

**Questions and Answers
About
Pension Division on
Marriage Breakdown in
British Columbia**

BRITISH COLUMBIA LAW INSTITUTE

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British Columbia Law Institute

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- (c) promote and carry out scholarly legal research.

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Introductory Note

In March, 1996, the first edition of this book was published to canvas 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 one of the assets to be divided is a pension. The original materials were prepared by the staff of the British Columbia Law Reform Commission.

Since publication of the first edition, there have been a number of developments that made it desirable to publish a revised second edition:

(1) Substantial amendments were made to the legislation in 1997 by the *Family Relations Amendment Act, 1997*.

(2) The 1996 statutory revision of B.C. legislation resulted in all of the provisions relating to pension division being renumbered.

(3) The pension division legislation operates against the legal background created by the British Columbia *Pension Benefits Standards Act*, which regulates pension plans in the province. The *PBSA* was substantially revised in 1999.

(4) The legislation governing public sector pension plans was thoroughly revised by the *Public Sector Pension Plans Act, 1999*, and the changes there also affect how Part 6 of the *Family Relations Act* operates in connection with those plans.

(5) In both federal and provincial legislation, the definition of who qualifies as a “spouse” has been completely revised to include (for most purposes) unmarried persons in opposite sex and same sex relationships. In B.C. this has been carried forward in the *Definition of Spouse Amendment Act, 1999*, the *Definition of Spouse Amendment Act, 2000*, the *Pension Benefits Standards Amendment Act, 1999* and the *Public Sector Pension Plans Act, 1999*. At the federal level, the relevant legislation is the *Modernization of Benefits and Obligations Act*, S.C. 2000, c. 12, which recognizes “common law partners” (unmarried persons in same and opposite sex relationships).

(6) Since the first edition was published, we have an additional five years worth of experience under the British Columbia legislation generating a more sophisticated understanding of its operation as well as knowledge and information respecting issues in its application that had not been foreseen in 1996.

It is with pleasure, consequently, that the *Q&A* Publication and the other supporting materials have now been revised to take into account these far-reaching developments.

The materials are in the form of questions and answers. They are based upon questions that have arisen since Part 6 of the *Family Relations Act* was introduced July 1, 1995 and that were directed to the BCLRC, the British Columbia Law Institute, the Ministry of Attorney General and the Pension Standards Branch. Since it is likely that a question raised by one person will occur to others, it was concluded that this resource should be made available generally.

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, plan administrators will 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.

The materials address questions raised by members and their spouses, plans 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 marriage breakdown, but issues like these will be resolved long before the plan is asked to assist in actually dividing the pension. The information has been sorted into Chapters based on whether the member has retired at the time of marriage breakdown, the kind of plan, and other categories, but to divide the information so that it would be useful to specific groups, such as just plans or just lawyers, 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, a British Columbia lawyer who specializes in pension matters, who assisted in preparing the first and the second edition of the Q&A, and to Jim Paterson, of Paterson Pension Management Inc., for his invaluable detailed comments on the first edition.

The BCLI would also like to acknowledge the financial support of the Ministry of Attorney General, the Pension Standards Branch, the Ministry of Labour and the Law Foundation in publishing this second edition of *Questions and Answers about Pension Division on Marriage Breakdown in British Columbia*.

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

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.

March 1, 2001

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<i>Kossen v. Kossen</i> , [1999] B.C.J. No. 595 (S.C.)	9.3
<i>Ladner v. Ladner</i> , (1997) 30 B.C.L.R. (3d) 144 (B.C.C.A.)	2.5
<i>Lang v. Lang</i> , (1993) 13 O.R. (3d) 534 (Ont. Gen. Div.)	Ch12 Intro.

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Tables of Cases, Statutes and Regulations

<i>Lawrence v. Lawrence</i> , [1998] B.C.J. No. 1907 (S.C.)	11.17
<i>Leppard v. Leppard</i> , [1991] B.C.J. No. 1053 (S.C.)	14.8
<i>Low v. Edgar</i> , (1990) 28 R.F.L. (3d) 318 (B.C.S.C.)	2.9, Ch8 Intro., 8.7, 14.10
<i>M.(E.E.) v. M.(P.F.)</i> , (1993) 50 R.F.L. (3d) 281 (B.C.S.C.)	2.9, Ch8 Intro.
<i>Mailhot v. Mailhot</i> , (1988) 18 R.F.L. (3d) 1 (B.C.C.A.)	2.23, 14.2
<i>Maloney v. Maloney</i> , (1993) 109 D.L.R. (4th) 161 (Ont. Gen. Div.)	1.1
<i>Martindale v. Martindale Estate</i> , (1998) 55 B.C.L.R. (3d) 63 (C.A.)	2.5
<i>McNiven v. Feng</i> , [1995] B.C.J. No. 279 (S.C.)	9.3
<i>Munro v. Munro Estate</i> , (1995) 4 B.C.L.R. (3d) 250 (C.A.)	8.7, 11.9, 14.10, 14.15
<i>Muzzillo v. Muzzillo</i> , 2000 BCSC 363 aff'd 2001 BCCA 44	14.11
<i>Park v. Park</i> , (2000) 73 B.C.L.R. (3d) 153 (C.A.)	2.23, 11.23
<i>Penner v. Penner</i> , (1984) 42 R.F.L. (2d) 402 (B.C.C.A.)	14.8
<i>Peter v. Beblow</i> , [1993] 1 S.C.R. 980, 44 R.F.L. (3d) 329, 342 (S.C.C.)	1.1
<i>Piskor v. Piskor</i> , (1981) 27 B.C.L.R. 230 (C.A.)	2.26
<i>Ree v. Ree</i> , [1999] B.C.J. No. 705 (S.C.)	5.6
<i>Robertson v. C.N.R.</i> , (2000) 79 B.C.L.R. (3d) 168, 9 R.F.L. (5th) 368 (S.C.)	1.11
<i>Rutherford v. Rutherford</i> , (1981) 23 R.F.L. (2d) 337 <i>add'l reasons</i> 44 B.C.L.R. 279 (B.C.C.A.)	2.7, 2.32, 2.38, 2.43, 2.48, 5.15, 14.4
<i>Sangha v. Sangha</i> , [1998] B.C.J. No. 1087 (B.C.S.C.)	2.25
<i>Shirran v. Shirran</i> , (1999) 46 R.F.L. (4th) 371 (B.C.S.C.)	2.25
<i>Sigvardsen v. Stanley</i> , [1996] B.C.J. No. 1429 (B.C.S.C.)	1.1
<i>Smiley v. Ontario Pension Board</i> , (1994) 4 R.F.L. (4th) 275 (Ont. Gen. Div.)	5.6

References are to paragraph numbers

Tables of Cases, Statutes and Regulations

<i>Srivastava v. Srivastava</i> , (1997) 40 B.C.L.R. (3d) 358 (C.A.)	2.60
<i>Suchostawsky v. Metropolitan Life Insurance</i> , (1993) 41 A.C.W.S. (3d) 1064, [1993] O.J. No. 1650 (Ont. Gen.Div.)	14.10
<i>Swan v. Canada</i> , (1998) 47 R.F.L. (4 th) 282 (F.C.A.)	14.8
<i>Taylor v. Taylor</i> , (1998) 50 B.C.L.R. (3d) 212 (C.A.)	2.52
<i>Thibert v. Thibert</i> , (1992) 66 B.C.L.R. (2d) 93 (B.C.C.A.)	1.1
<i>Verbeek v. Craig</i> , (1998) 37 R.F.L. (4th) 143 (B.C.S.C.)	11.19
<i>Vestrup v. Vestrup</i> , [1999] B.C.J. No. 1057 (S.C.)	2.57, 14.8
<i>W.(R.S.) v. W.(A.T.)</i> , [1997] B.C.J. No. 3065 (B.C.S.C.)	14.8
<i>Webb v. Webb</i> , (1985) 49 R.F.L. (2d) 279 (B.C.S.C.)	9.3, 9.4
<i>Walker v. Walker</i> , (1996) 31 R.F.L. (4th) 63 (B.C.S.C.)	11.17
<i>Walker v. Walker</i> , (1993) 142 A.R. 374 (Alta. Q.B.)	14.15

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2. Table of Statutes

<i>Canada Pension Plan Act, R.S.C. 1985, c. C-8</i>	2.57, 7.3, 9.3, 11.17-20
<i>s. 55</i>	11.18
<i>s. 55.1</i>	11.18
<i>s. 55.2(3)</i>	11.18
 <i>Definition of Spouse Amendment Act, S.B.C. 2000, c. 24</i>	
<i>s. 29</i>	1.1
 <i>Family Relations Act, R.S.B.C. 1996, c. 128</i>	
<i>s. 1</i>	1.1
<i>s. 56(1)</i>	2.22, 11.4, 13.8
<i>s. 57</i>	2.22, 13.8
<i>s. 58(3)(d)</i>	9.3
<i>s. 62</i>	11.18
<i>s. 65</i>	2.23, 3.6, 5.7, 11.12., 12.3, 14.8
<i>s. 65(1)(f)</i>	2.26
<i>s. 65(3)</i>	2.23, 2.34, Ch12 Intro.
<i>s. 66</i>	2.5, 3.6, 11.21, 14.8
<i>s. 70</i>	2.2, 2.17, 5.11, 11.6, 14.7
<i>s. 70(1)</i>	1.8, 2.36, 2.52, 2.55, Ch9 Intro., 9.3
<i>s. 70(2)</i>	Ch9 Intro.
<i>s. 71</i>	12.2

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<i>s. 71(1)</i>	<i>1.7, 11.1, 11.2, 11.3</i>
<i>s. 71(3)</i>	<i>11.17, 13.23, 14.14</i>
<i>s. 72</i>	<i>2.50, 14.4</i>
<i>s. 72(1)</i>	<i>11.13</i>
<i>s. 72(2)</i>	<i>2.1, Ch8 Intro., 15.25</i>
<i>s. 72(2)(a)</i>	<i>2.10, 2.14, 2.16, 2.39, 2.57, 8.2, 8.7</i>
<i>s. 72(3)</i>	<i>2.4, 5.6, 8.5, 14.1</i>
<i>s. 72(4)</i>	<i>14.1</i>
<i>s. 72(5)</i>	<i>Ch9 Intro.</i>
<i>s. 73</i>	<i>Ch3 Intro.</i>
<i>s. 74</i>	<i>2.14, 2.37, 2.39, 5.13, Ch9 Intro., 12.7, 14.1, 15.23</i>
<i>s. 74(a)</i>	<i>2.4, 2.6, 2.11, 2.21, 2.36, 2.44, 2.57, 10.2</i>
<i>s. 74(a)(ii)</i>	<i>2.1, 2.11</i>
<i>s. 74(b)</i>	<i>2.4, 2.6, 2.11, 2.21, 2.44, 2.49</i>
<i>s. 75</i>	<i>Ch4 Intro., 4.4</i>
<i>s. 75(2)</i>	<i>4.3</i>
<i>s. 75.1</i>	<i>2.5, 2.33, 2.52, 4.4, Ch12 Intro.</i>
<i>s. 76</i>	<i>Ch5 generally, Ch9 Intro., 9.1, 14.1, 14.7</i>
<i>s. 76(1)</i>	<i>5.8, 5.9, 5.10, Ch8 Intro., 11.13, 14.7</i>
<i>s. 76(2)</i>	<i>5.5, 5.12, 11.15</i>
<i>s. 76(3)</i>	<i>12.1</i>
<i>s. 76(4)</i>	<i>14.1, 14.4</i>

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<i>s. 77</i>	<i>Ch7 generally</i>
<i>s. 77(1)</i>	<i>7.2, 11.13</i>
<i>s. 78</i>	<i>8.3</i>
<i>s. 78(1)</i>	<i>5.9, 8.2, 8.4</i>
<i>s. 78(3)</i>	<i>8.10</i>
<i>s. 79</i>	<i>2.35</i>
<i>s. 80</i>	<i>Ch11 generally</i>
<i>s. 80(1)</i>	<i>2.33, 11.5, 11.10, 14.13</i>
<i>s. 80(1)(a)</i>	<i>2.22, 11.6</i>
<i>s. 80(1)(b)</i>	<i>11.17, 11.24</i>
<i>s. 80(1)(c)</i>	<i>11.18</i>
<i>s. 80(2)</i>	<i>14.1, 14.13</i>
<i>s. 80(2.1)</i>	<i>14.1</i>
<i>s. 80(2.2)</i>	<i>14.1, 15.27</i>
<i>s. 80(4)</i>	<i>11.21</i>
<i>s. 80(5)</i>	<i>11.17</i>
<i>s. 81</i>	<i>15.1</i>
<i>s. 82</i>	<i>2.1, 13.21</i>
<i>s. 83</i>	<i>5.9, Ch8 Intro., 8.2, 11.9, 14.10</i>
<i>s. 85</i>	<i>13.3</i>
<i>s. 120.1</i>	<i>1.1, 13.22</i>

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<i>Income Tax Act (Can.), R.S.C. 1985 (5th Suppl.), as amended, c.1</i>	1.17, 2.51, 6.2, 12.1	
<i>s. 146(16)(b)</i>	6.1	
<i>s. 146.3(14)</i>	6.1	
 <i>Interpretation Act, R.S.B.C. 1996, c. 238</i>		
<i>s. 25</i>	15.26	
<i>s. 28(1)</i>	13.9	
 <i>Limitation Act, R.S.B.C. 1996, c. 266</i>		11.4
 <i>Pension Benefits Division Act (Can.), S.C. 1992, c.46</i>		1.1, 1.8, 1.11, 7.4, 13.22
 <i>Pension Benefits Standards Act, R.S.B.C. 1996, c. 352</i>		
<i>s. 1</i>	11.4	
<i>s. 1(1)</i>	1.1, 11.17	
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<i>s. 34(1)</i>	Ch8 Intro., 11.4	
<i>s. 35</i>	2.59, 11.17	
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<i>s. 35(4)</i>	11.17
<i>s. 35(5)</i>	11.15, 11.17
<i>s. 35(6)</i>	11.17
<i>s. 37</i>	2.57
<i>s. 40</i>	2.35
<i>s. 63</i>	14.10, 15.8
<i>s. 64</i>	2.9, Ch8 Intro., 11.4, 14.10
<i>s. 65</i>	1.5, 13.11, 13.17

Pension Benefits Standards Amendment Act, 1999, S.B.C. 1999, c. 41

<i>s. 1(1)</i>	1.1
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Pension Benefits Standards Act (Can.), R.S.C. 1985, c. 32 (2nd Supp.)

<i>s. 22(2)</i>	5.6
<i>s. 25</i>	8.13
<i>s. 25(2)</i>	1.11
<i>s. 25(3)</i>	1.11
<i>s. 25(7)</i>	Ch5 Intro.
<i>s. 31</i>	8.13

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Family Relations Act, R.S.B.C. 1996, c. 128, Division of Pensions Regulation, B.C. Reg. 77/95

<i>Reg. 1</i>	2.22, 3.4
<i>Reg. 3(1)(b)</i>	<i>Ch2 Intro., Ch5 Intro.</i>
<i>Reg. 3(1)(c)</i>	<i>Ch3 Intro.</i>
<i>Reg. 3(1)(e)</i>	<i>Ch5 Intro.</i>
<i>Reg. 3(3)</i>	12.5, 12.6, 13.1, 13.2
<i>Reg. 4</i>	13.1
<i>Reg. 6</i>	2.17, 2.24, 11.6
<i>Reg. 6(2)</i>	2.19, 2.27-30, 8.10
<i>Reg. 6(3)</i>	8.9
<i>Reg. 7</i>	2.11, 2.39, <i>Ch3 Intro., Ch10 Intro., 15.25</i>
<i>Reg. 7(b)</i>	2.40
<i>Reg. 8</i>	15.30, 15.32
<i>Reg. 8(3)</i>	15.31
<i>Reg. 8(3)(a)</i>	15.34
<i>Reg. 8(3)(b)</i>	15.31
<i>Reg. 8(4)</i>	15.31
<i>Reg. 9</i>	<i>Ch3 Intro., 3.4</i>
<i>Reg. 9(2)</i>	3.7
<i>Reg. 10</i>	2.49, 2.52, 2.54

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<i>Reg. 10(a)</i>	2.44
<i>Reg. 10(b)(ii)</i>	2.50
<i>Reg. 11</i>	11.22, 15.18
<i>Reg. 11(4)</i>	3.6, 11.21
<i>Reg. 12</i>	<i>Ch9 Intro.</i> , 9.1
<i>Reg. 13</i>	15.1
<i>Reg. 14</i>	2.1, 13.20, 15.19
<i>Reg. 14(1)</i>	15.20
<i>Reg. 14(2)(b)</i>	15.23
<i>Reg. 14(4)</i>	15.22
<i>Reg. 15</i>	2.53, 15.25, 15.26
<i>Reg. 15(c)</i>	15.29
<i>Form 1</i>	5.8, 5.16, <i>Ch13 Intro.</i> , 13.8, 13.10, 13.15, 13.17, 13.19, 13.21, 13.22, 15.3, 15.12, 15.14, 15.20, 15.22, 15.29
<i>Form 2</i>	<i>Ch2 Intro.</i> , <i>Ch5 Intro.</i> , 5.13, 5.16, 11.24, 12.5, <i>Ch13 Intro.</i> , 14.1, 15.4, 15.12, 15.38
<i>Form 3</i>	<i>Ch3 Intro.</i> , <i>Ch13 Intro.</i> , 14.2, 15.4
<i>Form 4</i>	2.37, <i>Ch13 Intro.</i> , 15.23, 15.36
<i>Form 5</i>	<i>Ch5 Intro.</i> , <i>Ch13 Intro.</i> , <i>Ch14 Intro.</i> , 14.1, 14.4, 14.7, 14.10, 14.14, 15.4
<i>Form 6</i>	5.16, 11.24, 13.17, 15.27, 15.38
 <i>Income Tax Act (Can.)</i> , C.R.C. 1978, c. 945	
<i>Form 2220(e)</i>	6.1, 6.2
<i>Reg. 8501(5)(d)</i>	2.51
<i>Reg. 8503(3)(l)</i>	2.51

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Pension Benefits Division Regulation SOR/94-612, amended SOR/97-420

Reg. 17 10.5

Pension Benefits Standards Act (B.C.), R.S.B.C. 1996, c. 352

B.C. Reg. 455/99, Form 4 of Schedule 2 11.17

B.C. Reg. 455/99, Form 2 of Schedule 2 11.17

B.C. Reg. 433/93, as amended by B.C. Reg. 455/99

Reg. 9 15.20

Reg. 10 15.20

Reg. 11 15.20

Reg. 12 15.20

Reg. 30(6.1) 10.4

Reg. 33 2.35

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British Columbia enacted legislation in 1995 that provides for the assistance of plans in dividing pensions between spouses on marriage breakdown.

*The legislation applies to “local plans.” Any private occupational plan and any federally regulated occupational plan is a local plan **to the extent that it has members that accrue pension entitlement while working in B.C.** [For the rules that apply to non-local plans (which are called “extraprovincial plans”) see Chapter 7]*

The rules for pension division make distinctions among pensions on the basis of whether or not the member has retired by the time of marriage breakdown, and the kind of plan. (The rules are set out in a convenient table below.)

If the member has retired by the time of marriage breakdown, the pension is said to be “matured.” It will be divided by a plan-administered benefit split. [See Chapter 5] The plan will be required to divide each monthly payment, make separate 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.

If the member has not retired by the time of marriage breakdown, the method for dividing the pension will depend upon whether it is in a defined contribution (or “money purchase”) plan or a defined benefit plan.

An unmatured pension in a defined contribution plan is divided immediately. The plan transfers half of the portion of the pension acquired during the marriage (plus net investment returns on that portion) to, e.g., an RRSP for the spouse. [See Chapter 3]

The division of an unmatured pension in a defined benefit plan is deferred. The spouse is designated a limited member of the plan, who is entitled to either (a) a separate pension when the member retires or (b) any time after the member becomes eligible to retire, a transfer of the commuted value of the spouse’s share to, e.g., an RRSP for the spouse. [See Chapter 2]

Part 6 sets out Forms to be used for communicating with the plan. The plan will take the appropriate steps to divide the pension once it receives the correct Form, together with the order or agreement that provides that the spouse is entitled to a share of the pension. [See Chapter 15]

Chapter 1: General Information

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

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

! *A Family Lawyer's Guide to Pensions and RRSPs* (a publication of Continuing Legal Education of British Columbia, February, 2000)

! *Family Law Agreements - Annotated Precedents* (a publication of Continuing Legal Education of British Columbia)

! *Family Law Sourcebook* (a publication of Continuing Legal Education of British Columbia)

or visit the BCLI's website: www.bcli.org

- 1.1 Does “spouse” in the pension sections of the *FRA* include unmarried persons in marriage-like relationships (of the same or opposite sex)?

Spouse defined

Commentary: not under the *FRA*. The *FRA* divides property only on marriage breakdown and only between legally married spouses. [*FRA*, s. 1]

But an unmarried person in a marriage-like relationship may be able to establish an interest in the other partner's pension by asserting a constructive trust, in which case it would be open to the court to order that the pension division mechanisms under Part 6 are available for dividing the pension: see, e.g., *Dorflinger v. Melanson*, (1994) 91 B.C.L.R. (2d) 91 (C.A.) where the B.C. Court of Appeal ordered that a pension subject to the federal *Pension Benefits Standards Act* be divided between common law spouses when their relationship ended. [See also: *Hinder v. Beharrell*, [1993] B.C.J. No. 1516 (B.C.S.C.); *Maloney v. Maloney*, (1993) 109 D.L.R. (4th) 161 (Ont. Gen. Div.); *Thibert v. Thibert*, (1992) 66 B.C.L.R. (2d) 93 (B.C.C.A.); *Gregory v. Gregory*, (1994) 92 B.C.L.R. (2d) 133 (B.C.S.C.); *Sigvardsen v. Stanley*, [1996] B.C.J. No. 1429 (B.C.S.C.); *Fraser v. Fraser*, (1995) 16 R.F.L. (4th) 112 (B.C.S.C.)]

