or receiving a variable pension, this checklist does not apply. see Lawyer Checklist 2).

1. prepare *Form P1: Claim and Request for Information and Notice* and deliver it to the administrator (which includes an annuity issuer). Complete the portion of Form P1 authorizing administrator to release information to spouse's representative. Request information from the administrator respecting the benefits. [FLA, s. 133, Reg., s.10]

[Some administrators request additional information about spouse's status to make the request, such as a copy of the parties' marriage certificate, or if the parties are unmarried, an affidavit verifying the marriage-like relationship.]

2. negotiate or litigate the division of the benefits and prepare the agreement or court order. (For sample precedents, see *Family Law Agreements - Annotated Precedents* (Continuing Legal Education Society of B.C.) and *B.C. Family Practice Manual* (Continuing Legal Education Society of B.C.)
3. prepare *Form P2: Request for Designation as Limited Member*, and deliver it to the administrator with the agreement or court order dividing the benefits. [Ss. 113, 117, Reg., s. 17]
4. the administrator may require payment of an administrative fee. [Reg., s.28 sets out the maximum amounts that may be charged: \$750 for registering a spouse as a limited member.]

[The former spouse becomes a limited member of the plan, entitled to receive directly a share of each monthly payment made under the plan, less withholdings for taxes.]

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Lawyer Checklist2: Dividing benefits in a Defined Contribution Account

1. prepare *Form P1: Claim and Request for Information and Notice* and deliver it to the administrator (which includes an annuity issuer). Complete the portion of Form P1 authorizing administrator to release information to spouse's representative. Request information from the administrator respecting the benefits. [FLA, s. 133, Reg., s.10]

[Some administrators request additional information about spouse's status to make the request, such as a copy of the parties' marriage certificate, or if the parties are unmarried, an affidavit verifying the marriage-like relationship.]

2. negotiate or litigate the division of the benefits and prepare agreement or court order. (For sample precedents, see *Family Law Agreements - Annotated Precedents* (Continuing Legal Education Society of B.C.) and *B.C. Family Practice Manual* (Continuing Legal Education Society of B.C.)
3. prepare *Form P3: Request for Transfer from Defined Contribution Account*, and deliver it to the administrator with the agreement or court order dividing the benefits. [S. 114, Reg., s.20]
4. the administrator may require payment of an administrative fee. [Reg., s.13 sets out the maximum amount that may be charged: \$175 for transferring benefits from a defined contribution account; \$750 for registering a spouse as a limited member.]

[The benefits will be divided by a transfer of a share of contributions plus investment returns accumulated during the relationship to a prescribed pension vehicle, such as an RRSP. Usually, the funds will be locked-in, meaning they can't be cashed out, but must be used to provide a life income. The administrator may consent to keeping spouse's share in separate account in the plan. A spouse who chooses this option must file a Form P2 and become a limited member of the plan. In that case, the maximum administrative fee would be \$750.]

Lawyer Checklist3: Dividing unmatured benefits determined by defined benefit provision

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1. prepare *Form P1: Claim of Spouse to Interest and Notice* and deliver it to the administrator (which includes an annuity issuer). Complete the portion of *Form P1* authorizing administrator to release information to spouse's representative. Request information from the administrator respecting the benefits. [FLA, s. 133, Reg., s.10]

[Some administrators request additional information about spouse's status to make the request, such as a copy of the parties' marriage certificate, or if the parties are unmarried, an affidavit verifying the marriage-like relationship.]

2. negotiate or litigate the division of the benefits and prepare the agreement or court order. (For sample precedents, see *Family Law Agreements - Annotated Precedents* (Continuing Legal Education Society of B.C.) and *B.C. Family Practice Manual* (Continuing Legal Education Society of B.C.)
3. prepare *Form P2: Request for Designation as Limited Member*, and deliver it to the administrator with the agreement or court order dividing the benefits. [Ss. 113, 115, Reg., s. 17]
4. the administrator may require payment of an administrative fee. [Reg., s.13 sets out the maximum amounts that may be charged for registering a spouse as a limited member is \$750.]
5. provide the spouse with a copy of *Form P4: Request by Limited Member for Transfer of Pension* and advise about the future election between taking a transfer of commuted value or a separate pension on or after the member becomes eligible for pension commencement.[S. 115, Reg., s.23, Reg., s.24] Also provide spouse with a copy of *Form P8: Change of Information* and emphasize importance of keeping contact information up to date.