Contrary to the position adopted by some lower courts, the Supreme Court of Canada has held that a causal nexus between contributions and the asset with respect to which a constructive trust is claimed is not necessary. [*Peter v. Beblow*, [1993] 1 S.C.R. 980, 44 R.F.L. (3d) 329, 342 (S.C.C.)]

Unmarried persons in a same or opposite sex relationship, however, may make an agreement to have Parts 5 and 6 of the *FRA* apply to them. [*FRA*, s. 120.1]

Chapter 1: General Information

In contrast, both the federal *Pension Benefits Division Act* and the federal *Pension Benefits Standards Act* allows for the division of pension entitlement between common law partners. [See *Modernization of Benefits and Obligations Act*, S.C. 2000, c. 12]

Unmarried persons in marriage-like relationships are now recognized as spouses while the relationship continues (both under federal and provincial law). This means, for example, that preretirement survivor benefits would be payable to an unmarried partner when the member dies, provided the relationship has not been ended by separation.

This is the current definition of “spouse” in the B.C. *PBSA* (as amended in 2000):

“spouse” means, in relation to another person,

(a) a person who at the relevant time was married to that other person, and who, if living separate and apart from that other person at the relevant time, did not live separate and apart from that person for longer than the 2 year period immediately preceding the relevant time, or

(b) if paragraph (a) does not apply, a person who was living and cohabiting with that other person in a marriage-like relationship, including a marriage-like relationship between persons of the same gender, and who had been living and cohabiting in that relationship for a period of at least 2 years immediately preceding the relevant time;

[*Pension Benefits Standards Amendment Act, 1999*, S.B.C. 1999, c.41, s. 1(1); *Definition of Spouse Amendment Act, 2000*, c. 24, s. 29]

For the definition of “spouse” in the B.C. *FRA*, 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 from an insurance company to cover its obligations to the member would be divisible as a pension under Part 6. The insurance company would be considered to be the administrator.

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TABLE OF PENSION DIVISION METHODS

KIND OF PLAN	METHOD OF DIVISION IF MEMBER HAS NOT RETIRED	METHOD OF DIVISION IF MEMBER HAS RETIRED
PENSION IS IN A LOCAL DEFINED BENEFIT PLAN	<p>The spouse becomes a “limited member” of the plan, entitled to</p> <p>(a) have the commuted value of the spouse’s share transferred to a prescribed financial vehicle (e.g., an RRSP), at any time after the member becomes eligible to retire, or</p> <p>(b) wait until the member actually retires and receive the share in the form of a separate pension</p> <p>(see Chapter 2)</p>	<p>Plan-administered benefit split (the spouse waits until the member retires and receives a share of each monthly cheque from the plan)</p> <p>(see Chapter 5)</p>
PENSION IS IN A LOCAL DEFINED CONTRIBUTION PLAN	<p>The spouse is entitled to half of the pension that accrued during the marriage (plus net investment returns on that portion).</p> <p>The spouse’s share is transferred to a prescribed financial vehicle (e.g., an RRSP) (see Chapter 3)</p>	<p>Plan-administered benefit split</p> <p>(see Chapter 5)</p>
PENSION IS IN A LOCAL HYBRID PLAN	<p>The part of the pension that is based on defined contribution principles is divided like a pension in a defined contribution plan</p> <p>The remainder is divided like a pension in a defined benefit plan</p> <p>Or, if the plan consents, the whole of the pension is divided like a pension in a defined benefit plan</p> <p>(see Chapter 4)</p>	<p>Plan-administered benefit split</p> <p>(see Chapter 5)</p>
PENSION IS IN AN EXTRAPROVINCIAL PLAN	<p>Divided by methods applied in the plan’s jurisdiction (if fair)</p> <p>Otherwise, a plan-administered benefit split (the spouse waits until the member retires and receives a share of each monthly pension cheque from the plan)</p> <p>(see Chapter 7)</p>	<p>Plan-administered benefit split</p> <p>(see Chapter 7)</p>

1.3 Do my spouse and I need to consult a lawyer or actuary to divide the pension?

Chapter 1: General Information

*Need for
professional
advice?*

Commentary: a very simple agreement made between spouses, which provides that

(a) Part 6 applies to the division of the pension, and

(b) sets out the spouse's "entitlement date"

is all that is really needed. [See paras. 2.22 and 11.3] This agreement would be attached to the Forms the plan will require to administer the pension division.

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 and may receive an inadequate share of the pension.

- 1.4 Is a plan amendment required for a plan to be able to handle administration of the division of pension entitlements?

*Need for
a plan
amendment?*

Commentary: 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 pensions upon marriage breakdown. But a plan must not contain anything in derogation of the provisions of the *PBSA* or the *FRA* with respect to division of pensions.

[See, however, para. 5.13]

- 1.5 The legislation seems to say that it operates whenever a spouse is entitled to a share of a pension under Part 5. Entitlement under Part 5 arises automatically on marriage breakdown. Is it necessary to have an agreement or order that specifically says the pension is to be divided?

*Must agreement
or order
specifically
say pension
is being divided?*

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Commentary: yes. As a practical matter, a third party is not required to recognize one spouse's rights in the other spouse's property without a document evidencing the change in title. A third party that chooses to do so is taking a risk.

E.g., at the date of marriage breakdown, one spouse owns a car. Even if the other spouse is automatically entitled to a half interest as a tenant in common in the car, the motor vehicle branch will not change its records without something more.

The *PBSA* says that an administrator may require a person that claims entitlement to a benefit under a pension to produce evidence of the entitlement. [*PBSA*, s. 65] If the arrangements concerning the pension have not been recorded in an agreement or court order, an administrator would ordinarily require a letter under the signature of the spouse and member acknowledging that the pension is to be divided under Part 6. It is not unknown for spouses to settle their property arrangements by an unrecorded agreement, for example. A plan does not have to take that risk.

Part of the problem is that an agreement representing a final property settlement that is silent about the pension would ordinarily be interpreted by a court as waiving division of the pension. [See paras. 11.17 and 14.14]

1.6 If a pension is 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 the pension (usually in exchange for a compensation payment, the transfer of another asset, or the member waiving rights to an asset owned by the spouse). If so, Part 6 becomes irrelevant, except with respect to rules for valuing the compensation payment. [*FRA*, Reg. 11]

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 marriage or because the member has not accrued very much pension entitlement),
- ii. the member has substantial assets and wants to retain the pension, or
- iii. the spouse has separate pension entitlement and the difference in value with the member's pension 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

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of the spouse's share of the pension even where that is not available under Part 6.

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 pension is to be divided, Part 6 will apply. Where the pension is to be divided, Part 6 applies unless the spouse and member otherwise agree, or a court makes a contrary order. [*FRA*, s. 71(1). See para. 11.3]

1.8 How do I find out if my spouse's pension is in a plan that is subject to Part 6 of the *FRA*?

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

Commentary: Part 6 of the *FRA* provides rules for dividing any pension where the law of B.C. governs the division of family property on marriage breakdown. The rules for "local plans" are different from those for "extraprovincial plans." [Extraprovincial plans are discussed at paras. 1.12, 1.14 and Chapter 7.]

"Local plan" is a defined term. [*FRA*, s. 70(1)] Basically, a "local plan" is (a) any B.C. public plan, and (b) any occupational plan registered in B.C. under the *PBSA*, or registered in another Canadian province where the member accrued pension entitlement while employed in B.C.

"Local plan" would also include any plan with members employed in B.C. (para (b) of the definition). A plan is required to register in the province in which the majority of its members are employed. If the majority of a plan's members are employed in B.C., it must be registered under the B.C. *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. The exemption simplifies matters for a plan, which is required to abide by only the regulatory standards regarding pensions of the province in which it is registered. The exemption does not apply to other legislation, such as legislation governing the division of family property on marriage breakdown. Even if the member earned a pension 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) an occupational plan registered under the federal *Pension Benefits Standards Act*, [see, para. 1.11] but does not include a federal public

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plan. A federal public plan would be divisible under the federal *Pension Benefits Division Act*. Public service pensions under the following federal legislation 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 accrued pension entitlement under a single employer, but while working in a number of different provinces (as follows):

Alberta: 1965-1985
Saskatchewan: 1985-1990
B.C.: 1990-1995

What law governs the division of this pension? Is this pension in a “local plan?”

*Working in
different
provinces*

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?
- ! which province’s laws determine how to divide the pension?

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 pension has been earned in a number of different jurisdictions, the whole of the pension is subject to the laws of the province where pension entitlement was last accrued before the “event” (such as retirement, or pension division on marriage breakdown) takes place.

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In the example, if the “event” is marriage breakdown, the whole of the pension will be divided in accordance with B.C. law. If the last jurisdiction in which pension entitlement accrued 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, the member is also entitled to other termination (or 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 pensions. Courts have held that various termination or severance benefits payable by an employer are divisible between the parties when the relationship ends [see, e.g. *Cameron v. Cameron*, (1994) 100 B.C.L.R. (2d) 104 (B.C.S.C.)] But assisting in their division is not the responsibility of the pension plan. [See *A Family Lawyer’s Guide to Pensions and RRSPs* (B.C. Continuing Legal Education Society, 2000) beginning at para 7.4.15.]

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

*Federal
PBSA*

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

25.(2) Subject to this section, pension benefits, pension benefit credits and any other benefits under a pension plan shall, on divorce, annulment, separation or breakdown of a common-law partnership, be 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.

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

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 retired

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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 retired,

(b) the marriage 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

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

1.12 What is an example of an extraprovincial plan?

Extraprovincial Plans

Commentary: a common mistake under Part 6 of the *FRA* 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.

“Local plan” is defined to mean any registered pension plan that is subject to B.C. law, which includes some plans that are located outside B.C.

“Extraprovincial plan” is defined as “a plan that is not a local plan.” Consequently, the Part 6 rules apply comprehensively to all plans that provide pensions, 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.”

A plan located in the United States would also be regarded as 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 (B.C.S.C.); *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. (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]

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- 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
in another
province*

Commentary: yes.

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

*A plan
registered
in the U.S.*

Commentary: no. U.S. federal legislation provides methods of dividing a U.S. pension.

- 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.

E.g., 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. This pension would be divided by the rules that apply to local plans.

If the example is changed so that the member and spouse live in Alberta, Alberta law will determine how to divide their assets, including the pension. The pension would not be divided under Part 6 of the *FRA*.

- 1.16 Agreement or court order made before July 1, 1995

*Pre-July
1995
Arrangements*

Commentary: [See para. 14.1]

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

*Income tax
and pension
division*

Commentary: the *Income Tax Act* provides that where a transfer of pension entitlement from a member to the credit of a spouse takes place on marriage breakdown, there is a roll-over of the tax consequences.

[See also paras. 6.1 and 6.2]

If the member's pension is in a defined benefit plan, and the member has not retired at the time of marriage breakdown, the pension is 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 pension, attached to a Form 2. [FRA, Reg. 3(1)(b)] The limited member is entitled to (a) have a share of the pension (a "proportionate share" of the "commuted value" of the pension) transferred to the credit of the spouse at any time after the member becomes eligible to retire, or (b) wait until the member retires and receive a separate pension from the plan.

*Both of these are **deferred methods** of dividing the pension account (in contrast with the method used to divide an unmatured pension in a defined contribution plan, which is an immediate division of the pension account—see Chapter 3—and with the method used to divide a matured pension, which is a division of benefits when and as they are paid under the pension—see Chapter 5).*

2.1 What rights does a limited member have?

*Rights of
a limited
member*

Commentary: a limited member has most, but not all, of the rights of a member. [FRA, s. 72(2)] **Specifically:**

(1) to receive from the plan 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 FRA.

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

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

(4) to receive directly from the plan information about the member's pension and the spouse's share in it. [FRA, s. 82; Reg. 14]

(5) if the member terminates employment before reaching a retirement age, to require a proportionate share of the commuted value of the pension to be transferred from the plan to the credit of the limited member. [FRA, s. 74(a)(ii)]

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- 2.2 Would a limited member who has chosen to receive a separate pension continue to have rights? *E.g.*, 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 most of the rights that a member has. [FRA, s. 72] A “member” includes a “former member.” [FRA, s. 70] A limited member, consequently, would be entitled to the same ad hoc post-retirement enhancements that other pensioners would be entitled to.

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

*Rights a
limited
member
doesn't
have*

Commentary: one example of a right not possessed by the limited member is the right to vote concerning changes in the plan. Another is the right to purchase additional pension entitlement offered to members.

It is also important to recognize the difference between a pension and other kinds of employment benefits, even if they are typically provided in an integrated package. A limited member would not, *e.g.*, be entitled to group 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 old law. Under the old law, the plan could not provide information to the spouse without the consent of the member. And the plan was not compelled to recognize either (a) the former spouse or (b) the former spouse's interest in the member's pension.

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

*The member's
elections*

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Commentary: the member cannot change beneficiary designations in favour of the former spouse (spouse1) until spouse1 receives a share of the pension under s. 74(a) or (b). [*FRA*, s. 72(3)] After that time, the member is free to deal with the pension and may make elections and designations that protect the new family.

[See further Chapter 8]

- 2.5 Before marriage breakdown, the member designated spouse1 to be beneficiary of any preretirement survivor benefit under the pension. But the benefit exceeds the share of the pension 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: the *FRA* prevents the member from changing the designation until spouse1 receives the share of the pension (unless spouse1 consents). [*FRA*, s. 72(3). See para. 2.4]

This does not mean that member and spouse1 cannot agree on a more appropriate arrangement of their affairs. If spouse1 does not wish to agree, the member can apply to the court for an order varying the designation of the preretirement survivor benefit. It would be open to the court to order, e.g., that spouse1 holds in trust for spouse2 any portion of the preretirement survivor benefit that exceeds half of the commuted value of the pension that accrued during the marriage. [*FRA*, s. 66 and s. 75.1] Since a court can make such an order, it would make sense for the member and spouse to reach a similar agreement and save the expense of court proceedings.

In some cases, the obligation to maintain a beneficiary designation is limited in time. This is often the case where life insurance is used to secure support obligations. These cases are instructive concerning principles that may apply to pension beneficiary designations. The agreement, for example, may require the member to maintain the spouse as beneficiary of preretirement survivor benefits until the spouse receives a separate share of the pension.

Sometimes, the member forgets to change the beneficiary designation when that option becomes available (after the purpose for the beneficiary designation is no longer present). In the pension context, if the beneficiary designation is unchanged, this would theoretically provide the spouse with not only the half interest in the pension, but a further amount in the form of death benefits payable under the member's separate share.

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In these cases arising in the life insurance context, courts will often find that the beneficiary holds the benefits in trust for the member's estate. [*Ladner v. Ladner*, (1997) 30 B.C.L.R. (3d) 144 (B.C.C.A.); *Martindale v. Martindale Estate*, (1998) 55 B.C.L.R. (3d) 63 (B.C.C.A.)] It is possible a similar position would apply to pension beneficiary designations.

[See Chapter 8]

2.6 Why is the method for dividing pensions in unmatured defined contribution plans not used for pensions in unmatured defined benefit plans?

*Why are DBP's
treated
differently
from DCP's*

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

It is more difficult to value a defined benefit plan because guesses must be made about a number of future events. And the contributions made to the plan up to the time of marriage breakdown may not be enough to satisfy the estimate of the pension's value. Even if there is enough money, it may not be fair to one or more of the member, spouse or plan 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.

E.g., say the pension is valued taking into account the prospect that the member will stay in the plan until retirement. This would place a fairly high value on the pension 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, deferred methods of pension division are employed: the separate pension option [*FRA*, s. 74(b)], or the early retirement transfer option. [*FRA*, s. 74(a)]

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

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*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. The member will eventually be able to elect a survivorship option to protect spouse². Under a *Rutherford* split, a survivorship election must normally, if permitted, protect spouse¹.

2.8 How does the proportionate share work when the rates of accrual on the pension differ for different periods (*e.g.*, 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 pension as at the date the spouse actually receives the share (in the form of a transfer of a lump sum, or as a separate pension). The spouse's proportionate share is applied to the value the pension has at that time. [See para. 15.32 concerning adjusting the member's pension after division]

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

*The member
dies before
the spouse
receives
a share*

Commentary: in most cases, yes. The legislation secures a portion of any preretirement survivor benefit for the spouse, although in most cases the agreement or court order dividing the pension will also require the member to designate the spouse to be beneficiary (until the spouse receives a separate share of the pension) of any preretirement survivor benefit payable under the pension. Pension entitlement is subject to the terms of an agreement or court order dividing family property. [*PBSA*, s. 64; *Low v. Edgar*, (1990) 28 R.F.L. (3d) 318 (B.C.S.C.); *M.(E.E.) v. M.(P.F.)*, (1993) 50 R.F.L. (3d) 281 (B.C.S.C.)]

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In either case, there are situations where the spouse will not be completely protected. Some plans provide no preretirement survivor benefit, or only a very small preretirement survivor benefit, representing less than the share the spouse would have received had the member become eligible to retire. This is a problem that will become increasingly rare. The *PBSA* requires a generous preretirement survivor benefit for pension entitlement accrued after January, 1993.

An issue arises with respect to non-contributory plans regulated under the federal *PBSA*. [See para. 8.13]

[See further para. 2.41 and Chapter 8]

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

*The member
terminates
employment (1)*

Commentary: yes. Part 6 gives the limited member a proportionate share of any benefit paid out from the plan, and that would include a share of a transfer of commuted value when the member terminates employment. [*FRA*, s. 72(2)(a)]

If a plan receives a request from a member to transfer the commuted value of pension entitlement, it must give the limited member 30 days advance notice. 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]

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

*The member
terminates
employment (2)*

Commentary: the limited member has a choice. The limited member is entitled to have a share transferred to a prescribed pension vehicle, such as an RRSP or another pension plan. [*FRA*, s. 74(a)(ii), Reg. 7. See Chapter 10]

Or, the limited member can elect to receive the share at a later date such as, for example, in the form of a separate pension when the member retires.

The legislation gives the limited member four basic rights for sharing an unmatured pension in a defined benefit plan:

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(a) to receive a proportionate share of any benefit paid from the member's pension, [FRA, s. 72(2)]

(b) to require a transfer of a share of commuted value when the member terminates membership in the plan, [FRA, s. 74(a)(ii)]

(c) to require a transfer of a share of commuted value when the member reaches a retirement age, [FRA, s. 74(a)] or

(d) to wait until the member retires and take a separate pension. [FRA, s. 74(b)]

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

*Member
transfers
entitlement
to another
plan*

Commentary: no. [See para. 15.28]

- 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 method of dividing a pension 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. If, while waiting, events occur that enhance or diminish the member's pension, the limited member's share is proportionately enhanced or diminished.

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

*The plan
declares
a surplus*

Commentary: yes. If the amount is paid out before the limited member's share is received under FRA, s. 74, the limited member is entitled to a proportionate share

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under *FRA*, s. 72(2)(a). Otherwise, the entitlement to surplus would be taken into account when determining the limited member's separate pension (or lump sum transfer). [*FRA*, s. 74]

- 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 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.)]

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

Proportionate share (FRA, Reg. 6)

Commentary: the limited member is entitled to a share of any benefit paid under the pension. [*FRA*, s. 72(2)(a)] The share is determined as a fraction of the whole pension, or benefit, as the case may be. The fraction is called the "proportionate share."

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

Determining the proportionate share

Commentary: Regulation 6 sets out the formula for determining the proportionate share, which applies unless the spouse and member agree upon, or the court orders, another approach. [See *FRA*, s. 70, definition of "proportionate share"] Basically, the limited member's share is half of

(pensionable service accruing during the marriage) divided by (all of the member's pensionable service up to the date of transfer).

Pensionable service is measured in months or parts of months. Where the plan calculates service on another basis (e.g., on an hourly basis, or by bands of hours) a conversion may have to be made. [See paras. 2.32 and 2.33]

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If there is no agreement or court order, 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. [See s. 80, and s. 70, definition of “proportionate share”]

- 2.18 Regulation 6 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. In this case, the entitlement date is January, 1998. The member retired in 1995. How do we calculate the proportionate share?

*Proportionate share
of a matured
pension*

Commentary: since the member would have accrued no more pensionable service after retiring, the proportionate share stops changing at the date of retirement. In these situations, the retirement date is used to determine the limited member’s share.

- 2.19 What is meant under Reg. 6(2) where “A” is defined to exclude “any pensionable service for that period purchased by and credited to the member after that entitlement date?”

*Proportionate
share and
purchased
service*

Commentary: the reason the formula for determining the proportionate share refers to the exclusion of “purchased service” from the numerator 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). What happens, however, if service is purchased after the marriage ends, but is referable to the period during the marriage?

The policy adopted is that service purchased *during the marriage* increases the spouse’s share of the pension. Service purchased *after the end of the marriage*, even if it is referable to the marriage, does not increase the spouse’s share of the pension.

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

E.g.: the plan gives members an opportunity to purchase additional pension entitlement.

In each case, if the member takes the opportunity, the additional service would be

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“pensionable service...purchased by...the member.” Where 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.

E.g.,

Jan. 1, 1975	member joins plan
July 1, 1975	member marries spouse1
Dec.31 1978	member terminates employment and withdraws the pension (the equivalent of 4 years of service)
Jan. 1, 1980	member resumes employment and rejoins the plan
July 1, 1995	member and spouse1 divorce
Dec. 1, 1999	member buys back part of the pension service withdrawn in 1978 (the equivalent of 2 years service)
Jan. 1, 2005	member retires 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).

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

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

However, during the marriage some of the pension was withdrawn, so some pensionable service was lost. The numerator of the spouse’s proportionate share is based only on pensionable service accumulated during the marriage. Regulation 6(2) says that service purchased after the entitlement date 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 15, 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 pension, consequently, would be determined as:

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

[See paras. 2.27-2.29]

- 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

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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 para. 2.32]

- 2.21 Would benefit upgrades that are credited after the entitlement date 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 date are included in the spouse's share of the pension.

The spouse's proportionate share is applied to the whole of the pension. If the spouse elects an early retirement transfer of commuted value (under s. 74(a)), the spouse's proportionate share is determined on the whole of the value the pension has at the date of the transfer. If the spouse waits to take a separate pension when the member retires (s. 74(b)), the separate pension is based on the pension the member has at the date of retirement. Consequently, changes in the value of the pension following the entitlement date attributable to benefit upgrades are divided between the spouse and member.