[The benefits will be divided by the administrator either (a) transferring a portion of commuted value to a prescribed pension vehicle, such as an RRSP, or (b) providing the spouse with a separate pension. In most cases, the transfer of the commuted value will be locked-in, meaning the funds can't simply be withdrawn, but must be used to provide a life income.]

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APPENDIX E

Table 6 - Comparing the new *Family Law Act* and the old *Family Relations Act*

Section	<i>FLA</i>	<i>FRA</i>
s. 111(1)	A spouse's entitlement to a share of pension benefits under Part 5 is governed by Part 6.	NO CHANGE (equivalent to s. 71(1))
s. 111(2) and (3)	If an order or agreement doesn't mention the pension benefits, it's deemed to belong to the member, subject to an order under Part 5.	NO CHANGE (equivalent to s. 71(3))
s. 112	Sets out rules for how to deal with orders or agreements that are not subject to Part 6 (such as orders made before the FLA comes into force).	NO CHANGE (consolidates ss. 76(4), 80(2), (2.1), and (2.2)).
s. 113	Where a spouse receives a share of pension benefits on a deferred basis, the spouse becomes a limited member of the plan (but ceases to be a limited member when the spouse's share is transferred from the plan).	(equivalent to s. 72, but recognizes that a spouse must be a limited member in more situations than currently provided for under the FRA, such as for dividing benefits in a supplemental pension plan, or if the administrator of a defined contribution plan consents to the spouse keeping benefits in the plan)
	DIVIDING BENEFITS BEFORE PENSION COMMENCEMENT	
s. 114	If the benefits are in the member's account in a defined contribution plan , the spouse receives the share by an immediate transfer from the account to a prescribed plan (like an RRSP). If the administrator consents, the spouse can become a limited member of the plan with the same rights as members.	CHANGED - Under the FRA, the spouse's share is transferred immediately (see s. 73). Also, the FRA is not clear about what rights the former spouse has where the member receives benefits from a defined contribution plan by making withdrawals (sometimes referred to as a variable pension option). Under the FLA, it's clear that the immediate transfer option is still available.
s. 115	If the benefits are in a defined benefit plan , and the pension has not yet commenced, the former spouse becomes a limited member, and can choose at any date after the member is eligible to have the pension commence, to take the share by either (a) a lump sum transfer to an RRSP for example, or (b) to receive a separate pension (payable for the LM's lifetime).	CHANGED - under s. 74 a separate pension is only available if the limited member waits until the member elects to have the pension commence. The restriction on the member changing a beneficiary designation in favour of a limited member has not been carried forward. See also FLA, s. 125.

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Section	<i>FLA</i>	<i>FRA</i>
s. 116	If the benefits are in hybrid plan (having a DB part and a DC part), the spouse can choose to receive benefits: (a) under the DB rules or the DC rules, if members have that right or if the administrator consents, and otherwise (b) the defined benefit part is divided by the defined benefit plan rules, and (d) the defined contribution part is divided by the DC plan rules.	CHANGED (equivalent to s. 75, which provides that the DB part is divided by the DB plan rules and the DC part is divided by the DC plan rules, but the administrator can consent to the benefits being divided by just the DB rules. The FLA recognizes additional options available for hybrid plans.
	DIVIDING BENEFITS AFTER PENSION COMMENCEMENT	
S. 117	If the pension has commenced, the only option is to divide the monthly income stream between the parties. If the spouse dies first, the member resumes receiving all of the pension. If the member dies first, the spouse receives the postretirement survivor benefits elected by the member	NO CHANGE (equivalent to s. 76)
s. 118	If the member is receiving benefits under an annuity, the monthly income stream is divided between the parties (see s. 117).	CHANGED - although s. 58(3) expressly provides that an annuity is a family asset, Part 6 does not specify how to divide it.
	SUPPLEMENTAL PENSION PLANS	
S. 119	If the member has benefits under a pension plan that is supplemental to a local plan, the spouse becomes a limited member of the plan and receives the share by a separate pension (payable for the LM's lifetime) when the member elects to have the pension commence. Other options are available with the consent of the administrator.	CHANGED (equivalent to s. 77), which provides that the spouse receives a share of the monthly income stream when the pension commences, which usually means that it is not possible to provide the former spouse with lifetime security for the former spouse's share.
s. 119(4) and s. 120	The spouse's share is subject to the same rules that apply to the member's share. If benefits are adjusted, suspended or end, this will affect payments to the spouse. If the member is to blame, though, the spouse has a claim for compensation.	CHANGED (no equivalent in Part 6).
s. 121	If the member has benefits in a plan for specified individuals , the spouse becomes a limited member of the plan and receives the share by a separate pension (payable for the LM's lifetime) when the member elects to have the pension commence. Other options are available with the consent of the administrator.	CHANGED (equivalent to s. 77, which provides that the spouse receives a share of the monthly income stream when the pension commences, which usually means that it is not possible to provide the former spouse with lifetime security for the former spouse's share.)