However, the limited member is not entitled to a share where the enhanced value of the pension has been purchased by the member (in contrast to upgrades that apply to benefits generally under the plan). [See, paras. 2.20 and 2.32]

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

*What
is the
entitlement
date?*

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Commentary: “entitlement date” is defined in Reg. 1 to mean “in relation to a spouse, the date on which the spouse became entitled to an interest in family assets in accordance with section 56(1).”

S. 56(1) of the *FRA* provides that spouses each become entitled to a half interest in family assets (including pensions each of them may have) on the occurrence of various events signifying marriage breakdown: basically, when

! the spouses make a separation agreement, or

! a court makes an order recognizing the marriage breakdown (an order of divorce or nullity, or a declaration of irreconcilability under s. 57 of the *FRA*).

The parties, or the court, may select one of these dates, or another appropriate date, as the spouse’s entitlement date. *If the agreement or court order does not specify the entitlement date, the entitlement date is the first of these events to occur.*

The entitlement date is used to determine the spouse’s proportionate share of a pension. 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. [*FRA*, s. 80(1)(a)]. See further Chapter 11]

Another way would be for the agreement or order to set out a different formula or fraction.

- 2.23 The legislation provides that, unless the spouse and member otherwise agree, or a court orders, only pension entitlement accrued during the marriage is divided. But won’t a court have to take pre-marriage 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 (B.C.C.A.)?

*Pre-marriage
accruals:
usually
don’t divide*

Commentary: no.

Mailhot held that all of the pension accruing up to marriage breakdown, including pre-marriage accruals, is a family asset to be divided equally between the spouses. The court could exclude pre-marriage accruals from division where that would be unfair having regard to the factors set out in s. 65 of the *FRA*.

Since *Mailhot* was decided, however, s. 65 has been revised and Part 6 of the *FRA* says that only marriage accruals are divided. Pre-marriage accruals can be divided between the member and spouse, however, if they agree to do so, or a court holds that it would be unfair to exclude that portion of the pension from being divided. [*FRA*, s. 65(3)] The result is that the effect of the *Mailhot* case has been reversed by legislation.

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[*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 the *FRA* was revised. [See para. 14.2]

Even if the court determines that it is unfair not to divide pre-marriage accruals, the court cannot divide the pre-marriage accruals themselves unless first convinced that the spouse's share cannot be satisfied by transferring another asset, or that it would be inconvenient or unfair to do so. [*FRA*, s. 65(3)] There is a great deal of case law, however, which holds that it is inconvenient or unfair to require the member to pay a large capital sum immediately to compensate for retaining pension entitlement that the member may never live to enjoy. If the court decides that pre-marriage accruals should be divided under s. 65 of the *FRA*, it would usually be able to divide them directly by varying the spouse's proportionate share of the pension.

It is worth noting that every other Canadian jurisdiction that provides for pension division when a relationship ends divides only the pension accrued during the marriage. The B.C. legislation brings B.C. into step with the rest of Canada on that point. [See, however, para. 2.26]

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

*Drafting
a clause
to divide
pre-marriage
accruals*

Commentary: a reasonable approach would be to use the model employed in Regulation 6. Set out the formula for the proportionate share $(\frac{1}{2}) * (A/B)$ and define the period of time represented by A and B. "A" would be defined to include pre-marriage accruals (e.g., "pensionable service accruing from [date], the date the parties commenced cohabiting, to [date], the entitlement date").

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

*When to
divide
pre-marriage
accruals*

Commentary: case law suggests some circumstances where pre-marriage accruals should be divided, such as:

- ! the case involves a long marriage during which most of the pension accrued. [*Shirran v. Shirran*, (1999) 46 R.F.L. (4th) 371 (B.C.S.C.)]

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- ! the spouse brings assets into the marriage that are divided equally. [*Sangha v. Sangha*, [1998] B.C.J. No. 1087 (B.C.S.C.)]
- ! the spouse requires economic self-sufficiency (*i.e.*, if the spouse doesn't get a share of pre-marriage accruals, the member will have to pay maintenance).
- ! most of a long marriage extended into the period of retirement and therefore was not taken into account by the formula for the proportionate share.
- ! the pre-marriage accruals were acquired during a period of cohabitation preceding the marriage. [See para. 2.26 for more detail]

2.26 The spouse and member lived together in a common law relationship before marriage and the member earned pension entitlement during both the marriage and the common law relationship. Should the pre-marriage accruals be divided between the spouse and the member?

Pre-marriage accruals and cohabitation

Commentary: courts have on a number of occasions considered the significance of prior cohabitation and indirect contributions made by a non-owning spouse to the acquisition of property by the other spouse.

A court can take these facts into account under s. 65(1)(f) of the *FRA* when determining whether the share of family assets dictated by the legislation, or set out in an agreement, is fair in the circumstances. [*Piskor v. Piskor*, (1981) 27 B.C.L.R. 230 (C.A.); *Davidson v. Davidson*, [1985] B.C.D. Civ. 1680-03 (S.C.)]

Because both federal and provincial legislation recognizes the status of unmarried persons living together in marriage-like relationships, it is more common to see courts making such an order: *see, e.g., Baker v. Baker*, (1998) 34 R.F.L. (4th) 364 (B.C.S.C.), a case under the federal *Pension Benefits Division Act*, where it was held that the portion of the pension that accrued before the marriage, while the parties were cohabiting, should be divided because any other result would be illogical given that pension entitlement was now divisible between common law spouses who never marry.

A plan need not be concerned about this issue. The plan cannot divide the pension until it receives a court order or agreement, which will tell the plan whether or not pre-marriage accruals are to be divided. If the court order or agreement states that the pension is to be divided, but does not set out the manner of division, the rules in Part 6 will apply, under which pre-marriage accruals are not divided. [If the order or

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agreement was made before July 1, 1995, however, see para. 14.2]

- 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 after marriage breakdown won't ordinarily be divisible.

The Regulation to Part 6 of the *FRA* provides a formula, the "proportionate share," for dividing a pension. It is based on pensionable service accumulated (including purchased) by the member during the marriage. Any pensionable service accumulated after the marriage, even pensionable service attributable to the marriage that was "purchased by and credited to the member after" the entitlement date, is excluded from the numerator. [*FRA*, Reg. 6(2). See para. 2.32 for examples]

Pension entitlement purchased after marriage breakdown might be divisible if it can be established that it was purchased using family assets. [See also paras. 2.19 and 2.20]

- 2.28 The member purchased additional pension entitlement during the marriage, but it relates to a period before the marriage.

*Pension
entitlement
purchased
during the
marriage*

Commentary: 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 "accumulated," by whatever means, in the relevant period (*i.e.*, during the marriage). [*FRA*, Reg. 6(2)] It doesn't matter that the purchase relates to a period before the marriage. [See para. 2.19 and 2.21]

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

*Pension
entitlement*

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*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 marriage. [*FRA*, Reg. 6(2)]

As between member and spouse, their property division arrangements may address responsibility for the debt, but the plan does not have to worry about that issue. The approach adopted by courts is that a debt obligation associated with a family asset is taken into account when determining entitlement to the family asset. 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 family asset (*i.e.*, the pension). [See also paras. 2.19 and 15.8]

- 2.30 In some cases, a pension 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, *e.g.*, where the member must be employed for a minimum period before becoming a member of the plan. What rights does a spouse have where the plan credits the member with additional entitlement during the marriage that relates to a period before the marriage?

*Prior
service
credit*

Commentary: this would be pensionable service accumulated by the member during the marriage. [*FRA*, Reg. 6(2)] 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 during the marriage. It is possible to restore the lost service. The court has ordered the member to do so, and also ordered that the spouse's share of the pension be based on the restored service. What is the plan's obligation?

*Court orders
member*

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*to restore
service*

Commentary: the court order is binding on the plan. The restored service would be included in the numerator and denominator of 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* (e.g., the plan provides that the maximum pension is earned by a member upon completing 25 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 marriage, to acquire pension entitlement at a later date? Is service that is acquired with banked credits considered to be acquired during the marriage or after the entitlement date?

3. *as part of a flex benefits package*, the member gives up, e.g., 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 pension?

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, which is to be stated in months or parts of months?

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 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 in writing.

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

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

1. **cap on service:** in most cases the cap must be applied to both the numerator and the denominator of the formula [See para. 2.33] [Note: in the first edition of the Q&A the advice was to ignore the cap, but case law decided since then has recognized the cap, a position which is also consistent with the principles adopted in *Rutherford v. Rutherford*, (1981) 23 R.F.L. (2d) 337 (B.C.C.A.)]

2. **banked credits:** credits earned during the marriage qualify as family assets. 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 marriage and uses them after the entitlement date to acquire pensionable service, the spouse would probably be entitled to a share of that pensionable service (*i.e.*, it should be included in the numerator of 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. A plan should ignore banked credits unless the court order or agreement specifically provides that they be taken into account when determining the spouse's share of the pension.

3. **flex benefits:** the flex package will define a base pension. The spouse's rights before marriage breakdown 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 marriage breakdown would be determined by the base pension. [See para 2.20]

4. **hours or bands of hours:** the calculation would be converted so that service calculated in hours or bands or hours is expressed in months or parts of months. One of two approaches would be adopted:

i. the conversion can be based on a typical month's work (*e.g.*, assume the member works 45 hours in one month and the typical number of hours worked in a full month by people in the plan is 180 hours. In such a case, it would be appropriate to calculate the member's pensionable service for that month as equal to $45/180$ mo., or .25 of a month), or

ii. the proportionate share could simply be calculated in terms of hours.

If neither of these approaches is satisfactory, member and spouse may be prepared to agree upon a formula less firmly tied to pensionable service, such as months during marriage in which the member is in the plan, divided by all months that the member is in the plan.

2.33 In some cases, pensionable service increases but there is no corresponding increase in the size of the pension (such as, *e.g.*, where there is a cap on service). How is this

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dealt with?

*Pensionable
service
increases
without
increasing
pension value*

Commentary: the legislation and Regulation sets out a default formula for dividing pensions. 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 pension. [*FRA*, s. 75.1, s. 80(1). See further para. 2.32]

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

*Dividing a
divided
portion*

Commentary: the second spouse would not ordinarily be entitled to claim a share. The legislation adopts as a starting point that pre-marriage pension accruals are not divisible.

But it is open to a court to make an order dividing pension entitlement that accrued before the marriage. [*FRA*, s. 65(3)] A court that decides that it would be fair in the circumstance to divide pre-marriage accruals must first try to satisfy the entitlement out of other property. Situations in which a divided portion of a pension will be subject to further division will be rare. [See paras. 2.23-2.25]

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

*The spouse's
share is small*

Commentary: the plan can pay out when the share is very small. [*FRA*, s. 79] The threshold is set out in the *Pension Benefits Standards Act* [*PBSA*, s. 33(5) and s. 40(1) and Reg. 33]

- 2.36 If the limited member elects to take an early retirement transfer, how is the value of the limited member's portion determined?

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*Early
Retirement
Transfer Option
(S. 74(a))*

Commentary: the limited member's portion would be determined as a proportionate share of the commuted value of the pension calculated as of the date for the transfer. The commuted value is determined (in accordance with the *PBSA* and accepted actuarial principles) as the present value of the pension. [*FRA*, s. 74(a); *FRA*, s. 70(1), the definition of "commuted value;" Canadian Institute of Actuaries, *Recommendations for the Computation of Transfer Values From Registered Pension Plans*, (Sept. 1, 1993). See also paras. 3.11-12 and Chapter 10]

2.37 When the pension is in an unmatured defined benefit plan, the division is deferred. The limited member receives either (a) a transfer of a share of the commuted value at some date after the member becomes entitled to retire, or (b) a separate pension when the member retires. Who chooses between these options? The limited member? The plan?

*Who chooses?
Limited member
or plan?*

Commentary: the choice is exclusively that of the limited member. It is exercised by sending Form 4 to the plan. [*FRA*, s. 74]

2.38 Why is the spouse given an election?

*Elections
by the spouse*

Commentary: the election approximates the "deemed retirement" option usually made available in a *Rutherford* order. [See para. 2.7, 2.43, 2.48 and 14.11] If the member postpones retirement under a *Rutherford* order, the spouse can elect to require the member to make payments of the share of the pension the spouse would have received had the member retired.

The reason the spouse is given this election is that usually the overall value of the pension is greater the earlier the retirement date. Members don't usually wish to take an early retirement date, however, because the income they make more than compensates for any loss in value that results from deferring retirement.

Instead of being able to require a member who declines to retire to pay the spouse's share, the spouse can direct the plan to transfer the spouse's share to another pension vehicle and use it to produce a life income.

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- 2.39 The limited member has applied for a transfer of the proportionate share of the commuted value of the member's pension. The member has reached a retirement age but has not yet retired. The Regulation says that one transfer option is to another account in the same plan. The limited member has directed the plan to transfer the share to a separate account in the plan. What are the plan's responsibilities?

*Transfer
to where?*

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

The legislation allows a spouse to wait until the member retires to claim a separate pension from the plan, or direct a transfer when a member reaches a retirement age. [FRA, s. 74] The legislation also allows a limited member to claim a proportionate share of any benefit paid out from the plan. [FRA, s. 72(2)(a). See para 2.11]

If the limited member elects to have the share transferred once the member becomes eligible to retire, the share is transferred in accordance with Reg. 7 of the FRA 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 plan in question is willing to accept the transfer. [PBSA, s. 33(2)]

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

*Transfer
alternatives*

Commentary: a spouse may select this option, if the plan provides it. [FRA, Reg. 7(b)]

- 2.41 When would the spouse make the election to take the transfer of commuted value instead of waiting for the member to retire?

*Reasons for
taking the
transfer
of commuted
value*

Commentary: three factors would influence the spouse's decision.

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- ! the need to start a life income immediately.
- ! the view that the spouse could invest the money more effectively than the plan. Similarly, some people prefer to have control of the funds and make the request for that reason.
- ! the spouse would also 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. (The *PBSA* requires that plans pay an adequate preretirement survivor benefit, but this requirement only applies to post January 1993 pension accruals so that, in some cases, no preretirement survivor benefit may be payable, or the preretirement survivor benefit paid by the plan may be less than the spouse's proportionate share of the commuted value of the pension). [See also para 8.11]

2.42 When would the spouse elect to wait until the member retires and take a separate pension?

Reasons for waiting until the member retires

Commentary: the spouse might be tempted to make this election to avoid the responsibility of self-administering the investment of the funds to produce a life income.

2.43 Does a spouse need to know the value of the pension in order to make an informed choice between electing a transfer of the share or waiting until the member retires?

Need to value before making the election?

Commentary: usually, no.

It is easy to assume that the best choice in the circumstances will be the option that maximizes the value of the pension in the spouse's hands, but that will seldom be the case.

More often, the spouse will require payment of retirement income as early as possible. That factor alone will dictate the election. A comparison of the value of the pension then, and at a later date, would be irrelevant.

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This option is based on the “deemed retirement” option, available under a *Rutherford* order for the past 20 years. (If the member deferred retirement, the spouse was often given the option of requiring the member to pay to the spouse the share the spouse would have received had the member retired). Seldom, if at all, did anyone consider it necessary to value the pension to decide whether or not to take the deemed retirement. The same is true of the election under Part 6.

- 2.44 Whether the spouse takes an early retirement transfer, or waits until the member retires to take 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 is married. Do we determine the normal form to use by whether the member is married or whether the limited member is married?

*Spouse’s share
based on the
“normal form”*

Commentary: where the normal form is dictated by marital status, the selection of the normal form will depend upon whether or not the member is married.

Part 6 divides the pension based on the member’s entitlement. The early retirement transfer option gives the limited member a proportionate share of the commuted value of the member’s pension. [*FRA*, s. 74(a)]

Similarly, if the spouse waits to take a separate pension, the separate pension would be based on a proportionate share of the member’s pension. [*FRA*, s. 74(b)] Regulation 10(a) makes this clear. It says that the spouse’s separate pension is based on a proportionate share 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 marital status at the time the limited member receives the share is determinative.

If the spouse is single, however, even though the separate pension is based on a joint annuity, adjustments to the spouse’s share might be limited by thresholds defined by the Canada Customs and Revenue Agency concerning maximum pension entitlement.

- 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 pension be calculated on the basis that consent has or has not been given?

*Subsidized
early retirement
and trustee
consent*

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Commentary: [See para. 15.36]

- 2.46 Why isn't a transfer of a share of a pension in a defined benefit plan available as of the triggering event date (*i.e.*, on marriage breakdown)?

*Immediate
transfer
not available*

Commentary: most provinces that have pension division legislation provide for a transfer of the spouse's share on marriage breakdown. The value placed on the spouse's share is much lower than the value the pension will probably eventually have because it is based on the assumption that the member leaves employment on the transfer date. This approach to valuation is known as the "termination method."

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 (*i.e.*, 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 pension.

- 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 the payment would have to be calculated in accordance with Regulation 11, and make reasonable provision for future changes to salary levels, or the benefit formula, that would increase the value of the pension.

The legislation does not stipulate how to adjust the member's pension in this situation. Before agreeing to the option, a plan 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 retires 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

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calculate the payments the member has been making to the spouse.

*Proportionate
share and deemed
retirement*

Commentary: the member is correct.

Courts have consistently held that in these circumstances the spouse's election to take the deemed retirement fixes the spouse's share in the pension. [*Anderson v. Anderson*, (1986) 1 R.F.L. (3d) 222 (B.C.S.C.); *Rutherford v. Rutherford*, (1981) 23 R.F.L. (2d) 337, 349-50 (B.C.C.A.)] The spouse cannot both

- i. exercise the "deemed retirement" clause, and thereby begin receiving payments from the member up to the date of retirement, and
- ii. assert a claim to increases in the pension that accrued after the member was required to begin making the payments to the spouse.

[See para. 2.43]

2.49 The limited member has waited until the member retires. The limited member is entitled to a "separate pension." How is the separate pension determined?

*Separate Pension
(S. 74(b)):
Determining
the separate
pension*

Commentary: see *FRA*, Reg. 10.

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

*Form of
pension*

Commentary: the spouse. The policy is that the limited member enjoys this right in common with members. [*FRA*, s. 72] The plan is protected since whatever option the spouse selects is adjusted on an actuarial basis. [*FRA*, Reg. 10(b)(ii)]

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

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Income Tax Act (particularly Reg. 8503(3)(1))?

*Income Tax
Act and
spousal
elections*

Commentary: no. The Canada Customs and Revenue Agency has indicated that the provincial legislation is consistent with the *Income Tax Act*. The *ITA Regulations* recognize family property division arrangements authorized by provincial legislation. [ITA Reg. 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 the Canada Customs and Revenue Agency will allow to be paid under registered pension plans. Are these divisible?

SPP

Commentary: a supplementary pension plan or "top up" pension is a divisible family asset under Part 6 [FRA, s. 70(1), definition of "extraprovincial plan"; *Taylor v. Taylor*, (1998) 50 B.C.L.R. (3d) 212 (C.A.)] It is divided in the same way as a matured pension: the spouse must wait until the member retires and then will receive a share of each benefit payable to the member. The plan is responsible for administering the division upon receiving the appropriate agreement or court order.

Some plans will allow the member's spouse to elect a separate pension (and a court may make such an order under FRA s. 75.1) since this provides the former spouse with a guaranteed life income, unaffected by the member's death. From the plan's position, offering a separate pension is cost neutral since the adjustment would be done on an actuarial basis, in accordance with Reg. 10.

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 plan is advised that the member intends to retire, the plan is under an obligation to give the limited member 30 days advance notice. [FRA, Reg. 15] This would allow the spouse to choose between the options.

Chapter 2: Dividing a Pension in a Defined Benefit Plan

- 2.54 Why does Regulation 10 require the spouse's separate pension to be adjusted by reference to the difference in ages between the member and the spouse? Why not simply have it based on the spouse's life expectancy?

*Age
adjustment*

Commentary: the adjustment must first take into account the member's life expectancy: how long on average would the pension be paid to a person of the same age as the member at the date the pension commences? This information is necessary to determine how to adjust the monthly payments to reflect the fact that it will be paid to a person of the age of the limited member.

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

- 2.55 Some plans have a kind of "deferred retirement", under which a member *who is entitled to commence receiving the pension* may elect to retire but delay payment until some date in the future. In such a case can the former spouse begin receiving the pension at the date of retirement? or does the spouse have to wait until the member's pension actually commences?

*"Deferred
retirement"*

Commentary: it is the fact of retirement, not commencement, that triggers entitlement. "Retirement" is a defined term. It means "the date a member commences to receive a pension under a plan, whether or not the receipt of benefits has been deferred." [*FRA*, s. 70(1)] The limited member can begin receiving the separate pension at the date the member elected to retire and does not have to wait until the date the member actually begins to receive payments.

- 2.56 If a member retires at 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 answer to this question depends upon how the issue was handled when the spouse's share was determined (*i.e.*, the spouse's share must be determined on the assumption that either the indexing begins at the spouse's age 60 or at the member's age 60. Whichever approach was taken determines when indexing is to

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begin for the spouse's share).

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

*Bridging
benefits*

Commentary: yes. The *FRA* uses the same definition of “benefit” as in the *PBSA* (it means “a pension or any other benefit under a pension plan, and includes a return of contributions and any payment in a series of payments that constitutes a benefit”).

A limited member is entitled to a proportionate share of any benefit paid under the pension. [*FRA*, s. 72(2)(a), s. 74(a)]

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 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 make 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 receive an additional amount of his pension early on.

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

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

Where money is paid from the plan to the credit of a spouse, it is based on the commuted value calculation under the *PBSA*, which will determine the extent to which bridging benefits are taken into account. If the spouse waits until the member retires and takes a separate pension, it will be determined on exactly the same basis as the pension paid to the member (*i.e.*, the spouse will be entitled to a proportionate share of the bridging benefit).

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

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*limited
member*

Commentary: the limited member's share is treated the same way a member's pension would be handled if the member could not be located. The plan is required to hold the share, subject to the special escheat rules that apply to funds held in trust.

2.59 Does the *PBSA* requirement—that a member who is married must take pension entitlement in the form of a joint annuity—apply to a limited member who remarries?