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Section	<i>FLA</i>	<i>FRA</i>
s. 122	If a spouse is entitled to a share of disability benefits provided under a pension plan under an agreement or order, the monthly income stream is divided between the parties (see s. 117).	CHANGED (the FRA provided for disability benefits to be divided by the matured pension rules when the member reached 60, but this policy has not been carried forward.)
	EXTRAPROVINCIAL PLANS	
s. 123	The rules described above apply to plans that are subject to B.C. legislation. If benefits were earned by employment outside B.C., usually another jurisdiction's law will apply. A B.C. court can, however, in appropriate cases, order that the monthly income stream be divided between the parties	NO CHANGE (equivalent to s. 77)
	LOCAL PLANS - DEATH OF A MEMBER OR LIMITED MEMBER	
s. 124(1)-(3)	If the member dies before pension commencement and before the limited member receives the proportionate share, the deferred division ends, and the limited member's share of the pension benefits must be determined as of the day before the death of the member.	CHANGED. Under the FRA (see s. 78) the limited member is entitled to a share of the preretirement survivor benefits. Preretirement survivor benefits can be anywhere from zero to 100% of the commuted value of the pension, making it very difficult to arrive at a fair division in every case. Providing that the pension benefits are divided the day before the member's death solves those problems.
s. 124(4)	If the limited member dies before receiving the proportionate share, it is paid to the limited member's estate.	NO CHANGE (equivalent to s. 78(3)) (But see s. 126(1))
s. 124(5)	If the member elected a joint pension with the spouse, the spouse will receive all of the postretirement survivor benefits (subject to the entitlement of another limited member).	CLARIFIED. This is how a joint pension works. But arguments are frequently raised, when the member dies, that a general waiver in a separation agreement means that the former spouse has forfeited the survivorship benefits. S. 124(5) will prevent that. (But see s. 126(2))
s. 125	After the member dies, and the limited member receives the proportionate share of the pension benefits, the preretirement survivor benefits under the member's share go to the designated beneficiary or the person entitled if no designation is made.	CLARIFIED. Under the FRA, it is implicit that the law that applies to determining entitlement to preretirement survivor benefits on the member's share of the pension.

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Section	<i>FLA</i>	<i>FRA</i>
s. 126(1)	The person representative of a deceased limited member can waive receiving the share of the pension benefits payable on the limited member's death.	CLARIFIED. s. 80(1)(b) permitted a spouse to waive any interest in the pension. S. 126(1) confirms that this also applies to a personal representative. Often this will be the member's children who want to make sure the surviving parent has adequate retirement income.
s. 126(2)-(3)	A spouse entitled to post retirement survivor benefits can waive them (and a court can order it) provided it is done expressly. But the spouse will have to pay them to the person entitled, unless the administrator consents to do this instead.	CLARIFIED. Ancillary to s. 124(5).
	OTHER MATTERS RESPECTING PENSION DIVISION	
s. 127(1)	The parties can agree that the spouse receive more than half of the pension benefits (even all of it).	CHANGED. s. 75.1 permits the spouse to have more than a half share, but only by court order. (see s. 129)
s. 127(2)	The parties can waive CPP credit splitting.	NO CHANGE (equivalent to s. 62 and 80(1)(c))
s. 128(1)	It is open to the parties to agree that the spouse's share of the pension benefits be satisfied by a compensation payment. If so, it must be calculated as prescribed under the Regulation, unless their agreement or order provides otherwise.	NO CHANGE (equivalent to s. 80(3)).
s. 128(2)	A spouse can agree with the administrator to receive the share by a lump sum transfer, provided it is calculated as prescribed under the Regulation, unless the court orders otherwise.	NO CHANGE (equivalent to s. 80(4)).
s. 129	The court can give the spouse more than half of the pension benefits (even all of it).	NO CHANGE (equivalent to s. 75.1)
s. 130	If there are any questions about pension division, the court can give directions and make additional orders.	CLARIFIED (equivalent to s. 75.1(1), but clarifying the ambit and intention of that section).
s. 131	If there is something unusual about the plan that is not dealt with by the Part 6 rules, the court can make an appropriate order, even if there is already an agreement or court order dividing the benefits.	NO CHANGE (equivalent to s. 75.1(1), but providing more direction about the procedure and the right of the administrator to make representations).