*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 member has made voluntary contributions to the pension, 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 pensions 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, and does not expressly address how voluntary contributions are to be divided, the formula will apply to both the pension and the voluntary contributions equally. [See *Srivastava v. Srivastava*, (1997) 40 B.C.L.R. (3d) 358 (C.A.)]

If the member’s pension is in a defined contribution plan, and the member has not retired at the time of marriage breakdown, the pension is divided by transferring to the credit of the spouse a share of contributions plus investment returns accumulated during the marriage. [FRA, Reg. 9] The spouse would send to the plan the agreement or court order dividing the pension, attached to a Form 3. [FRA, Reg. 3(1)(c)] The plan would then request the spouse to select a prescribed investment vehicle to which the spouse’s share would be transferred. [FRA, Reg. 7]

3.1 Is the pension plan subject to the FRA?

*Subject
to the
FRA?*

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

3.2 Agreement or court order made before July 1, 1995

*Old orders &
agreements*

Commentary: [See para. 14.1]

3.3 Why is an immediate transfer of the spouse’s share of the pension the best method for dividing an unmatured pension in a defined contribution plan?

*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 marriage breaks down, and

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! because earnings are made by investing it. But similar earnings on the spouse's share can be realized if it is transferred to the credit of the spouse and re-invested.

An unmatured pension in a defined contribution plan is the easiest situation for pension division.

3.4 How do you determine the share of the spouse in a pension in a defined contribution plan?

*Spouse's
share
in a DCP*

Commentary: the spouse is entitled to half of contributions, plus net investment returns allocated to those contributions, made from the date of marriage to the spouse's "entitlement date." [See para. 2.22 and Reg. 1]

Basically, half of

(value when the relationship ends) - (value of contributions at marriage plus net investment returns on the marriage date contributions). [FRA, Reg. 9]

3.5 Does "net investment returns" include commission expenses?

*"Net investment
returns" and
commission
expenses*

Commentary: yes.

The definition of "net investment returns" provides that "related investment expenses normally charged to investment earnings" are deducted from proceeds realized from investing contributions. Commission expenses are normal investment expenses taken into account when calculating net return on an investment.

3.6 Are employer contributions that have not vested by the entitlement date divided between the spouses?

*Employer
contributions*

Commentary: no.

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Regulation 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 sizable, a spouse may seek to divide the pension by a compensation payment. [FRA, s. 66] Under Regulation 11(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 pension will vest, but adjusting it to take into account the contingency that the member may die or leave employment before vesting.” (Courts have also held that unvested entitlement may be taken into account by reapportioning entitlement under s. 65).

- 3.7 What does the plan do if it does not know the value of a money purchase plan at the date of the spouse and member’s marriage?

Record

Keeping:

*Pre-marriage
value*

Commentary: the plan must make sure it can value the pension as of past dates following July 1, 1995. It can use a *pro rata* approach to determining values for relevant dates before that time. [FRA, Reg. 9(2)]

- 3.8 Is a defined contribution plan now required to keep records that allow it to pin-point the value of any member’s pension on a daily basis to establish a marriage date value?

Daily

records?

Commentary: no.

Some defined contribution plans value pensions 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 pension. What it does is require plans to change how they keep historical records of those values.

Most plans do not keep historical records of the value of the pension. The Regulation requires plans now 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.

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- 3.9 How long must a plan retain records to determine the value of a member's plan at the date of marriage?

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.

- 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 a marriage date value?

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 marriage date value would have to be estimated on a pro-rata basis. [See para. 3.7]

- 3.11 When is the 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 a pension vests pension entitlement is "locked-in" (*i.e.*, must be used to produce life income at a later date: see para. 10.4). A pension vests after 2 years of service. [*PBSA*, s. 26(1)] 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 pension entitlement from locked-in to not locked-in.

Different locking-in rules apply depending on the source of the funds. 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 pension consists 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?

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*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]

3.13 Transfer options: Generally

*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.)]

If the member's pension is in a hybrid plan, and the member has not retired at the time of marriage breakdown, it is divided in two steps. [FRA, s. 75] The part based on defined contribution principles is divided using the methods that apply to defined contribution plans (see Chapter 3). The part determined by a defined benefit formula is divided by the methods that apply to defined benefit plans (see Chapter 2).

4.1 Is the plan subject to the FRA?

*Subject to
FRA?*

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

4.2 Agreement or court order made before July 1, 1995

*Old orders &
agreements*

Commentary: [See para. 14.1]

4.3 The member's pension is in a hybrid plan. The plan 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 as if it were a defined benefit plan. May the spouse accept that option?

*Alternatives
to hybrid
split*

Commentary: yes. This is expressly permitted under Part 6. [FRA, s. 75(2)]

4.4 Our plan is a defined benefit plan, but we allow members to purchase additional pension entitlement on defined contribution principles. Are we a "hybrid plan" and does that allow us to charge the higher administrative fee identified with "hybrid plans?"

*Charging the
admin. fee*

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Commentary: the reason that the legislation sets out a slightly higher administrative fee for hybrid plans is that the hybrid plan might have to divide the pension in a 2-step process (immediately transfer the spouse's portion that is based on defined contribution principles, but defer the division of the portion based on a benefit formula).

The legislation included rules for hybrid plans for the sake of completeness, but also acknowledges that these rules will often not be appropriate for the spouse, member or plan. *FRA*, s. 75.1 preserves the court's ability to direct an appropriate method of division of the pension that departs from the method set out in Part 6 for pensions in any kind of plan, including hybrid plans.

Some hybrid plans have already indicated that they are prepared to treat the hybrid plan as a defined benefit plan. [See para. 4.3] If the plan is being divided as a defined benefit plan, the administrative fee set out for defined benefit plans should apply. Basically, to charge the higher fee, a plan should not only technically meet the definition of "hybrid plan" but carry out the division under s. 75.

When a member retires and begins receiving monthly payments, the pension “matures.” A matured pension in a local plan—whether a defined benefit, defined contribution or hybrid plan—is divided by a plan-administered benefit split. [FRA, s. 76] The spouse would send to the plan the agreement or court order dividing the pension, attached to a Form 2, not a Form 5. (Form 5 is only used for an agreement or court order made before July 1, 1995.) [FRA, Reg. 3(1)(b) and (e). See para. 14.1]

Form 2 designates the spouse to be a limited member. The limited member is entitled to a proportionate share of each benefit paid out under the pension until the limited member dies, or until the pension terminates.

This method of pension division is completely different from the methods used for unmatured pensions in local plans. For unmatured pensions, the pension account is divided into two parts (although the division is deferred for a defined benefit plan). For matured pensions, the pension is left intact and the income stream is divided. (The federal PBSA, however, permits a plan to divide a matured pension into two single life pensions: s. 25(7)).

5.1 What is a matured pension?

What is a matured pension?

Commentary: a pension matures when the member retires and begins to receive the pension. [See para. 2.55]

5.2 Is the matured pension in a plan that is subject to the FRA?

Subject to FRA?

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

5.3 Agreement or court order made before July 1, 1995.

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*Old orders &
agreements*

Commentary: [See para. 14.1]

- 5.4 S. 76 says the spouse gets a share of a matured pension until the pension terminates or the spouse dies. When does a pension “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 pension does 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
the spouse
is the
joint
annuitant*

Commentary:

Eg.: 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 per cent 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. [FRA, s. 76(2)]

Why does the legislation adopt this policy? For these reasons:

! any other approach would require opening up the pension and setting

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aside elections already made. Some, but not all, plans would be capable of doing this. It would be difficult, e.g., 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 will have been paying maintenance, 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 fact of their marriage breakdown probably affects not at all the level of income needed by the survivor.
- ! the member "benefits" if the member survives the limited 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 remarried shortly before retiring. As the *PBSA* required, the member took the pension with a 60 per cent survivor option election. The spouse has now left the member. Can the member change the survivorship election?

Can the person named joint annuitant be changed?

Commentary: no, not without the consent of the limited member. *FRA*, s. 72(3) prevents re-election in the absence of the limited member's consent.

Nor is the survivor benefit a factor justifying reapportionment of the spouse's interest in the pension income stream during the parties' joint lives. [*Ree v. Ree*, [1999] B.C.J. No. 705 (S.C.)]

Some plan texts provide that the post-retirement survivor benefit is payable only to a "spouse," and a former spouse would no longer qualify as a spouse under the terms of the plan. These plans have not been amended to comply with relevant provincial (or federal) legislation.

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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.)]

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]

- 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:

E.g.: the member is married to spouse1 at the date of retirement and a joint and 60 per cent last survivor pension is elected. The member's pension pays \$1200 per month. The survivor benefit reduces the monthly payment to 60 per cent on the death of the member. The marriage fails and spouse1 becomes entitled to 1/4 of benefits paid under the pension. The member remarries. When the second marriage fails, spouse2 receives 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 accrued 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 *FRA*, s. 65, if that would be fair in the circumstances.

Before the failure of the member's second marriage, the divided pension would give the member \$900/mo. and spouse1 \$300/mo. When the second marriage 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 are \$750/mo. to the member and \$450/mo. to spouse2.

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 survivorship 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:

E.g.: member and spouse1 separate, but do not divide family assets. In the meantime, the member forms a common law relationship with spouse2. The member retires and takes a joint and 60 per cent 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. [*FRA*, s. 76(1)]

One option is for the plan to pay the spouse a portion of the pension during the member's life. On the member's death, the plan would commute the joint annuity in favour of spouse2 and transfer spouse1's proportionate share of the commuted value to a prescribed pension vehicle such as, e.g., an RRSP for spouse1, or provide spouse1 with a separate annuity.

Alternatively, the plan could immediately

! separate out spouse1's interest (as a proportionate share of the commuted value of the matured pension) and transfer it on a lump sum basis to, e.g., an RRSP in favour of the spouse (or provide spouse1 with a separate annuity), and

! adjust the member's pension accordingly. [See Chapter 8]

A problem like this is less likely to occur under Part 6. Spouse1 will immediately send the plan Form 1. Then, when the member makes elections on retirement, the plan must give spouse1 30 days notice before acting on them. That will give spouse1 time to protect personal interests.

- 5.9 The spouse 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 plan must pay each spouse their respective shares.

A limited member is entitled to a share of all benefits paid under the pension. [*FRA*, S. 76(1)] That would include a share of the survivor benefit payable to spouse2

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(except in the situation described in para. 5.8). Spouse2 would be a trustee for that share, [FRA, s. 83] but the plan is required to pay spouse 1's share directly to spouse1.

If the benefit to spouse2 is in the form of an annuity, then the benefit to spouse1 would also be in that form. [FRA, s. 78(1)]

- 5.10 If a matured pension is being divided by a benefit split and the limited member dies before the member, does the plan keep the portion previously paid to the limited member?

After the limited 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 life. Under the legislation, the amount formerly paid to the limited member will now be paid to the member. [FRA, s. 76(1)]

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.

(Note: the situation may be modified by the terms of the agreement or court order.)

- 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. [FRA, s. 76(1) and (2)]

These are the same principles that apply generally to dividing a postretirement survivor benefit [See paras. 5.7, 5.8 and 5.9] The definition of "postretirement survivor benefit" would include the guarantee period. "Postretirement survivor benefit" is

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defined to mean “a lump sum or periodic benefits paid by a plan to a beneficiary when a member dies after the pension matures.” [FRA, s. 70]

- 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 marriage ended two years later and spouse1 was designated a limited member of the plan.

The member changed the beneficiary 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,
- ! 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. Part 6, however, provides that a designation of a postretirement survivor benefit (which includes a guarantee period: see para. 5.11) in favour of a limited member may not be changed without either a court order or the limited member’s consent. [FRA, s. 72(3). See para. 5.6]

In the example, consequently, unless the limited member consented to the change of the beneficiary, or the court otherwise ordered, the limited member would be entitled to receive the whole of the benefits under the guarantee period. [FRA, s. 76(2)]

- 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 was married, and the spouse has now delivered to the plan a Form 2 and an order giving the spouse a share of the pension. What can the plan do in this situation?

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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 plan 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. 74.

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 are married. 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 is a plan-administered benefit split the best method for dividing a matured pension?

Plan-administered benefit split v. other pension division methods

Commentary: the legislation adopts the policy that once the member has retired, undoing the arrangements made when the member retired would prejudice the plan too much. *E.g.*, 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 Why is a plan-administered benefit split better than a *Rutherford* split?

Why not use a Rutherford split?

Chapter 5: Dividing a Matured Pension

Commentary: the legislation requires the plan to administer the benefit split. 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 old law, 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 plan for all entitlement to the pension.

- 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 1. What obligations does the plan have?

Form 1 and the plan's obligations

Commentary: the plan must send the member a Form 6 advising that the Form 1 has been received. The plan should advise the spouse that the pension has matured (i.e., is being paid). Until the plan receives a Form 2 with court order or agreement recognizing the spouse's share in the pension, the plan must continue to pay the member the entire pension.

When the plan receives the Form 2 and court order or agreement, it will be responsible for dividing the pension by a benefit split. [*FRA*, s. 76] 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 plan to undo the joint annuity election. [See para. 5.8]

- 6.1 Do the Part 6 rules regarding the division of benefits apply to unmatured locked-in RRSP funds?

*Unmatured
Locked-In
RRSP funds*

Commentary: no.

Although Part 6 doesn't apply to RRSP's, this presents no practical problem. The *Income Tax Act* already accommodates transfers from RRSP's and RRIF's on marriage breakdown. [See *ITA Form 2220(e)*, *ITA ss. 146(16)(b)* and *146.3(14)*] The B.C. legislation does not replace the current practice on this point.

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

- 6.2 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 assets under Part 5 of the *FRA*, but there is no reason to resort to Part 6 to divide them. The *Income Tax Act* allows a transfer from an RRSP or a RRIF to another RRSP or RRIF on marriage breakdown and the Canada Customs and Revenue Agency has indicated the RRIF rules also apply to LIFs. [See *ITA Form T2220(e)*]

If the member's pension is not in a local plan, it is subject to the rules that apply to "extraprovincial plans." [FRA, s. 77]

No form is 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 pension is divided in the same way as a matured pension (see Chapter 5) by a plan-administered benefit split. (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" 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 pension is in an extraprovincial plan just because it is registered outside of B.C. [See para. 1.12 and Chapter 1 generally]

7.2 How is a pension in an extraprovincial plan divided?

*Dividing
a pension
in an
extraprovincial
plan*

Commentary: s. 77(1) provides that a pension in an extraprovincial plan is divided by a plan-administered benefit split. There may be some difficulty enforcing such an arrangement against a plan located outside B.C. As a practical matter, a member-administered benefit split may be the only available method of dividing the pension. If problems in this respect arise, the spouse is protected by s. 77, which designates the member to be a trustee of the spouse's proportionate share (*i.e.*, if the plan pays any part of the spouse's share to the member, the member would be under an obligation to pay it to the spouse).

Chapter 7: Dividing a Pension in an Extraprovincial Plan

Part 6 sets out a default rule for dividing an extraprovincial plan. In many cases, another provincial statute, or a federal statute, will govern the plan and provide a method of pension division. If the plan is subject to legislation that sets out a method of pension division, the legislated method applies (although a B.C. court can order a plan-administered benefit split or a member-administered benefit split if the legislated method would produce an unfair result). [S. 77(4)]

Where a court's ability to make an order dividing property on marriage breakdown 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 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*

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

*Pension entitlement does not simply vanish when a member dies. Preretirement survivor benefits are usually payable when a member **dies before retiring**. 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 preretirement survivor benefit is 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. The value of the benefit may be significantly less than the value of the pension as of the date of the member's death. In some cases (such as where the plan is a non-contributory plan regulated under the federal PBSA) no preretirement survivor benefit may be payable at all.

Postretirement Survivor Benefits

Postretirement survivor benefits may also take the form of either a 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.

If 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, often in the form of a lump sum payment representing the commuted value of the unexpired guarantee period.

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 remarries, rights between the former spouse (spouse1) and the current spouse (spouse2) may come into conflict. The FRA 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. Problems that arise when the member dies after retirement are also addressed in Chapter 5.

Chapter 8: Survivor Benefits

The B.C. PBSA provides that all pension entitlement is subject to a court order or agreement settling property rights as well as to the provisions of Part 6 of the FRA. [PBSA, s. 64]

Consequently, if the plan is subject to the B.C. PBSA, an agreement or court order can give the former spouse priority to benefits payable on the member's death. [See, e.g., Low v. Edgar, (1990) 28 R.F.L. (3d) 318 (B.C.S.C.); M.(E.E.) v. M.(P.F.), (1993) 50 R.F.L. (3d) 281 (B.C.S.C.)]

If the agreement or court order does not expressly recognize spouse1's priority over spouse2, the FRA protects spouse1's interests by giving spouse1 priority to a proportionate share of any benefit paid under the pension, including payments made to spouse2. [FRA, ss. 72(2), 76(1), 78(1) and 83] The value of the benefit would be commuted, and spouse1's share would be satisfied by either (a) a transfer to a prescribed investment vehicle of a lump sum from the plan to the credit of spouse1, or (b) the plan providing spouse1 with a separate annuity. [See, e.g., Gregory v. Gregory, (1994) 92 B.C.L.R. (2d) 133 (S.C.); and Fraser v. Fraser, (1995) 16 R.F.L. (4th) 112 (B.C.S.C.)]

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

*Limited
member
dies before
the member*

Commentary: the limited member's share (based on the commuted value of the pension at the date of the limited member's death) is paid to the limited member's estate. [FRA, s. 78(3)]

- 8.2 If the member dies before retiring and someone other than the limited member is entitled to the preretirement survivor benefit, what rights does the limited member have?

*Dividing a
survivor
benefit:
limited member
v. beneficiary*

Commentary: the limited member is entitled to receive from the plan a proportionate

Chapter 8: Survivor Benefits

share of any benefit paid under the pension, including a preretirement survivor benefit payable to someone else. [FRA, s. 72(2)(a) and s. 78(1)] Any person who receives a share to which the limited member is entitled holds the share in trust for the limited member. [FRA, s. 83] A plan owes the limited member fiduciary responsibilities. A plan that has notice of the limited member's interest and pays someone else the share would be liable to the limited member.

[See Introduction to Chapter 8 and para. 2.9]

- 8.3 If spouse1 is beneficiary of the preretirement survivor benefit, and the member dies, does spouse1 get the whole of the benefit or just the proportionate share?

When the member dies

Commentary: if the spouse is the beneficiary of the preretirement survivor benefit, the spouse will receive the whole of the benefit. [FRA, s. 72(3)] In most cases, however, the fairest resolution will be for the court order or agreement to provide that the spouse receives a proportionate share of the preretirement survivor benefit (which is the default rule under s. 78). [See para. 2.5 and 11.3]

- 8.4 When a spouse is entitled to a proportionate share of a preretirement survivor benefit, who is entitled to the balance of it? Would the plan get it?

Beneficiary's interest in the survivor benefit

Commentary: the plan does not get the balance. If the spouse is not the beneficiary, it goes to the beneficiary (as determined under the PBSA, the terms of the plan, or by virtue of the member's designation) as follows:

- i. *if the preretirement survivor benefit is in the form of an annuity:* the plan will be required to commute the benefit and separate the shares of the spouse and the beneficiary. The spouse's share could be satisfied by providing the spouse with a separate pension. [FRA, s. 78(1)] The beneficiary retains the remainder of the survivor benefit.
- ii. *if the preretirement survivor benefit is in the form of a lump sum,* the plan will be required to pay a proportionate share of the lump sum to the credit of spouse1 and the balance to the beneficiary.

[See also the similar issue concerning matured pensions at para. 5.10]

Chapter 8: Survivor Benefits

- 8.5 If the spouse is designated beneficiary of the preretirement survivor benefit, but the preretirement survivor benefit is generous and exceeds the amount the spouse would receive based on a commuted value of the pension, why can't the member designate another beneficiary (such as spouse2) for the excess?

*Survivor benefit
exceeds the
spouse's
share of
the pension*

Commentary: this can be done, but only by the agreement of the member and spouse, or by order of the court. [FRA, s. 72(3). See also para. 2.5 and 8.3]

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

Interpleading

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. [Gregory v. Gregory, (1994) 92 B.C.L.R. (2d) 133 (S.C.); and Fraser v. Fraser, (1995) 16 R.F.L. (4th) 112 (B.C.S.C.)]

- 8.7 Under our plan, the value and kind of preretirement survivor benefit depends upon whether the beneficiary is a spouse. Suppose the member designates spouse1 to be the beneficiary. On divorce, spouse1 would no longer be considered a "spouse." If the member dies before retiring, or before the spouse receives a share of the pension, how do we determine spouse1's preretirement survivor benefit?

*Different
survivor benefit
for a
spouse*

Chapter 8: Survivor Benefits

Commentary: if at the member's death, no one qualifies as a "spouse," the preretirement survivor benefit would be the ordinary benefit. [As to the similar issue that arises with respect to a postretirement survivor benefit, see, however, *Low v. Edgar*, (1990) 28, R.F.L. (3d) 318 (B.C.S.C.); and *Munro v. Munro Estate*, (1995) 4 B.C.L.R. (3d) 250 (C.A.)] Note that federal and provincial legislation has expanded the definition of spouse to include unmarried partners (of the same or opposite sex: see para. 1.1).

Suppose, however, in the meantime the member forms a new spousal relationship and dies before retiring. The preretirement survivor benefit for your plan would then be based on the spousal benefit. And spouse 1 would be entitled to a share of that.

Part 6 is based on the idea that the former spouse is entitled to a share of whatever benefits are eventually paid out under the plan. [*FRA*, s. 72(2)(a)]

- 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 under *FRA*, s. 76. But the limited member no longer qualifies as a spouse. What should happen 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. 5.6]

If, however, the member retired 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.

- 8.9 If the member dies before retirement, how is the former spouse's proportionate share of the preretirement survivor benefit calculated?

*Proportionate
share of
the survivor
benefit*

Commentary: the proportionate share is determined by this formula: [*FRA*, Reg. 6(3)]

Proportionate Share = A/B

Chapter 8: Survivor Benefits

Where

A = the pensionable service accumulated by the member from the date of marriage to the entitlement date for the spouse, excluding any pensionable service for that period purchased by and credited to the member after that entitlement date, and

B = the total pensionable service accumulated by the member to the date of the member's death.

A different formula for determining the proportionate share is used to determine the spouse's share of other kinds of benefits paid under the plan. That formula is $(\frac{1}{2}) * (A/B)$. [See para. 2.17]

8.10 What is the proportionate share if the limited member predeceases the member?

*Proportionate share
if limited member
dies before
the member
retires*

Commentary: if the limited member dies before the member retires, a proportionate share of the commuted value of the pension is paid to the limited member's estate. [FRA, s. 78(3). See para. 8.1] In this case, the proportionate share is determined by the general formula, $(\frac{1}{2}) * (A/B)$. [FRA, Reg. 6(1) and (2). See also para. 2.17]

8.11 Why are different rules applied depending upon whether the member or the limited member dies first?

*Different
rules for
member and
limited
member*

Commentary: the fraction A/B is used to identify the part of the pension that accrues during the marriage. The general formula divides this part of the pension equally between spouse and member: each gets half. That is why the general formula is $(\frac{1}{2}) * (A/B)$.

The rule that applies when the member dies first is based on the fact that many plans calculate the preretirement survivor benefit as a reduced portion of the pension because it will be used to support only one person.

Where the preretirement survivor benefit is reduced by the plan because it is being paid to a survivor, it would result in the spouse receiving too small a share to further

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divide it. In a sense, the plan's approach has already resulted in dividing the pension. The proportionate share for the preretirement survivor benefit, consequently, gives all of the portion of the preretirement survivor benefit attributable to the marriage to the limited member.

In contrast, when the limited member dies first, there is no reduction in the overall value of the pension, so therefore the limited member's share is based on the whole of the value of the pension. The limited member's share is paid to the limited member's estate, and the member retains the rest of the pension. In this case, the pension is being divided between two people, so the general formula applies.

Some plans provide a very generous preretirement survivor benefit that may equal or exceed the share the spouse would have received had the member survived. If, under the terms of the plan, the death benefit is not reduced, then the agreement or court order should make a different division of the death benefit. Death benefits under a defined contribution plan, for example, may be based on total contributions made to the plan, in which case the death benefit may equal or almost equal the value of the retirement benefit. In these cases, the proportionate share under the legislation will give the spouse too great a share of the preretirement survivor benefit. It would make sense for member and spouse to agree that the portion in excess of the spouse's share is to go to a beneficiary designated by the member (such as spouse2). [See also para. 2.41, 2.5, 8.3 and 8.5]

- 8.12 The member died (before retiring). He and his spouse separated 20 years ago. There was no triggering event under the *FRA*. The member had a common law spouse at the date of his death. Who is entitled to the death benefit? Spouse1 has now filed a Form 1.

*Competition between
separated spouse
and common law
spouse*

Commentary: the plan must pay the death benefit to the common law spouse. Although the separated spouse may have rights in this situation, a court order must be obtained to advance them.

Because spouse1 has filed a Form 1, the plan must first give spouse1 30 days notice before paying out to the common law spouse. If in this time the spouse gets an injunction or issues a writ, consider interpleading. [See para. 8.6]

- 8.13 Our plan is governed by the federal *PBSA*. It is a non-contributory plan. Our plan text, in accordance with the federal *PBSA*, provides for a preretirement survivor benefit if the member dies before retiring and is survived by a spouse. Otherwise, the requirement is for a refund of contributions. Since we are a non-contributory

Chapter 8: Survivor Benefits

plan, if there is no spouse, no death benefit is payable. Does that mean the limited member's share of the pension disappears if the member dies before retiring (unless the limited member applies for the commuted value transfer before then)?

*Survivor benefits
under the
federal PBSA*

Commentary: no. The plan is required to pay the limited member an amount determined in accordance with B.C. legislation. In this case, that would mean determining the spouse's share by reference to the death benefit that would be required under the B.C. *PBSA* (by operation of s. 25 and s. 31 of the federal *PBSA*, which incorporate the provincial pension division rules by reference, and which provide that B.C. law is applicable if not inconsistent with the federal legislation).

B.C. pension division legislation is based on there being a minimum death benefit in the event the member dies before the former spouse receives the required share.

The definition of “matured pension” [FRA, s. 70(1)] specifically refers to disability pensions, but not other kinds of disability benefits:

“matured pension,” or “matured” with reference to a pension,...includes a payment of a disability pension when the member reaches a prescribed age;

The Pension Division Regulation provides that a disability pension is treated as a matured pension when the member reaches age 60. [FRA, Reg. 12]

“Disability pension” is also a defined term. It means “a benefit paid to a member under a plan as a consequence of a member’s disability.” [FRA, s. 70(1)]

The FRA incorporates the B.C. PBSA definition of “benefit” by reference. [FRA, s. 70(2)] The B.C. PBSA defines “benefit” as meaning “a pension or any other benefit under a pension plan, and includes a return of contributions and any payment in a series of payments that constitutes a benefit.” The FRA definition of “plan” [FRA, s. 70(1)] is restricted to plans that provide pensions.

The combined effect of these provisions is that if the pension plan provides a disability pension, the default rules under Part 6 apply to it when the member reaches age 60. Part 6 does not apply to disability benefits provided outside of pension plans.

Typically the way a disability pension operates is that it provides periodic payments to the member until the member is eligible to retire under the basic retirement pension. At that point, the disability pension ends, and the member begins receiving payments under the retirement pension. In many cases, pension entitlement continues to accrue in favour of the member while on the disability pension.

If

(a) the agreement or court order simply says that a pension (in a defined benefit plan or hybrid plan which is not matured) is divisible under Part 6 of the Family Relations Act,

(b) the spouse becomes a limited member of the plan, and

(c) the member subsequently becomes entitled to a disability pension, this is the result:

1. the limited member remains entitled to the basic rights available under Part 6 with respect to the retirement pension (i.e., the limited member may elect to take the share by a commuted value transfer of the retirement pension at any

Chapter 9: Disability Benefits

time after the member becomes eligible to retire, or wait until the member retires and take a separate pension). [FRA, s. 74] The fact that the member is receiving a disability pension does not restrict the operation of Part 6 with respect to the division of the retirement pension.

2. if the limited member elects to take the commuted value transfer, then that ends any further rights with respect to sharing in the member's pension. [FRA, s. 72(5)]

3. if the limited member elects to wait until the member retires and take a separate pension, then the limited member may also elect to receive payments under the disability pension, after the member reaches age 60. The plan would be required to divide the monthly payments made under the disability pension between the member and the spouse. [FRA, s. 76]

It should be noted that Part 6 sets out “default” rules. It is open to parties to agree on, or the court to order, a different result.

- 9.1 The definition of a “matured pension” says that a disability pension becomes a matured pension when a member reaches a prescribed age. What age?

*Dividing a
disability
pension:
as a
matured
pension*

Commentary: once a member reaches age 60 a disability pension is to be treated as a matured pension. [FRA, Reg. 12] That means that when a member reaches age 60, the disability pension can be divided by a benefit split administered by the plan under FRA, s. 76. [See Chapter 5]

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

*Disability
benefits:
divisible
family assets?*

Chapter 9: Disability Benefits

Commentary: no. The spouse's entitlement will be determined by the agreement or court order. If the arrangements do not give the spouse a share of the disability pension, it is irrelevant that the legislation treats it as a matured pension when the member reaches age 60. The spouse will not share in it.

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

*Disability
benefits
under CPP*

Commentary: no.

CPP disability benefits qualify as a pension within the meaning of Part 5 of the *FRA* and, as such, are family assets by definition. [*FRA*, s. 58(3)(d) and s. 70(1). *Webb v. Webb*, (1985) 49 R.F.L. (2d) 279 (B.C.S.C.); *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. Pension division of CPP is under the terms of the governing federal *Canada Pension Plan Act*, which provides for division of unadjusted pensionable earnings. A division of CPP will probably result in reducing the disability benefit, with no offsetting amount being payable to the member's spouse (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 per cent 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 a family asset (because it is a "pension" or because it is ordinarily used for a family purpose) is only the beginning of the analysis. Entitlement to family assets is subject to reapportionment under *FRA*, s. 65.

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 for finding that an equal division is unfair is the member's need for economic self-sufficiency. [See, e.g., *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.)]

9.4 Are disability benefits that do not qualify as "disability pensions" divisible between the parties when their relationship ends? If so, how are they divided?

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

Chapter 9: Disability Benefits

Commentary: as emphasized, the Part 6 rules apply to benefits that meet the definition of “disability pension” under Part 6. Not all disability benefits will meet that definition. [See the Introduction to this Chapter]

If the disability benefit does not qualify as a “pension” under *FRA*, Part 6, but is nevertheless a divisible family asset under *FRA*, Part 5, it would be divisible by the same kind of rules that apply to “extraprovincial plans:” the plan (or the member) could be required to divide each payment between the member and the spouse, and the division need not be postponed until the member reaches age 60. [See *Webb v. Webb*, (1985) 49 R.F.L. (2d) 279 (B.C.S.C.); and *Coulter v. Coulter*, (1998) 60 B.C.L.R. (3d) 6 (C.A.), where the spouse’s share took the form of support]

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

- (a) when the division is of an unmatured pension in a defined contribution plan [see Chapter 3],*
- (b) when the division is of an unmatured pension in a defined benefit plan, and the spouse elects to take a transfer at some time after the member becomes eligible to retire [see Chapter 2], and*
- (c) 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 (i.e., the funds will be paid into an RRSP or another plan or be used to purchase an annuity). [FRA, Reg. 7] 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 pension in a defined benefit plan. The pension plan 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 pension. The spouse is not obliged to accept the trade-off. Reg. 11 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 pension. 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 (this usually places a smaller value on the pension than is required under the Regulation). A person who has doubts must either retain an actuary to verify the calculation or consult a lawyer.

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

- 10.2 The member has not yet retired. The pension is in a defined benefit plan. Under Part 6, the spouse is entitled to have the plan transfer a share to a locked-in RRSP when the member becomes eligible to retire. [FRA, s. 74(a)] Can the spouse require a plan to make a transfer before the member becomes eligible to retire?

Chapter 10: Transfers

*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 pension to an account in the same plan. Can the spouse require a plan to do this?

*Transfer
to same
plan*

Commentary: no. [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. 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 (*i.e.*, they 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. 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]

- 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?

Chapter 10: Transfers

*Federal
locking-in rules*

Commentary: the *Pension Benefits Division Act Regulation* [PBDA, Reg 17(1)] provides that a transfer may be made to

(a) a federal Life Income Fund (under the federal *PBSA*, the transfer to the LIF may be made at any age), or

(b) a provincial LIF, which, in B.C., may be made when the age requirements set out in B.C. Reg. 455/99, para. 20 (amending the existing para. 30) are satisfied. Basically, in B.C. the transfer may be made when either the spouse or the member reaches an age at which payments under the pension may commence. [See para. 10.4]

The member and spouse can modify some aspects of pension division under Part 6 of the FRA by agreement. [FRA, s. 80] 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 pension. Can the member require the pension be divided under Part 6 instead?

*The spouse
wants a
compensation
payment.*

Commentary: yes.

Part 6 applies to the division of a pension except to the extent that the Part 6 rules are amended by agreement or court order. If the member will not agree to make a compensation payment, the spouse's only alternative is to seek a court order. [FRA, s. 71(1)]

Case law suggests that 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]

- 11.2 The member's pension is unmatured and it is in a defined benefit plan. The member refuses to agree that the spouse can accept a transfer of a share of the commuted value of the pension when the member reaches a retirement age. What recourse does the spouse have?

*The member
won't agree
to an early
retirement
transfer*

Commentary: if the pension is to be divided under Part 6, there is no need to obtain the member's agreement for the option to be available. Part 6 provides that a spouse has that option. If the pension is to be divided, Part 6 applies unless the spouse and member otherwise agree, or a court otherwise orders. [FRA, s. 71(1)] The member may

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not realize that the rules for adjusting the pension after a division mean that the member receives the same pension entitlement whether the spouse elects to take an early retirement transfer or wait until the member retires and receive a separate pension. [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 *FRA*?

*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 provide that the pension will be divided in accordance with Part 6 of the *FRA* and set out the spouse's entitlement date. [See para. 1.3. For the meaning of "entitlement date" see para. 2.22] A simple letter agreement between member and spouse, signed by both of them, should be satisfactory.

(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. This is particularly true, e.g., when determining when a maintenance obligation should end.)

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

If the agreement was made after July 1, 1995 (the date Part 6 of the *Family Relations Act* came into force) it is not even necessary for the agreement (or order) to refer to the Part 6 rules. Simply providing that the pension is to be divided is sufficient to trigger the operation of Part 6 and the *Pension Division Regulation*. Part 6 applies unless (a) the parties waive its application, or (b) the agreement or order is silent about pension division. [*FRA*, s. 71(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 pension so that the spouse would get whatever benefits were available under it on the member's death. This arrangement was never written down, but the member kept his word and, when the member died (before retiring) the spouse was still the beneficiary. However, the member had formed a relationship in the meantime, with a person who is claiming the benefit as the member's common law spouse ("spouse2"). What rights does spouse1 have in this case?

Oral agreement

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Commentary: the *PBSA* gives priority in this case to spouse2. [*PBSA*, s. 34(1); *PBSA*, s. 1 definition of “spouse;” *Re Hodgens Estate*, (1996) 11 C.C.P.B. 109 (B.C.S.C.)] Had the agreement to maintain the spouse as a beneficiary been in writing and qualified as a “separation agreement,” spouse1 would have had priority by operation of s. 64 of the *PBSA*. [See also para. 13.15]

The plan can only deal with the person who qualifies as a spouse under the *PBSA* (who in this case is spouse2) unless the former spouse can establish entitlement under an agreement or court order. In this case, after the death of the member, if spouse1 has a claim, spouse1 must first convince a court.

If the agreement cannot be proved, and there is no other agreement (or court order) finalizing the disposition of property, presumably spouse1 is still entitled to a half interest in family assets as a tenant in common, under s. 56(1) of the *FRA*. If so, spouse1 can still bring a court proceeding to assert rights to the assets, subject to the expiration of the relevant limitation period under the *FRA* or the *Limitation Act*.

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

- 11.5 If the spouse and member make an agreement under s. 80, can they require the plan administrator to pay the amount they agree upon?

*Departures from
Part 6:
Effect on
plan’s
responsibilities*

Commentary: yes, provided the agreement is within the 50 per cent ceiling. [*FRA*, s. 80(1)]

[See para. 11.10]

- 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 *FRA* without modification, the Regulation defines the “proportionate share.” [*FRA*, Reg. 6] 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 a formula, that would be the “proportionate share.” [*FRA*, s. 80(1)(a); and s. 70(1), definition of “proportionate share”]

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- 11.7 The plan has received the appropriate forms, and an agreement which gives the spouse a larger proportionate share of the pension than set out in Regulation 6. Does the plan 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 plan must use the agreed-upon proportionate share (provided it satisfies the 50 per cent ceiling). [See para. 11.10]

- 11.8 Can the pension be divided partly by making a compensation payment and partly by requiring the plan to administer the division?

*Compensation
payment*

Commentary: yes.

- 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. Part 6 allows the limited member to enforce all of these rights directly against the plan. It also provides that a person that receives a spouse's share of preretirement or postretirement survivor benefits holds them in trust for the spouse. [FRA, s. 83]

Nevertheless, as a matter of drafting, including a clause like this would help in those cases where the plan, 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, e.g., in *Munro v. Munro Estate*, (1995) 4 B.C.L.R. (3d) 250 (C.A.).

- 11.10 The legislation says the member must keep half the pension. Is that half of the pension accrued during marriage? or half of the entire pension?

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*50 %
ceiling*

Commentary: half of the entire pension (up to the date the spouse receives the share).

The portion the member keeps cannot be less than half of the undivided value of the pension or represent less than half of the benefits that would have been paid out under an undivided pension. It would be possible, consequently, for an agreement to give a spouse more than half of the pension that accrued during the marriage and still remain within the 50 per cent ceiling. [*FRA*, s. 80(1)]

11.11 Why does the legislation impose a 50 per cent ceiling?

*Reason
for a
50 % ceiling*

Commentary: the rule attempts to preserve the pension's function, even after it is divided, of providing retirement income for both the member and the spouse.

11.12 Does the 50 per cent ceiling apply to court orders?

*The 50 %
ceiling and
court orders*

Commentary: no. This restriction does not apply to court orders (*FRA*, s. 75.1(1)). A court could reapportion entitlement to a pension under s. 65 of the *FRA* by allocating 100 percent of it to the spouse. Courts should be reluctant to make such an order, even if it seems to be expedient in the circumstances. Pension division legislation is based on the policy of preserving the essential function of a pension: to provide retirement income. A court order should protect both member and spouse by ensuring that each has retirement income. [See para. 12.3]

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

*Beneficiary
designation*

Commentary: it should.

If the agreement is silent on this issue, then the default rules apply. They provide that the limited member is entitled to a proportionate share of any benefit (including a

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preretirement or postretirement survivor benefit) paid under the pension (until the time the spouse receives a separate share of the pension). [FRA, ss. 72(1), 76(1) and 77(1)] In some cases, this share of the benefit will not be adequate.

Where the pension is not matured, the best protection for the spouse is a requirement that the member designate the spouse beneficiary of any preretirement survivor benefit paid under the pension until the time the spouse receives a separate share of the pension. Whether the designation should be for the entire benefit, subject to a maximum amount, or in accordance with the spouse's proportionate share will depend upon the adequacy of the benefit. If survivor benefits are not adequate, steps should be taken to protect the spouse's retirement income by some other means (such as life insurance, or a claim against the deceased's estate).

The *PBSA* confers rights on the member's current spouse, which may come into conflict with those of spouse1. But an agreement or court order requiring the member to designate spouse1 protects spouse1. [See Chapter 8]

- 11.14 Both spouse and member have pensions. Neither has retired. The member's pension is worth more. Do both pensions have to be divided? What options are available to them?

*Both spouse
and member
have pensions
and neither
has retired*

Commentary: rather than divide both pensions, it would make sense to take both interests into account, but divide only one pension. This is one way of doing it (remember that in the example member1's pension is more valuable than member2's)

- ! member1 and member2 agree to place a value on each party's entitlement, and arrive at a net amount by deducting member1's share of member2's pension from member2's share of member1's pension.
- ! member1 waives any entitlement to a share in member2's pension.
- ! member2's claim to member1's pension is determined by the amount calculated in the first step. The agreement/court order can either (a) express member2's share as that amount, or (b) express member2's share as a revised proportionate share.

- 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?

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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.

This is confirmed by s. 76(2) of the *Family Relations Act*, which provides that a spouse who is designated the beneficiary of the postretirement survivor benefit is entitled to the whole of the postretirement survivor benefit.

Even if the agreement specified that the survivor benefits were waived, it would be ineffective. B.C. legislation requires a waiver of a postretirement survivor benefit to be made in the 90 days before the member retires. [*PBSA*, s. 35(5). See para. 11.17]

- 11.16 Both parties have pensions. Under the terms of the agreement, each pension is to be divided in accordance with Part 6 of the *FRA*. But neither pension is to be divided until both parties have retired. The member of our plan has just retired. What happens to the spouse's share until the spouse retires?

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 (i.e., 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 former spouse retires. Under the terms of their agreement, the former spouse has no interest in the pension until she retires.

When the former spouse retires, the share becomes payable. At that time the former spouse will be entitled to a share of each monthly payment made after the date of the former spouse's retirement.

This is not that uncommon an arrangement. Where both parties have pensions, this arrangement protects the retirement income of the party who first retires (the only other way to do this would be by requiring the former spouse who keeps working to pay support until retirement).

- 11.17 Can a spouse waive rights to pension entitlement in a pre-marital agreement?

Waiver: Pre-marriage agreement

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Commentary: the question of waiver arises in two cases:

- (a) entitlement to a preretirement or postretirement survivor benefit, and
- (b) division of the pension on marriage breakdown.

(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 after living separate and apart for more than 2 years, a spouse is no longer considered to be a “spouse” 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 a pre-marital agreement, provided the prescribed form is used, but it would be of no use unless the member retires 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 pre-marital agreement, provided the prescribed form is used.

(b) division of the pension on marriage breakdown: Part 6 of the *FRA* governs pension division on marriage breakdown. A spouse can waive any right to or interest in a member’s pension or any benefit under it [*FRA*, s. 80(1)(b)], subject to the B.C. *PBSA* restrictions on waiving survivor benefits. A spouse can waive entitlement to have the pension divided on marriage breakdown in a pre-marital agreement, but the agreement would be subject to the principles set out by the B.C. Court of Appeal in *Gold v. Gold*, (1993) 49 R.F.L. (3d) 41: even if the agreement was validly made and fair at the time it was made, it can be set aside or varied if its terms operate unfairly when it comes into operation.

Part 6 stipulates that if a form of waiver is prescribed, it must be used, but currently no form of waiver is prescribed. [*FRA*, s. 80(5)]

A separation agreement that is silent about pension entitlement functions as a waiver since it is deemed to allocate all of the pension to the member. [*FRA*, s. 71(3)] However, this is subject to the court’s jurisdiction to review agreements (under Part 5). If an agreement is unfair because it did not divide the pension appropriately—whether there is an express waiver or the agreement is silent—a court may reapportion entitlement to the pension [*Walker v. Walker*, (1996) 31 R.F.L. (4th) 63 (B.C.S.C.); *Lawrence v. Lawrence*, [1998] B.C.J. No. 1907 (B.C.S.C.)] although a failure to divide the pension is not, in itself, necessarily considered to be unfair. [*Gariepyv. Gariepy*, [1996] B.C.J. No. 1544 (B.C.C.A.)]

Special rules apply to CPP entitlement. [See para. 11.18]

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11.18 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*

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 or 55.1" 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* has been amended to allow a spouse to waive CPP entitlement. [FRA, s. 62 and s. 80(1)(c)] This legislation applies retrospectively.

11.19 The agreement dividing the spouse's 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 a share?

*No CPP
waiver*

Commentary: yes. Division of unadjusted pensionable earnings under the *Canada Pension Plan* is automatic. The division 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. [Verbeek v. Craig, (1998) 37 R.F.L. (4th) 143 (B.C.S.C.)]

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: in some cases, unadjusted pensionable earnings can be divided without any loss, or any appreciable loss to the member. That is because benefits payable under CPP are subject to a maximum based on contributions to the plan, so that the member often has time to earn back the portion transferred to the spouse.