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Section	<i>FLA</i>	<i>FRA</i>
s. 132	If the member is about to have the pension commence, but the parties haven't finalized the pension division arrangements, the pension commencement date can be preserved, and the pension division arrangements implemented retroactively to that date	CHANGED (no equivalent section, but permitted under the <i>ITA</i>).
	ADMINISTRATIVE MATTERS	
S. 133	A spouse claiming an interest in pension benefits is entitled to receive information from the administrator.	NO CHANGE (equivalent to s. 82).
s. 134	Benefits cannot be divided unless there is an order or agreement that expressly provides for their division.	CLARIFIED (this is the position under Part 6, but arguments are sometimes made that Part 6 applies even in the absence of an order or agreement).
s. 135	An administrator asked to implement pension division arrangements is entitled to insist on the plan being identified satisfactorily, and also to receive evidence establishing proof of the claim.	CLARIFIED.
s. 136	Notices (and waivers) required under Part 6 must be in the prescribed form.	NO CHANGE
s. 137	The administrator is not required to implement pension division arrangements until the required information and documents are received.	CLARIFIED
s. 138	Adjusting the member's pension after pension division is prescribed.	NO CHANGE (equivalent to s. 84)
s. 139	The PBSA sets out detailed rules for when a member can (or must) take a transfer of the commuted value from the plan and these apply equally to a limited member	CHANGED (equivalent to s. 79 which deals with transfers required by the administrator). Expands the limited member's transfer options so that, in addition to the lump sum transfer option under s. 115(2)(b) they include other options available to members.
s. 140	An administrative fee may be charged by the administrator, and this may be deducted from the payment of benefits.	CHANGED (equivalent to s. 81, but the ability to deduct the fee from benefits is new)
s. 141	The parties are separately responsible for taxes on their respective shares.	EXPANDED (equivalent to 76(3), but providing more direction on issues that can arise, and including a right of indemnity between the parties where one party pays taxes on the other's share).

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Section	<i>FLA</i>	<i>FRA</i>
s. 142	Notice of a spouse's claim does not relieve the administrator of the obligation of administering the pension benefits in accordance with the plan text.	CLARIFIED (nothing in the FRA relieves the administrator of this obligation, but some administrators put everything on hold if a notice of a claim is made).
s. 143	An administrator is not liable for actions taken in good faith. There is no obligation to a former spouse to pay benefits until the documents required under s. 137 are provided the administrator. In cases of incomplete applications, the administrator can discharge any liability by giving notice.	EXPANDED (equivalent to s. 85, but providing more direction on how the administrator is to discharge obligations).
s. 144	If someone receives benefits to which they are not entitled they hold them in trust for the person who is entitled.	EXPANDED (equivalent to s. 83, which dealt only with survivor benefits).
s. 145	After pension benefits are divided, a spouse has no further rights to the pension benefits under other legislation, such as the PBSA.	EXPANDED. The PBSA confers various rights on a person who qualifies as a spouse, such as survivor benefits, but provides that entitlement ends in various circumstances (2 years separation, or if the pension is divided under the FRA). S. 145 consolidates this principle, and also confirms that it applies in circumstances where a share of the pension is waived.

APPENDIX F

List of Abbreviations

Here is the key to abbreviations used in the Q&A:

BCCA	British Columbia Court of Appeal
BCSC	British Columbia Supreme Court
CRA	Canada Revenue Agency
DBP	Defined Benefit Plan
DC account	Defined Contribution account
DCP	Defined Contribution Plan
FLA	<i>Family Law Act</i>
FRA	<i>Family Relations Act</i>
IPP	Individual Pension Plan
ITA	<i>Income Tax Act</i>
LIF	Life Income Fund
PBSA	<i>Pension Benefits Standards Act</i>
Reg.	Division of Pensions Regulation (under the <i>Family Law Act</i>)
RRIF	Registered Retirement Income Fund
RRSP	Registered Retirement Savings Plan
SPP	Supplemental Pension Plan