For information about whether in the specific case it is beneficial to split CPP credits, contact the Income Security Program branch of Human Resources Development Canada. [1 (800) 277-9914]

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In some cases, equalizing CPP will reduce the member's entitlement without benefiting the 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 simply removes the benefit of the drop-out.

Example 2: CPP provides for a drop-out of a percentage of the lowest earning years. If these drop-out periods correspond with the marriage 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 per cent to the member, and protected the spouse by awarding support.

- 11.21 Regulation 11(1) refers to (a) a "compensation payment" and (b) an "amount to be transferred under an agreement between a spouse and a plan." What is the difference between them?

*Compensation
payment*

Commentary: the Regulation sets out some rules and assumptions for valuing pensions for different purposes and in different situations. Regulation 11(1) is referring to (a) compensation payments made by a member to a spouse under s. 66 of the *FRA*, and (b) a transfer of an amount from a plan to a spouse under s. 80(4) of the *FRA*.

- 11.22 Regulation 11 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*

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Commentary: the formula is an adequate direction to an actuary to calculate the present value taking into account future contingencies. The actuary will not, e.g., 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.

- 11.23 Regulation 11 doesn't refer to the impact of tax on valuing a pension. Shouldn't tax consequences be taken into account when determining the present value of the future pension benefits?

Tax

Commentary: yes. Regulation 11 doesn't provide a restrictive list of assumptions to take into account when determining the present 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 Regulation was promulgated.

Other aspects of the calculation should be carried out in accordance with accepted actuarial principles. Refer to standards published by the Canadian Institute of Actuaries.

The impact of tax, for example, should be taken into account even though not listed in Regulation 11. [*Park v. Park*, (2000) 73 B.C.L.R. (3d) 153 (C.A.)]

- 11.24 We have received a Form 2 and an agreement dividing an unmatured pension. 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? 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 an unmatured pension in a defined benefit plan provides for a deferred division of the pension. It is open to the spouse to subsequently waive an interest in the pension and there is no restriction on when the waiver may be made. [*FRA*, s. 80(1)(b)]

The plan is protected in any event by the obligation to send a Form 6 notice to the member if the limited member elects to take a transfer of the commuted value of the pension some time after the member becomes eligible to retire.

- 11.25 The agreement dividing the pension sets out the interests of the spouse and member
-

Chapter 11: Agreements

based on the assumption that the member will pay tax on the whole amount. But the legislation requires the plan to make separate withholdings from the member and the spouse, which leads to a different result. What should the plan do?

*Agreement
divides
pension
on a
net basis*

Commentary: [See para. 12.1]

A court order can vary some aspects of pension division. A court can, for example,

(a) vary the share of the pension the spouse receives under s. 65(3) of the FRA, or

(b) vary the portion of the pension that is attributable to the marriage by revising the proportionate share formula.

A court is also empowered to modify aspects of pension division under Part 6 of the FRA where the default rules would produce an inappropriate result. [FRA, s. 75.1] 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 and plan. Departures from the statutory division methods may well prejudice one of these parties. Note, however, that 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. S. 75.1 was designed to ensure that the court retained a jurisdiction to deal with unexpected provisions in pension plans.

E.g., a court could order that more than 50 per cent of the member's pension be transferred to the credit of the spouse, but in most cases this would defeat the policy of the legislation to protect retirement income for both spouse and member.

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 came into force, courts refused to make orders binding on plans. Plans were regarded as innocent third parties. 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 should consider giving the plan notice of the application, although this is not strictly necessary under either federal or provincial legislation. [FRA, s. 75.1; Lang v. Lang, (1993) 13 O.R. (3d) 534 (Ont. Gen. Div.)]

- 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 to make separate withholdings from 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 *FRA*. 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 *CCRA*'s policy on this issue was settled. It is clear now, however, that under the *ITA* each of the parties is responsible for taxes payable on their respective shares. Part 6 requires separate withholdings. [*FRA*, s. 76(3)]

The plan should

- ! explain the problem to the member and spouse,
- ! 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, but it does not refer to Part 6 of the *FRA*. Is the order binding on the plan anyway?

*Court order
doesn't say
Part 6
applies*

Commentary: yes. Part 6 of the *FRA* applies in any case in which the spouse is entitled under Part 5 of the *FRA* to a share of a pension (unless the parties expressly agree, or the court expressly orders, that Part 6 does not apply). [*FRA*, s. 71] Provided the agreement or court order indicates that the pension is to be divided, there is no need for an express reference to Part 6 for the agreement or order to be binding on the plan (although it is obviously better practice if it does). [See paras. 1.5, 1.7 and 11.3]

Chapter 12: Court Orders

12.3 We have received a court order that gives the spouse 100 per cent of the member's pension. Is that a valid order under the legislation?

*Court order
gives all
to spouse*

Commentary: yes.

Member and spouse are limited in what they can agree to by the 50 per cent ceiling. [See para. 11.10-11.12] A court, on the other hand, can reapportion entitlement to give the spouse any portion of the pension up to all of it, under s. 65 of the FRA.

As a matter of policy, a court should be reluctant to make such an order. It is important to protect the nature of the pension, 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 spouse might be a very sensible way of apportioning entitlement in such a case. [See also para. 11.12]

12.4 When should a court order the division of pre-marriage pension accruals?

*Pre-marriage
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 pension is to be divided under Part 6, says 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 this pension division.

*Insufficient
information to
divide*

Commentary: send the spouse and member a notice under FRA Regulation 3(3) explaining that the materials filed do not provide enough information to divide the pension. Explain the problem. The notice must be sent within 30 days of receiving the Form 2. [See para. 12.6 on revising the obligations under a court order]

Chapter 12: Court Orders

- 12.6 The plan sent the member and spouse a notice under Regulation 3(3) explaining that the materials filed do not provide enough information to divide the pension. The spouse and member are in agreement about how the order should be revised. Do they have to apply for a new order before we can act on their agreement?

*Insufficient
information to
divide*

Commentary: no. You 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 would require in this case would be written instructions signed by both the spouse and member. It might be easiest for the plan to set out the new instructions and request the spouse and member to sign a copy and return it.

- 12.7 We are a defined benefit plan. We have received a Form 2 and a court order providing for an immediate transfer of the spouse's share from the plan, but the member is not yet eligible to retire (and this option is not available under Part 6 until the member becomes eligible to retire). 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 a pension in a defined benefit plan is not available until after the member becomes eligible to retire. [FRA, s. 74] Technically, a court can make an order departing from the Part 6 rules, but the jurisdiction 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 Ch12, Intro.] Consequently, you should advise the parties that the order does not comply with the Act.

- 12.8 The member has retired 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's obligation to assist in dividing the pension arises when it receives from the parties either (a) a written agreement dividing the pension, or (b) an entered court order. The Reasons for Judgment are not the same thing as an entered order.

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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 be entered in the registry. Only then is it binding on third parties, such as the plan.

Until the parties provide you with the entered order, the former spouse must look to the member for the spouse's share of the pension.

However, since you now have notice of the spouse's interest, it would be prudent to deduct the spouse's share from the payments to the member and retain them in an interest bearing account pending receipt of an entered order.

Once the entered order is delivered to the plan (with Form 2 and the administrative fee, if required), payments (including accrued arrears) can be made directly to the spouse.

Part 6 of the FRA requires forms (set out in the Regulation) to be used for dividing pensions. [See Appendix B for the forms]

Form 1, “Claim of a Spouse to Interest in Member’s Pension” notifies the plan that the spouse has an interest in the member’s pension. Once the plan receives the notice, the plan is under an obligation (a) to provide the spouse with information about the pension, and (b) to give the spouse advance notice before it acts on a direction received from the member in connection with the pension.

Form 2, “Request for Designation as Limited Member of Pension Plan” is used after the spouse’s interest in the pension has been recognized by agreement or court order. The Form directs the plan to register the spouse as a limited member. It is used if (a) the pension is matured, or (b) if the pension is in a defined benefit plan (or hybrid plan) and is unmatured. [See Chapter 2]

Form 3, “Request for Transfer from Unmatured Defined Contribution Plan” is used if the member has not yet retired and the pension is in a defined contribution plan. After the spouse’s interest in the pension has been recognized by an agreement or court order, the form is used to direct the plan to transfer the spouse’s share to another pension vehicle, such as an RRSP. [See Chapter 3]

Form 4, “Request by Limited Member for Transfer or Pension” is used for an unmatured pension in a defined benefit plan. After the spouse is registered as a limited member, this form is used to select the method of division for the pension (either an early retirement transfer, or a separate pension payable when the member retires).

Form 5, “Request in Relation to a Matured Pension Divided under an Agreement or Court Order made Before July 1, 1995,” allows a spouse, who is entitled to an interest in the pension under an agreement or order made before Part 6 came into force, to direct the plan to administer a benefit split of the pension once the member retires.

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. [FRA, Reg. 3(3)] If the Form is incomplete, the administrator should promptly so inform the party that submitted it.

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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 phone first). [FRA, Reg. 4] 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 needless proceedings to be brought.

13.2 What should the plan do if the Form isn't valid? *E.g.*, 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?

! 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. [FRA, Reg. 3(3)] In most cases, the problem can probably be rectified by a quick telephone call. But, if not rectified, the legislation clearly requires a notice to be sent in the time required. The Regulations do not set out a form of notice. Plans will find it convenient to develop a standard form for this purpose.

13.3 What is the plan's position if it acts on an invalid notice?

*Acting
on an
invalid
Form*

Commentary: the FRA protects an administrator from liability if the administrator acts in good faith on a notice, order or agreement. [FRA, s. 85] No plan or administrator who acts in good faith on a notice, order or agreement is liable.

13.4 Can a court award costs against a plan that forces a spouse to get an order?

*Court
costs*

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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 pension 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 Why do the Forms ask for the date of separation?

*Relevance
of the
date of
separation*

Commentary: pension division is available only after marriage breakdown. Requiring information about the date of separation reassures the plan that there has been a marriage breakdown. The date of separation, however, is not used as a reference point for determining pension entitlement unless the spouses have agreed, or the court has ordered, that the entitlement date be determined by the date of separation (very rare in B.C.).

- 13.7 When a plan gets a Form, does the Form have immediate legal effect? Regulation 3(3) says a plan must notify 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, e.g., the pension has matured and is being paid, the limited member is entitled to a share of the payment made in that month (if made after the Form is received), not the next month. The 30 day period is a limitation period. If the plan 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 of the Form.

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- 13.8 Form 1 says the spouse is claiming an interest based on *FRA* s. 56. Does that mean there must be a triggering event under the *FRA* (a separation agreement, a s. 57 declaration, or an order of divorce or nullity) before Form 1 can be submitted?

*Triggering
event not
required*

Commentary: no. S. 82 of the *FRA* provides that a limited member, “or a spouse claiming an interest in a pension who has delivered to the plan a notice in the prescribed form” is entitled to information as well as advance notice of future steps taken with respect to the pension.

Nothing in the legislation restricts who is “a spouse claiming an interest.”

By using the Form 1, the spouse is stating that the spouse is in the process of claiming an interest under the pension in accordance with the *FRA* and that there has been, or will eventually be, a triggering event.

- 13.9 Can the Forms be placed in a computer?

Computers

Commentary: yes, so long as any deviation from the Forms set out in the Regulation is not calculated to deceive. [*Interpretation Act*, s. 28(1)]

- 13.10 If the spouses agree not to divide the pension, should they send a copy of the agreement (or court order) to the plan?

*Agreement
not to
divide*

Commentary: if a Form 1 has been filed, then to remove it a letter should be sent to the plan by the person who filed it, and it would be useful if relevant portions of the agreement or court order are attached.

- 13.11 Legislation doesn't require the agreement or order to be attached to the Forms. Why do the Forms make that requirement?

*Attaching the
agreement
or order to
the Forms*

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Commentary: the *PBSA* provides that a person claiming to be entitled to receive a benefit under a pension plan has the onus of proving to the satisfaction of the administrator that the claimant is entitled to the benefit. [*PBSA*, s. 65] A necessary part of establishing entitlement when a pension is divided is to produce the agreement or court order. If the agreement is not attached to the Form, a prudent administrator should request something in writing, signed by both spouse and member, setting out their arrangement for dividing the pension. [See also para. 1.5]

- 13.12 What constitutes a separation agreement? Is it enough for the parties to draw up and sign their own agreement, or does it need to be certified or notarized?

*Separation
agreements*

Commentary: the *FRA* does not set out the requirements that must be met for an agreement to qualify as a separation agreement. It is an issue that has been considered, but not yet finally resolved, in case law under the *FRA*.

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 pension. There is certainly no need for the agreement to be certified or notarized. [See para. 1.3]

- 13.13 My spouse has entitlement to pensions in two different plans. Are there special rules for dividing pensions in this case?

*Entitlement
to pensions
in two
different
plans*

Commentary: each pension must be treated separately. Each plan must receive separate Forms.

- 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. The approach adopted for determining a spouse's share of pension entitlement means that entitlement is not going to change depending upon when the plan receives the appropriate Form. Problems will arise if the Form is delivered after something has happened (the member has died, the limited member has died, the member has reached

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a retirement date, the member has retired). A spouse may find that payments due the spouse have been made to the member or another.

The spouse will have a claim against the recipient of the payments and, perhaps, against the lawyer who might have been negligent in not delivering the notices, but not against the plan. The plan's obligations arise when it receives the correct Forms (although a plan that receives notice of an order or agreement without the correct Forms will sometimes be placed in a difficult position). [See para. 13.15]

- 13.15 The member and the spouse agreed, orally, that spouse1 would be beneficiary of the pension. But the member died before changing the designation. When the member died, the member had a common law relationship with spouse2.

*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, will have to obtain a court order to do so. [See para. 11.4]

If there is an order or agreement dividing the pension, this should be served on the plan promptly. In the absence of a restraining order, a Form 1, or service of the order or agreement made before the member's death, the plan 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 a plan do if it receives an order dividing the pension that was made before Part 6 of the *FRA* came into force (*i.e.*, before July 1, 1995)?

*Orders made
before
July 1, 1995*

Commentary: [See para. 14.1]

- 13.17 We have received a Form 1 from someone purporting to be the spouse of the member. Is there anything we can (or should) do to double-check whether this person is in fact the spouse?

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*Verifying
identity*

Commentary: in most cases, you are protected by the requirement to give notice in Form 6 to the member. If the member has any concerns, the member should contact you.

However, s. 65 of the PBSA authorizes the plan to request any person claiming a benefit under a pension to produce evidence to establish the claim. The practice adopted by some plans is to request a certified copy of the marriage certificate from the spouse who sends in a Form 1, to ensure that the spouse has status to make a claim.

- 13.18 The marriage of the member and spouse ended 5 years ago. The spouse obtained a court order for a share of the pension, but never served it on the plan. The member retired 2 years ago and 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. It is open to the plan at its election, however, to commute spouse1's interest to establish separate pension entitlement now, or when the member dies. [See para. 5.8]

- 13.19 The spouse requested a Form 1, 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's obligations? Are we required to alert the spouse?

*Form 1
requested but
not filed*

Commentary: no. The plan 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 FRA changes that, but only once you have the Form 1.

- 13.20 The employee quit and directed that pension entitlement be transferred from the plan. The spouse has now filed a Form 1. Are we under an obligation to tell what was transferred and to where?

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*What information
must be disclosed*

Commentary: no. The obligation on the plan is only to provide information to value the pension. [Reg. 14. See para. 15.20]

- 13.21 The spouse has an order dividing the pension that was made in 1992. The spouse has now sent in a Form 1 and requested information about the pension. Are we obligated to provide that information?

*Form 1 and old
orders and
agreements*

Commentary: yes. A spouse claiming an interest in a pension is entitled to this information after sending in a Form 1. [FRA, s. 82] In this case, the spouse is claiming an interest. It is irrelevant that the interest arises under an order made before Part 6 came into force.

- 13.22 We have received a Form 1 from the member's common law spouse together with a request for information. Can we provide it?

*Common law
spouse
requests info*

Commentary: not if the claim is under the B.C. FRA. In the absence of legislation, the plan owes a fiduciary obligation to the member not to disclose information without the member's consent. Part 6 of the FRA requires a plan to disclose prescribed information upon receiving a Form 1 from a "spouse." However, a common law spouse does not qualify as a "spouse" under Part 6. Consequently, you cannot provide information about the pension without the member's consent, unless the parties have made an agreement under FRA, s. 120.1. [See para. 1.1]

Unmarried parties would have greater rights to information under the federal Pension Benefits Division Act. [See para. 1.1]

- 13.23 We have a file where the spouse sent in a Form 2 with a Divorce Order attached to it, but nothing that deals with the pension.

On another file, the former spouse of a member has claimed an interest in the member's pension and sent in a Form 2. Their marriage ended years ago, and the agreement dividing their property did not mention the pension.

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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 pension. An agreement or court order that is silent on that point is deemed to allocate the entire pension to the member. [FRA, s. 71(3). See paras. 1.5, 11.15 and 14.14]

[For the rules that apply to CPP, see para. 11.18-20]

- 13.24 The member and spouse's marriage ended last year, and they entered into a separation agreement dividing the unmatured pension in a defined benefit plan. The spouse died before the forms to make the spouse a limited member were filed with the plan. 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 pension 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 under the pension before the plan 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. 15.6 and 15.12]

The British Columbia legislation does not apply automatically to agreements and orders dividing pensions that were made before Part 6 came into force July 1, 1995.

However, if the order or agreement provides for a division of the pension by the member, after retirement, paying a share of each monthly pension cheque to the former spouse (sometimes called in B.C. a “benefit split” of a Rutherford Order) the former spouse can require the plan to administer the benefit split by delivering a Form 5. [See Appendix B]

The parties can also agree to have Part 6 apply to the order or agreement (if the pension has not yet matured). [FRA, s. 80(2)] In some situations, the parties are deemed to have agreed (as explained more fully in this Chapter). [FRA, s. 80(2.2)]

- 14.1 The former spouse has a court order dividing the pension by a benefit split. The order was made before July 1, 1995. Does the former spouse have rights under the legislation?

*Pre-July
1995 order or
agreement:
opting in*

Commentary: the legislation allows opting in for pension division agreements and orders made before July 1, 1995.

After the member retires

After the member retires, the spouse can require the plan to administer the benefit split. [FRA, s. 76(4)] The spouse would file Form 5. 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 legislation came into force.

Form 5 can be filed at any time. It is not necessary to wait until the member retires. If Form 5 is filed before the member retires, the Plan would register the spouse as a limited member of the plan, entitled to information and a division of the pension by a plan-administered benefit split under FRA, s. 76. In this case, the limited member is not entitled to the pension division options available under FRA, s. 74.

Before the member retires

Before the member retires, the spouse and member can agree to opt into Part 6. [FRA, s. 80(2)] They will do this by filing the appropriate form (a Form 2 for a defined benefit

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plan or a Form 3 for a defined contribution plan) and related material. The plan will also want a letter signed by the spouse and member that says they agree to opt in under *FRA*, s. 80(2) (unless *FRA*, s. 80(2.2) applies).

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. [*FRA*, s. 72(3) and (4)]

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. [*FRA*, s. 80(2.1)]

Deemed to opt-in

Part 6 also provides that if the original order or agreement contains a term that places an obligation on the member to sever the spouse's share from the member's pension (a very common term), that term is conclusively deemed to be an agreement to opt into Part 6 of the *FRA*. [*FRA*, s. 80(2.2)] The member's agreement to have Part 6 apply to an order or agreement made before July 1, 1995, consequently, is not necessary if the agreement places an obligation on the member to sever the spouse's share of the pension 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 pension being divided is in a defined contribution plan and a *Rutherford* formula has been used. [See para. 14.2]

The spouse's share is determined by the formula set out in the agreement or court order. In some situations, however, the formula is only intended to apply when the member retires, and is not applicable to division at an earlier date. In these cases, the plan should simply advise that it requires the joint direction of the member and spouse (or a court order) concerning the proportionate share.

- 14.2 We are a defined contribution ("money purchase") plan. The parties have an agreement made before July 1, 1995 dividing the pension. It requires the member to sever the spouse's share when that becomes possible, so the parties are deemed to opt in under s. 80 (2.2). The agreement, however, says that the pension must be divided by a *Rutherford* order. How does that work?

*Opting-in
to a
DC plan*

Commentary: the reference to a *Rutherford* order incorporates a formula for

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determining the spouse's share which is very similar to the formula used under Part 6, except that, unless the agreement or order otherwise provides, for agreements or orders made before July 1, 1995 the spouse is also entitled to a share of pre-marriage service. [*Mailhot v. Mailhot*, (1988) 18 R.F.L. (3d) 1 (B.C.C.A.). See para. 2.23]

Under Part 6, after opting in, the former spouse will be entitled to a transfer of the share to a prescribed pension vehicle. [See Chapter 3 and Chapter 7] The amount to be transferred must be determined using the *Rutherford* formula, determined as of the date the plan receives the agreement and a Form 3 (unless the parties otherwise direct, or a court otherwise orders).

Unless the agreement or order otherwise specifies, this is the formula to be used for determining the spouse's share:

$$\frac{1}{2} * A/B$$

where

A = all years of service (including fractions) in which pension entitlement accrued, from the date the member entered the plan to the spouse's entitlement date, and

B = all years of service (including fractions) in which pension entitlement accrued, from the date the member entered the plan to the date the parties elect to opt in to Part 6.

The denominator of the formula must be determined as of the date of the opting in—i.e., the date the plan receives the Form 3 with the original agreement (and the opt in agreement, if required). [See para. 14.1] If the member ceased to accrue pension entitlement at an earlier date, then the denominator would be determined by the earlier date.

14.3 Does Part 6 apply if the spouses separated before July 1, 1995?

*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. If the order or agreement dividing the pension is made after July 1, 1995, then Part 6 applies (except to the extent that its provisions are varied by the order or agreement). If the order or agreement is made before that date, Part 6 will 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

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Rutherford benefit split. The member has not yet retired, but 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 have the plan administer the benefit split when the member retires, by delivering a Form 5 to the plan with the agreement. [*FRA*, s. 76(4), s. 72. See para. 14.1]

If the agreement provides that the pension is to be severed 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 that fit the member's personal situation. *E.g.*, 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 pension, the member can take a survivorship option on spouse2 that would be free of any claim by spouse1.

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*

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Commentary: no. The agreement places an obligation on the plan as well as on the member. You must advise the member in writing that you 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.

- 14.7 Our plan has received a Form 5 and a separation agreement made before July 1, 1995 is attached to it. The member has retired. What share does the spouse get: the proportionate share set out in the Pension Division Regulation? or the share stipulated in the separation agreement?

*Proportionate
Share*

Commentary: the share stipulated in the separation agreement.

S. 76(4) allows a spouse to have a plan administrator the benefit split in accordance with s. 76. **S. 76(1)** 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 *FRA*, s. 70(1), definition of "proportionate share." See also para. 11.6]

- 14.8 The member has not made all payments to the spouse required under the court order. Can a spouse who files a Form 5 with a plan recover the arrears from the plan?

Arrears

Commentary: no. [See, e.g., *Swan v. Canada*, (1998) 47 R.F.L. (4th) 282 (F.C.A.)]

The spouse is entitled to receive from the plan the proportionate share of benefits paid under the pension only after the Form 5 is filed. The plan's obligation to pay the spouse starts from the date that the form is received. [*FRA*, s. 76(1)] The plan has no obligation to pay the spouse a share of benefits paid before the Form 5 was filed. (The plan may be responsible for arrears, however, if it had notice of the agreement or court order dividing the pension and made payments contrary to its requirements).

The spouse's claim is against the member (or, if the member has died, against the member's estate) who may be required to compensate the spouse. [See *FRA*, s. 66(2)(c); *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 compensation payment for the spouse for waiving a share of the pension. [*Penner v. Penner* (1984), 42 R.F.L. (2d) 402 (B.C.C.A.)]

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Courts, however, have 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 (e.g., because of the quantum that had accumulated and the retired member's financial inability to repay it, or because the funds were used to enhance family assets that are divided), or

(b) provide for their repayment in instalments.

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 (B.C.S.C.)]

While there is no responsibility on the plan to pay arrears or assist in their collection, courts have made orders to recover arrears by setting the spouse's proportionate share at a high amount, to recover the arrears over a period of time from future payments, and after that reducing the proportionate share.

- 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 a Form 5 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 5 and
calculating the
spouse's share*

Commentary: once you receive the Form 5, your obligation is to administer the benefit split and pay the spouse the correct amount. [See paras. 11.25 and 12.1] The spouse probably has a claim for arrears against the member.

- 14.10 Our plan has received a Form 5, and a court order made before July 1, 1995 attached to it. The member has retired. The court order requires the member to designate spouse1 beneficiary of the survivor benefits, but the member has taken a joint annuity with the new spouse ("spouse2").

*Survivor
benefits*

Commentary: this fact pattern presents a complex problem. Rights will depend upon
! the terms of the court order,

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! whether the plan had notice of the court order before the member made the election,

! whether the terms of the plan allow for spouse1 to be designated beneficiary of the survivor benefits.

Pension entitlement, including rights to a survivor benefits, are subject to a court order or agreement dividing family property. [*PBSA*, s. 63 and 64] Therefore,

! if the plan had notice of the order, it should have required spouse1 to be designated beneficiary of the survivor benefits. [*Low v. Edgar*, (1990) 28 R.F.L. (3d) 318 (B.C.S.C.); see also *Baxter v. Baxter*, [1995] B.C.D. Civ. 1676-01 (S.C.); *Gilman v. Gilman*, (1995) 158 N.B.R. (2d) 123, 406 A.P.R. 123 (N.B.Q.B.); *Suchostawsky v. Metropolitan Life Insurance Co.*, (1993) 41 A.C.W.S. (3d) 1064, [1997] O.J. No. 1650 (Ont. Gen. Div.)] Spouse1 may have a claim against the plan.

! if the plan had no notice of the order, spouse1 may have a claim against the member, the member's estate and spouse2. [*Munro v. Munro Estate*, (1995) 4 B.C.L.R. (3d) 250 (C.A.)]

Part 6, however, protects the interests of spouse1. It provides that spouse2 holds the survivor benefits in trust for spouse1. [*FRA*, s. 83]

A plan that receives a Form 5 in these circumstances should consider exploring with the parties possibilities of recalculating the pension to provide, e.g., spouse1 with a single life pension and a joint annuity for the member and spouse2 on the remainder of the pension. Such an arrangement will require the consent of spouse1, spouse2 and the member. [See also Chapter 8]

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 *FRA*, s. 80(2.2) and now 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 pension results in ending the deemed retirement arrangements (because the former spouse can directly access the share of the pension, notwithstanding the member's decision to postpone retirement). [See, e.g., *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 retirement until age 60, but the member wants to retire earlier than that. The spouse consents because, under Part 6,

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the date of the member's retirement cannot affect the spouse's separate rights in the pension. Can the parties do that?

*Changes
to the old
order or
agreement*

Commentary: the term requiring the member to postpone retirement is an example of a part of the order which 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. Even if they don't, the term should be regarded as void once the spouse becomes a limited member.

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 plan give effect to that agreement?

*Changing the
proportionate
share*

Commentary: yes. S. 80(2) allows spouse and member to agree to divide the pension "in accordance with this Part." They can agree, under *FRA*, s. 80(1), on a different proportionate share than the one set out in the pre-existing court order or agreement.

14.14 We have received from a former spouse of a member a Form 5 and a court order made before July 1, 1995. The court order does not refer to the pension. The member has retired. 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, to allocate the entire pension to the member. [*FRA*, s. 71(3). 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?

Chapter 14: Agreements and Orders 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 retiring (or to give notice of an intention to retire, 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.

The purpose of provisions of this nature is to ensure that the election the member makes protects the spouse's interests in the pension. [*Walker v. Walker*, (1993) 142 A.R. 374 (Alta. Q.B.)] If the member elects a single life pension, for example, the spouse is 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 pension. 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, e.g., *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 plan had notice of the agreement, the plan may be liable as well.

Another common contractual provision is the requirement that on retirement the member 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 (B.C.C.A.). 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 plan is aware that the agreement or order places a positive duty on the member to sever the spouse's interest in the pension when that becomes possible to do, the plan may be liable if it accepts the member's election to retire without severing the spouse's share. [See para. 14.6]

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Because the plan has notice of the requirements of the parties' pension division arrangements, to allow the member to retire without (a) protecting the former spouse's interest, or (b) obtaining the spouse's written consent in advance, would be to participate in the member's breach of trust.

- 15.1 The legislation sets out maximum amounts that may be charged by a plan to offset costs of dividing a pension (\$500 for dividing a pension in a defined benefit plan; \$150 for dividing a pension in a defined contribution plan; \$650 for dividing a pension in a hybrid plan). Does the plan have to charge the administrative fee?

*Waiving the
admin. fee?*

Commentary: no.

It is not mandatory to charge a fee. [FRA, s. 81, Reg. 13] Some plans 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 will be married and not everyone's marriage breaks up). But plans provide other kinds of services and benefits even though not all members will take advantage of them.

Some plans have indicated that they will not be charging an administrative fee, or will recognize situations where the fee, or part of it, should be waived.

- 15.2 In what circumstances would it be appropriate to waive the administrative fees?

*When to
waive
fees*

Commentary:

Examples

- ! a plan has indicated it will consider waiving the fee when the application for division is late in the life of the pension (e.g., the member took a single life pension and, at the time the Forms are received, the guarantee period has expired).
- ! a plan has indicated it will only charge the fees once where the division relates to two separate pensions in the plan (or separate pensions in related plans).
- ! some defined benefit and hybrid plans have indicated that they will charge a smaller fee if the pension is matured.

The examples are not exhaustive.

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15.3 The plan has just received a request for information to value the pension. Can it demand payment of administrative fees before the information is provided?

*Charging
the fee:
when
information
is requested?*

Commentary: no. A plan is required to provide information to a spouse upon receipt of a valid Form 1, which tells the plan that the spouse is claiming an interest in the member's pension. Administrative fees should not be charged until the plan is asked to take a positive step in dividing the pension. The fee could not be charged on receiving Form 1 because the pension may be divided in other ways that do not involve the plan.

15.4 If a plan 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

- ! after receiving a Form 2 for an unmatured pension in a defined benefit plan or for a matured pension
- ! after receiving a Form 3 for an unmatured pension in a defined contribution plan, and
- ! after receiving a Form 5 for a matured pension where marriage breakdown occurred prior to July 1, 1995.

15.5 Who should be billed, the member or the spouse?

*Who is
billed?*

Commentary: the administrator should advise the member and spouse that it will not act on the Form 2, 3 or 5 (as the case may be) until it receives the administrative fee.

It is not the administrator's responsibility to determine who should pay the fee, nor to collect from member and spouse according to their responsibility to pay. And the administrator doesn't care who pays the fee. If, e.g., the spouse pays the entire amount, it is up to the spouse, not the plan, to collect from the member.

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15.6 Can the plan refuse to, *e.g.*, register the spouse as a limited member until paid the administrative fee?

*Parties refuse
to pay the
administrative
fee*

Commentary: yes. The plan may decline to process the forms until it is paid the administrative fee. However, payment of the administrative fee is a procedural issue. Once it is paid, entitlement will be determined by reference to when the forms were first submitted [See para. 15.12]

15.7 Does the administrative fee have to be paid to the plan? Can the sponsor collect it on behalf of the plan?

*Paying the
administrative
fee to
the plan*

Commentary: the legislation uses the words “paid to” the plan, but a plan sponsor can collect it on behalf of the plan (the arrangement, in legal terms, would be characterized as one of agency or assignment).

15.8 Can the plan provide that the administrative fee be paid by instalments?

*Paying by
instalments*

Commentary: yes.

Just as it is up to the plan concerning whether to charge administrative fees at all, the plan can decide how it wishes to be paid. It can insist on full payment before acting on a direction to divide the pension, *e.g.*, or it can accept another arrangement for satisfying the fee.

The plan may also deduct instalments from benefits. This is not prohibited by s. 63 of the *PBSA* (which voids any agreement to alienate or anticipate pension benefits) because s. 63(3) recognizes an exception for property-sharing arrangements on marriage breakdown. [See para. 2.29]

15.9 Are the administrative fees subject to the GST?

GST

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Commentary: no. The Canada Customs and Revenue Agency has advised that the payment of the administrative fee is exempt from GST.

15.10 Is the administrative fee tax deductible?

Income tax

Commentary: CCRA has taken the position that the administrative fee is not tax deductible.

15.11 Does paying an administrative fee offend the *Income Tax Act*?

*Income Tax Act
Regs &
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 Customs and Revenue Agency, however, has indicated that it is acceptable as a payment to offset administrative costs.

15.12 The spouse sent in Forms 1 and 2 with an agreement dividing the pension. Form 2 was returned because the spouse couldn’t afford to send in \$500 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: pension rights conferred by Part 5 and Part 6 of the *FRA* arise automatically, although they require a court order or agreement providing for pension division before they would be enforceable against the plan. In this case, there is a valid agreement. Part 6 sets out administrative rules to protect the plan, 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. [See paras. 15.6 and 13.24]

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- 15.13 In addition to the maximum administrative costs 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)?

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 pension—such as actuarial fees—could not be charged to the spouse or member nor deducted from the member’s pension. Similarly, the plan could not require member and spouse to carry out at their own expense duties imposed by the legislation on the plan.

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 (and when) in connection with a member’s pension?

Plan’s obligation to provide information: who can request information?

Commentary: a spouse who files a Form 1 but who is not yet a limited member is entitled to information on request. So would a spouse, where the agreement or court order authorizes, or requires the member to authorize, the release of information.

In contrast, a plan is required to send information annually to a spouse who is registered as a limited member, whether or not a request is made. [FRA, Reg. 14]

- 15.15 My spouse has a pension. I want information about the plan so my lawyer can advise me about options for dividing the pension. I haven’t come to any decision about whether to assert a claim to the pension or, if so, how I wish my share to be satisfied. Do I have to pay the pension plan for providing that information?

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*Information
and the
admin. fee*

Commentary: no. [See paras. 15.3-15.4]

15.16 I filed a Form 1 with the plan, but the plan 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 1
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. The plan should be advised that if a court application is necessary to compel the plan to accept the Form 1 and provide information, the court will likely award costs against the plan.

Regulation 14 requires the plan to provide the spouse with information once a Form 1 is filed. Under the old law, a plan could not provide the spouse with information without the member's consent.

15.17 I filed the Form 1 and asked the plan to value the member's pension, but they declined to do so.

*Valuing the
member's
pension*

Commentary: Part 6 only requires the plan to provide a spouse with the information necessary to value the member's pension. However, when it comes time to transfer the spouse's share, the plan will have to do its own valuation.

15.18 The spouse has asked us (the plan) to place a value on the pension. We are not in a position to value the pension 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*

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Commentary: nothing in the legislation prevents a plan from providing any form of information. If the plan is able to provide a termination value, this will be of some use to spouse and member. But to ensure that the parties are not misled, the plan should state that

- ! the value is based on assuming the member leaves employment as of the valuation date,
- ! the value differs from that which would be placed on it under Regulation 11, and
- ! if greater accuracy is needed by the parties, they would have to have an actuarial valuation performed.

15.19 The plan is receiving repeated requests for information about the same pension. Does the legislation place any limits on when information may be requested?

Repeated requests for information

Commentary: the plan is only required to provide information once in each calendar year. [*FRA*, Reg. 14]

The legislation is designed to protect the plan from being pestered. But a plan should not insist upon strict compliance with this right where the protection is unnecessary.

E.g., 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 only provide information once a calendar year. The Regulation should not be used to destroy sensible negotiations.

15.20 We have just received a Form 1 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 plan have to give?

Kinds of Information

Commentary: Regulation 14(1) says that the information must be sufficient to value the interest in the member's pension. In most cases, it will be sufficient to send

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(a) a copy of the most recent annual statement about the member's pension. [This is the information the plan is required to provide members under Regulation 11 and 12 of the *PBSA*] If a copy of the annual statement is not available, prepare a current statement showing contributions to date and accrued service,

(b) a copy of the most recent explanation or summary of

1) the plan,

2) material amendments to the plan, and

3) relevant entitlements and obligations under the plan, [this is the information the plan is required to provide members under Regulation 9 and 10 of the *PBSA*] and

(c) invite the parties, if they require more information, to indicate more particularly what they need.

This is not a new issue. Pensions have been divisible in B.C. since 1979. Plans have over 22 years of experience with this kind of issue. Ordinarily, the spouse will retain an actuary, who will deal directly with the plan and will indicate precisely what information is required.

15.21 Does a plan have to disclose purely personal information about the member such as, *e.g.*, whether additional pension entitlement has been purchased after marriage breakdown, or whether the member has appointed a new beneficiary? Is a plan even allowed to disclose this information?

*Information
purely
personal
to the
member*

Commentary: any information the plan has in connection with the member's pension must be disclosed to the spouse because the spouse also has a property interest in the pension. After the spouse's interest in the pension is satisfied, there is no further obligation to provide information about the member's pension.

15.22 Must a plan send information sufficient to value the interest in the member's pension immediately on receiving Form 1?

*When to
provide the
information*

Chapter 15: Misc. Administrative Issues

Commentary: no.

A spouse, by delivering to a plan a Form 1, becomes entitled to request the information, but the spouse may not need the information immediately or at all.

Some plans 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 1. Technically, however, there is no obligation on the plan to deliver the information until the spouse makes a formal request for it. [FRA, Reg. 14(4)]

- 15.23 The pension is in a defined benefit plan. Should the plan send out the Form 4 (which the spouse uses to select between the options under s. 74) with the initial package of information? This might avoid diarizing problems.

*Obligation
to advise
about
options*

Commentary: a plan can do this, but providing a spouse with a Form 4 prematurely might produce unwelcome results.

An uninformed spouse might complete and deliver the Form years before the decision must be made. This won't help the spouse or the plan.

Regulation 14(2)(b) requires a plan to give a limited member information about retirement elections on an annual basis. In most cases, it will be preferable for the spouse to wait and make a more informed choice. A plan should consider setting up a system under which Form 4 is sent out in the year when the member first becomes eligible to retire, with an appropriate explanation about how the Form is to be used.

If a plan chooses to send out the Form 4 with the initial package of information, it should consider stamping it with the advice that the spouse does not have to complete the form before the member becomes eligible to retire.

- 15.24 Is it necessary for the information to show how the pension division affects the member's pension, and what portion of the pension the spouse will eventually receive?

*Obligation
to inform
about
separate
entitlement?*

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Commentary: no. The information sent to the member can be photocopied and sent to the spouse. That would satisfy the requirements of the Regulation. There is no need for a plan to show the separate interests of the member and the spouse.

A plan 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 pension in its undivided form, and

! the member and the spouse will each receive a part of the pension, 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 left employment and requested a transfer of commuted value 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:
advance notice
to limited spouse*

Commentary: the limited member must be given 30 days advance notice of the transfer. [FRA, Reg. 15] The limited member is entitled to a proportionate share of any benefit paid from the plan, including a transfer of commuted value. [FRA, s. 72(2)] The limited member will direct the plan to transfer the share to a locked-in RRSP, e.g., or another pension plan. [FRA, Reg. 7] (Nothing forces the limited member to make this election, but the limited member will have difficulty realizing on the share of the pension if this election is not made.) [See also para. 2.10]

15.26 The spouse sent in a Form 1, 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. [FRA, Reg. 15]

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Be careful about how you calculate the 30 days. Under s. 25 of the B.C. *Interpretation Act*, the first day is excluded and the last day is included. Also, if the last day occurs on a non-business day, it is extended to the next business day.

- 15.27 The member and spouse have an agreement dividing the pension made before July 1, 1995 which provides that the member must sever the spouse's interest when that becomes possible. The spouse has exercised her rights under *FRA*, s. 80 (2.2) to opt in to Part 6 by delivering a Form 2 to the plan, together with the agreement. Is the plan under an obligation to notify the member?

*Obligation
to notify:
advance notice
to member*

Commentary: yes. The member should be sent a Form 6 advising that the plan has received a Form 2 from the spouse (although, if s. 80(2.2) 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, 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 plan protects itself by sending the limited member advance notice of the member's request. If the limited member does not communicate with the plan, it may technically be possible to transfer the whole of the entitlement to the member, but it is probably a safer practise to pay the money into court, or to segregate it and hold it in trust for the limited member until 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 pension is invested. How does filing a Form 1 affect that right?

*Investment
directions*

Commentary: the plan 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 by a member. [*FRA*, Reg. 15(c)]

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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 plan a general waiver concerning notice for all investment directions.

- 15.30 If the spouse takes a transfer of the commuted value of the pension before the member retires, 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 plan must follow. [FRA, Reg. 8]

- 15.31 How is the member's remaining pension adjusted after there has been a division?

*Adjusting
the member's
pension (2)*

Commentary: if at the time the spouse received the share of the pension all of the member's pension had vested, the adjustment is made by reducing pensionable service. In the usual case, the reduction will be half the pensionable service acquired from the date of marriage to the entitlement date when the spouse received the share. [FRA, Reg. 8(3) and (4). But see para. 15.32]

If not all of the member's pension has vested at the entitlement date, the adjustment is made by deducting from the pension or benefits payable to the member the present value, at the time of adjustment, of the amount paid or transferred to the credit of the spouse. [FRA, Reg. 8(3)(b)]

- 15.32 How is the member's pension adjusted if the formula changes in different periods? For example, suppose the member has 30 years of service, and the marriage lasted 24 years. During

(a) 4 years of the marriage, the formula provided that the member was entitled to 1% of Final Average Earnings ("Period 1"), and

(b) 20 years the formula provided that the member was entitled to 2% of Final Average Earnings ("Period 2").

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If the spouse is entitled to a half interest, is pension entitlement adjusted by leaving the member with 2 years during Period 1 and 10 years during Period 2?

*Adjustment
when benefits accrue
at different rates*

Commentary: no. This approach would actually create a loss of value to the spouse and member (their combined shares would be less than the value of the pension had it not been divided) because the spouse's share has been determined on a pro rata basis (which determines the spouse's share as if the pension accrued at a constant rate).

The adjustment to the member's pension must be on a neutral basis to both the member and the plan. [*FRA*, Reg. 8] That means that there must not be any value loss as a result of the division.

The usual rule set out under Regulation 8 is that where the pension is vested, the adjustment must be by service. However, where that approach would not be neutral to the member and the plan, the plan should adjust the member's service by either (a) deducting the same amount that has been credited to the spouse, using a pro rata approach, or (b) an actuarial adjustment, by deducting the present value of the share allocated to the spouse.

15.33 How is the member's pension adjusted when there is more than one marriage breakdown and more than one division? If service is adjusted immediately, then the order in which the pension is divided might affect the value of a spouse's share.

*Adjustment
when more than
one division*

Commentary: the Regulations do not provide a rule for adjusting the member's pension when there is more than one pension division. However, the approach that appears to work best 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 where the adjustment is based on reducing service, [*FRA*, Reg. 8(3)(a)] or where the spouse's share is based on an unreduced early retirement option, this may not always be the case. [See para. 15.31]

15.35 Why are different approaches to adjusting the member's pension adopted depending upon whether all of it is vested?

*When not
all of the
pension
is vested*

Commentary: adjusting by deducting service is the preferred method because it produces a fair result and is easy for a small plan to apply. The method cannot be used when not all of the pension is vested, however, because a service deduction in that case will usually be too large in proportion to the amount credited to the spouse.

15.36 The limited member has sent us a Form 4 directing a transfer of a proportionate share of the pension to a locked-in RRSP. The member is eligible to retire, but hasn't done so. Under our plan, an early retirement pension may be subsidized if the trustees consent. The trustees typically do consent, but that is for a retirement pension, not for the purposes of determining a commuted value. Would a procedure for calculating the commuted value which assumes that consent has not been granted be in compliance with the *PBSA* and the *FRA*?

*Subsidized
early
retirement
and consent*

Commentary: yes. Such an approach, determined by whether the benefit in question is a retirement pension or a transfer of commuted value, would not unfairly discriminate between the rights of members and limited members.

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 2 and the court order and the pension was divided in accordance with them. After receiving Form 6, the member has written disagreeing with the approach to division. What are our obligations?

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*Member objects
to method
adopted
by plan*

Commentary: if the calculations are checked and are accurate, the plan must continue to pay member and spouse 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 member and spouse are in agreement on the point, then the plan can rely on their joint direction. If member and spouse cannot reach agreement, and court proceedings are commenced, the plan 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.

APPENDIX A
Selected Portions of the
FAMILY RELATIONS ACT
R.S.B.C. 1996, Chapter 128

Part 1 -- Definitions and Jurisdiction

Part 5 -- Matrimonial Property

- 56** Equality of entitlement to family assets on marriage breakup
- 57** Declaratory judgment

Part 6 -- Division of Pension Entitlement

- 70** Definitions for Part
- 71** Application of Part
- 72** Local plans: limited members
- 73** Local plans: division of an unmatured defined contribution plan
- 74** Local plans: division of an unmatured defined benefit plan
- 75** Local plans: division of an unmatured hybrid plan
- 75.1** Supreme Court retains a discretion
- 76** Local plans: benefit split of a matured pension
- 77** Division of an extraprovincial plan
- 78** Death of a member or limited member
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PART 1 -- Definitions and Jurisdiction

Definitions

1 (1) In this Act ...

“spouse” means a person who

- (a)** is married to another person,
- (b)** except under Parts 5 and 6, lived with another person in a marriage-like relationship for a period of at least 2 years if the

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application under this Act is made within one year after they ceased to live together and, for the purposes of this Act, the marriage-like relationship may be between persons of the same gender,

- (c) applies for an order under this Act within 2 years of the making of an order
 - (i) for dissolution of the person's marriage,
 - (ii) for judicial separation, or
 - (iii) declaring the person's marriage to be null and void, or
- (d) is a former spouse for the purpose of proceedings to enforce or vary an order;

...

Part 5 -- Matrimonial Property

Equality of entitlement to family assets on marriage breakup

- 56 (1) Subject to this Part and Part 6, each spouse is entitled to an interest in each family asset on or after March 31, 1979 when
- (a) a separation agreement,
 - (b) a declaratory judgment under section 57,
 - (c) an order for dissolution of marriage or judicial separation, or
 - (d) an order declaring the marriage null and void
- respecting the marriage is first made.
- (2) The interest under subsection (1) is an undivided half interest in the family asset as a tenant in common.
 - (3) An interest under subsection (1) is subject to
 - (a) an order under this Part or Part 6, or
 - (b) a marriage agreement or a separation agreement.

- (4) This section applies to a marriage entered into before or after March 31, 1979.

Declaratory judgment

- 57 On application by 2 spouses married to each other or by one of the spouses, the Supreme Court may make a declaratory judgment that the spouses have no reasonable prospect of reconciliation with each other.

...

PART 6 -- Division of Pension Entitlement

Definitions for Part

- 70 (1) In this Part:

“beneficiary” means a person, or the estate of a member, entitled under the terms of a plan to receive preretirement survivor benefits or postretirement survivor benefits on the death of the member;

“commuted value” means the value of a benefit determined in accordance with the *Pension Benefits Standards Act*;

“defined benefit plan” means a plan that is not a defined contribution plan or a hybrid plan;

“disability pension” means a benefit paid to a member under a plan as a consequence of a member’s disability;

“extraprovincial plan” means a plan that is not a local plan and includes

- (a) a supplemental pension plan to a local plan or extraprovincial plan, or
- (b) a plan whose only members are “specified individuals” as defined in the regulations under the *Income Tax Act (Canada)*;

“hybrid plan” means a plan under which

- (a) some benefits, but not all of the benefits, are determined as if the plan were a defined contribution plan, and

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- (b) some benefits, but not all of the benefits, are determined by a defined benefit formula;

“limited member” means a person designated as a limited member of a local plan under section 72 (1);

“local plan” means one of the following:

- (a) a plan that is established by the government;
- (b) a plan that must be registered under the *Pension Benefits Standards Act*;
- (c) a plan that is subject to this Part
 - (i) by the terms of the plan,
 - (ii) by the operation of legislation that regulates the plan, or
 - (iii) by reason of a reciprocal agreement under the *Pension Benefits Standards Act*;

“matured pension”, or “matured” with reference to a pension, means a pension under which benefits are being paid to a retired member or a beneficiary and includes a payment of a disability pension when the member reaches a prescribed age;

“pension” means a series of payments that continue for the life of a member, whether or not it is afterward continued to any other person;

“plan” means a plan, scheme or arrangement organized and administered to provide pensions for members;

“postretirement survivor benefit” means lump sum or periodic benefits paid by a plan to a beneficiary when a member dies after the pension matures;

“preretirement survivor benefit” means lump sum or periodic benefits paid by a plan to a beneficiary when a member dies before the pension matures;

“proportionate share” means a fraction calculated in accordance with the regulations, the agreement of the spouse and member under section 80 or a court order;

“retirement” or “retire” means the date a member begins to receive a pension under a plan, whether or not the receipt of benefits has been deferred;

“separate pension” means the share of a member’s pension that is established in a separate account in favour of a spouse;

“transfer” means, when referring to the payment of a proportionate share of the commuted value of a pension to the credit of a spouse, a transfer made in accordance with the regulations.

(2) In this Part:

- (a) “administrator”, “benefit”, “defined contribution plan”, “former member”, “member” and “supplemental pension plan” have the same meaning as they have in section 1 (1) of the *Pension Benefits Standards Act*,
- (b) “member” includes a former member, and
- (c) “spouse” includes a former spouse of a member.

Application of Part

- 71 (1) Subject to subsection (2), if a spouse is entitled under Part 5 to an interest in a pension,
- (a) the spouse’s share of the pension, and
 - (b) the manner in which the spouse’s entitlement in the pension is to be satisfied

must be determined in accordance with this Part.

(2) This Part applies only if a spouse

- (a) was entitled under Part 5 to an interest in a pension before July 1, 1995 and on July 1, 1995 there is no allocation of the pension by agreement between the spouse and the member or by court order, or
 - (b) becomes entitled under Part 5 to an interest in a pension after June 30, 1995.
- (3) An agreement between a spouse and member, or a court order, that is silent on pension entitlement but that represents a final settlement and

separation of the financial affairs of the spouse and member in recognition of the end of their marriage is, for the purposes of this part, an allocation of the entire pension to the member by agreement or court order but nothing in this subsection affects a court's jurisdiction under Part 5 to review such an agreement or order.

Local plans: limited members

- 72 (1) If a pension to be divided is
- (a) an unmatured pension in a local plan that is a defined benefit plan, or
 - (b) a matured pension in a local plan,

a spouse may be designated a limited member of the local plan by delivering a notice in the prescribed form to the administrator.

- (2) A limited member has the following rights:
- (a) to receive from the plan direct payment of a separate pension or a proportionate share of benefits paid under the pension, as the case may be, as determined under this Part;
 - (b) to enforce rights against the plan and recover damages for losses suffered as a result of a breach of a duty owed by the plan to the limited member;
 - (c) except as modified by this Part, all of the rights of a member under the *Pension Benefits Standards Act*;
 - (d) the additional rights that are set out in this Part.
- (3) Subject to an order of the Supreme Court, a designation of preretirement survivor benefits or postretirement survivor benefits under the member's pension in favour of a limited member may not be changed without the limited member's consent.
- (4) Subsection (3) applies until the limited member ceases to be a limited member or becomes entitled to a separate pension.
- (5) If the commuted value of the spouse's share in the pension is transferred under this Part to the credit of the spouse, the spouse ceases to be a limited member of the plan.

Local plans: division of an unmatured defined contribution plan

- 73** If a pension to be divided is in a local plan and has not matured and the plan is a defined contribution plan, a spouse, by delivering a notice in the prescribed form to the administrator, is entitled to have a prescribed portion of the member's account balance transferred from the plan in accordance with the regulations.

Local plans: division of an unmatured defined benefit plan

- 74** If a pension to be divided is in a local plan and has not matured and the plan is a defined benefit plan, a spouse, by delivering a notice in the prescribed form to the administrator,
- (a)** is entitled to have, before the member retires, a proportionate share of the commuted value of the pension transferred from the plan to the credit of the spouse when the member
 - (i)** is eligible to retire, or
 - (ii)** terminates his or her membership in the pension plan, or
 - (b)** is entitled to receive, when the member retires, a separate pension from the plan determined in accordance with the regulations.

Local plans: division of an unmatured hybrid plan

- 75** (1) If a pension to be divided is in a local plan and has not matured and the plan is a hybrid plan,
- (a)** to the extent that the pension in the hybrid plan is based on, or the member may choose to have it based on, principles applicable to a defined contribution plan, the pension must be divided in accordance with this Part and the regulations as if it were in a defined contribution plan, and
 - (b)** the remainder of the pension must be divided in accordance with this Part and the regulations as if the pension were in a defined benefit plan.
- (2) Despite subsection (1), a spouse may elect, with the consent of the administrator, to have the pension divided as if it were in a defined benefit plan.

Supreme Court retains a discretion

- 75.1 (1)** If, in the circumstances, the method of division required under this Part and the regulations is inappropriate because of the terms of the plan, the Supreme Court, despite the *Pension Benefits Standards Act* or any other Act purporting to limit the jurisdiction of a court to make an appropriate order respecting pension entitlement of the member and the spouse on marriage breakdown, may direct an appropriate method of division of the pension and the order of the court is binding on the plan.
- (2)** Unless the application of section 65 requires the share to the spouse to be larger, an order under subsection (1) must leave the member with at least half of
- (a)** the value the pension would have had, or
 - (b)** the periodic benefits that would have been paid under the pension on retirement
- had there been no division of the pension between the member and the spouse.

Local plans: benefit split of a matured pension

- 76 (1)** If a pension to be divided is in a local plan and has matured, a spouse, by delivering a notice in the prescribed form under section 72 (1), is entitled to receive from the plan a proportionate share of benefits paid under the pension until
- (a)** the death of the spouse, or
 - (b)** the termination of the pension,
- whichever occurs first.
- (2)** Despite subsection (1), if no other spouse is entitled to receive a proportionate share of benefits paid under the pension, the spouse who is the designated beneficiary of a postretirement survivor benefit under the pension is entitled to the whole of the postretirement survivor benefit.
- (3)** A local plan that pays a proportionate share of benefits to a spouse must make separate source deductions with respect to deductions required under the *Income Tax Act (Canada)* for the spouse's share and the member's share of the benefits.

- (4) Despite section 71 (2), a spouse who, before July 1, 1995, is entitled to receive from a member payment of a proportionate share of benefits paid under a matured pension, may, by delivering a notice in the prescribed form to the administrator, require the plan to administer the division in accordance with this section.

Division of an extraprovincial plan

- 77 (1) If a pension to be divided is in an extraprovincial plan, a spouse is entitled to receive from the plan a proportionate share of benefits paid under the pension until
- (a) the death of the spouse, or
 - (b) the termination of the pension,
- whichever occurs first, and the member is a trustee of the proportionate share of benefits for the spouse.
- (2) Despite subsection (1), if no other spouse is entitled to receive a proportionate share of benefits paid under the pension, the spouse who is the designated beneficiary of a postretirement survivor benefit under the pension is entitled to the whole of the postretirement survivor benefit.
- (3) Subject to subsection (4), subsection (1) does not apply if the plan, or legislation establishing or regulating the plan, provides an alternative method of satisfying the interest of the spouse in the pension.
- (4) If, having regard to the principles that apply to pension division under this Part, the alternative method under subsection (3) would operate unfairly, the Supreme Court may order the spouse's share in the pension be satisfied under subsection (1).

Death of a member or limited member

- 78 (1) If a member dies before the limited member receives a share of the pension under section 74, and the limited member is not entitled to the whole of any preretirement survivor benefit payable under the member's pension, then the limited member is entitled to a proportionate share of that preretirement survivor benefit in the form of
- (a) a separate benefit, or

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- (b) if the preretirement survivor benefit is in the form of an annuity, a separate pension determined in accordance with the regulations.
- (2) If a member dies after the limited member receives a share of the pension under section 74, the limited member is entitled to no further share of the member's pension except to the extent that the member has designated the limited member to be a beneficiary of the pension.
- (3) If a limited member dies before the member and before receiving a share of the pension under section 74, the plan must transfer to the credit of the limited member's estate a proportionate share of the commuted value of the pension.

Transfer of the commuted value of a separate pension or a share of a pension

79 If a limited member is entitled to a separate pension or a proportionate share of benefits paid under the pension, a plan may require the limited member to accept a transfer of the commuted value of the separate pension or of the proportionate share of the benefits, as the case may be, in the same manner that a plan can require a member to do so under section 33(5) or 40 (1) of the *Pension Benefits Standards Act*.

Agreements

- 80 (1) A spouse may enter into a written agreement with a member respecting one or more of the following:
- (a) if there has been no division of a pension between the member and spouse, an arrangement for sharing the pension that departs from the proportionate shares required under this Act so long as the share to the spouse leaves the member with at least half of
 - (i) the value the pension would have had, or (ii) the periodic benefits that would have been paid under the pension on retirementhad there been no division of the pension between the member and spouse;
 - (b) a waiver by the spouse of any right to or interest in a member's pension or any benefit under it;
 - (c) a waiver by the spouse under section 62 of any right to or interest in a division of the unadjusted pensionable earnings under the *Canada Pension Plan*;

- (d) the satisfaction of the spouse's interest in the pension by the payment of compensation in money or money's worth by the member to the spouse.
- (2) Despite section 71 (2), if
- (a) a spouse became entitled under Part 5 to an interest in family assets before July 1, 1995,
 - (b) the pension is to be divided by having the member pay the spouse a proportionate share of benefits payable under the pension, and
 - (c) the member has not yet retired or the spouse is not yet receiving benefits,

the spouse and member may agree to divide the pension in accordance with this Part and, in that case, a notice in the prescribed form issued under section 72 (1) or 73 is as valid as if entitlement to an interest in family assets arose after June 30, 1995.

- (2.1) If the spouse and member agree under subsection (2) to divide the pension in accordance with this Part, then, unless the spouse and member otherwise agree, for the purposes of this Part
- (a) the original agreement or order dividing the pension applies as if it were made as of the date of the agreement under subsection (2),
 - (b) despite paragraph (c), subsection (1) or section 75.1, the spouse's proportionate share of the pension is determined by the share or formula set out in the original agreement or order,
 - (c) the original agreement or order dividing the pension is of no further effect to the extent that it contains provisions that are inconsistent with division under this Part because they
 - (i) provide for a different method of pension division, or
 - (ii) are inapplicable because of changed circumstances, and
 - (d) to the extent that the original agreement or order dividing the pension contains provisions that clarify, supplement or are collateral to division under this Part, those provisions continue in effect.

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- (2.2) A term in an order or agreement, whenever made, that requires the member to sever, or to assist the spouse in severing, the spouse's share from the member's pension as soon as it becomes possible to do so is conclusively deemed to be an agreement referred to in subsection (2), unless the parties otherwise agree or the court otherwise orders, made as of the date the plan receives notice in the prescribed form under subsection (2).
- (3) If the spouse and member agree, or the Supreme Court makes an order under section 66, that the member must pay compensation to the spouse in satisfaction of part or all of the spouse's interest in the pension, the compensation payment must be calculated in accordance with the regulations unless the spouse and member otherwise agree or the court otherwise orders.
- (4) If the plan and a spouse enter into an agreement under which the spouse accepts from the plan compensation, or a transfer of a share of the pension, in satisfaction of the spouse's interest in any circumstances not specifically dealt with under this Part, the compensation payment or amount transferred must be calculated in accordance with the regulations unless the Supreme Court otherwise orders.
- (5) If, for the purposes of this Part, a form of notice or waiver is prescribed by the regulations, the notice or waiver is of no effect unless it is in the prescribed form.

Administrative costs

- 81 (1) The spouse and member are responsible for paying to the plan a prescribed amount to offset administrative costs incurred by the plan in satisfying the share of the spouse under this Part.
- (2) A spouse or member who pays more than a half share of the administrative costs may recover from the other the additional amount paid.

Information from plan

- 82 (1) A limited member, or a spouse claiming an interest in a pension who has delivered to the plan a notice in the prescribed form, is entitled to receive from the administrator
- (a) at the time of marriage breakdown, and

(b) on an annual basis,
prescribed information in respect of the plan.

(2) Despite subsection (1), the Supreme Court may order that an administrator provide some or all of the information required by subsection (1) at any time.

Trust of survivor benefits

83 If a spouse is entitled to a share of preretirement survivor benefits or postretirement survivor benefits paid to another person, the recipient holds them in trust for the spouse.

Adjustment of member's pension

84 If under this Act a spouse or the spouse's estate receives a share of a member's pension directly from a plan, the interest in the pension of the member, or of any person claiming an interest through the member, must be adjusted in accordance with the regulations.

Plan and administrator not liable

85 No plan or administrator of a plan is liable for loss or damage suffered by any person because of anything done or omitted to be done by an administrator who relies and acts in good faith on

- (a) a notice or waiver given under this Part, or
- (b) a court order or separation agreement attached to a notice given under this Part.

Power to make regulations

86 The Lieutenant Governor in Council may make regulations for the following purposes and respecting the following matters:

- (a) the methods and assumptions to be followed for the valuation, division and transfer of a pension and benefits, or the calculation of any compensation payment or commuted value, at the end of a marriage;
- (b) the procedures to be followed by a spouse, member and plan when dividing a pension or satisfying a spouse's entitlement to a pension;

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- (c) the kinds of information a plan must make available to a spouse or limited member about a plan or pension entitlement and when the information must be provided, and requiring that different information be provided at different times;
- (d) the form, content and manner of giving any notice or waiver under this Part;
- (e) the procedures to be followed for failing to give or failing to comply with a notice under this Part;
- (f) the method of calculating the proportionate share of benefits under a plan;
- (g) the method of calculating a compensation payment or a transfer of a share of a pension for the purposes of section 80 (4);
- (h) the prescribing of any age requirement under this Part;
- (i) the prescribing of the amount of any administrative cost.

APPENDIX B
DIVISION OF PENSIONS REGULATION
to Part 6 of the Family Relations Act
B.C. Reg. 77/95
The British Columbia Gazette, Part II,
Vol. 38, No. 6, March 14, 1995

Note: These regulations have been updated in this version to reflect the changes in section numbers that were made as part of the 1996 British Columbia statutory revision. However, these changes are not part of the official compilation, and this version is for personal use only.

B.C. Reg. 77/95, deposited March 3, 1995, pursuant to the *FAMILY RELATIONS ACT* [Section 86] and the *FAMILY RELATIONS AMENDMENT ACT, 1994* [Section 18]. Order in Council 196/95, approved and ordered March 2, 1995.

On the recommendation of the undersigned, the Administrator, by and with the advice and consent of the Executive Council, orders that, effective July 1, 1995,

- (a) the *Family Relations Amendment Act, 1994*, S.B.C. 1994, c. 6, comes into force, and
- (b) the *Division of Pensions Regulation*, as set out in the attached appendix is made.

--

C. GABELMANN, Attorney General;

M. HARCOURT, Presiding Member of the Executive Council.

DIVISION OF PENSIONS REGULATION

Definitions

1. In this regulation:

“Act” means the *Family Relations Act*;

“entitlement date” means, in relation to a spouse, the date on which the spouse became entitled to an interest in family assets in accordance with section 56 (1) [*entitlement to family assets on marriage break down*] of the Act;

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“net investment returns” means interest, dividends and realized and unrealized capital gains and losses, less related investment expenses normally charged to investment earnings;

“pensionable service” means the months or parts of months in respect of which pension entitlement in favour of a member accrues, and includes pension entitlement earned by a member under another plan that has been transferred to the credit of the member;

“vested pension” means a pension under which a member has an unrestricted entitlement, or option of an entitlement, to the payment of benefits that will become payable in accordance with the plan or applicable legislation.

Application and interpretation of regulation

2. (1) This regulation applies to the division of a pension under Part 6 of the Act, except as modified directly or indirectly by an order of the Supreme Court under the Act or by an agreement between the spouse and the member in accordance with section 80 [*written agreements between member and spouse*] of the Act.
- (2) In this regulation, if a reference to a provision of the Act is followed by italicized words in square brackets that are or purport to be descriptive of the subject matter of the referenced provision, the words in brackets are provided for convenience of reference only and are not to be interpreted as forming part of the provision in which the reference is made.

Requirements for giving notice to a plan

3. (1) Notices under the following sections of the Act must be in the specified form set out in the Schedule to this regulation:
 - (a) notice under section 82 [*information from plan*] must be given in Form 1: Claim of Spouse to Interest in Member’s Pension;
 - (b) notice under section 72 (1) [*limited members*] must be given in Form 2: Request for Designation as Limited Member of Pension Plan;
 - (c) notice under section 73 [*division of unmatured defined contribution plan*] must be given in Form 3: Request for Transfer from Unmatured Defined Contribution Plan;
 - (d) notice under section 74 [*division of unmatured defined benefit*]

plan] must be given in Form 4; Request by Limited Member for Transfer or Pension;

- (e) notice under section 76(4) [*benefit split of previously divided matured pension]* must be given in Form 5: Request in relation to a Matured Pension Divided under an Agreement or Court Order Made Before July 1, 1995 for Designation as Limited Member and for Payment of Benefits.
- (2) On receipt of a notice referred to in subsection (1), the administrator must send to the member a notice in Form 6: Notice of Receipt.
- (3) If a plan does not comply with a notice referred to in subsection (1) because it is incomplete, or because it fails to provide sufficient information for the plan to act on it, within 30 days after receiving the notice the administrator must give written notice of the inability to comply to both the spouse and the member.
- (4) The obligation under subsection (3) is satisfied if the written notice is mailed to the spouse and member at their addresses given on the applicable notice referred to in subsection (1).

Failure of a plan to comply with a notice

- 4. (1) If a plan fails to act on a notice referred to in section 3 of this regulation within 30 days of its delivery to the administrator, in proceedings under Part 6 of the Act or on application by the spouse under section 66 [*determination of ownership, possession or division of property]* of the Act, the Supreme Court may make orders as follows:
 - (a) in the case of a defined contribution plan that has not matured, directing the administrator to pay out the spouse's share from the plan in accordance with section 73 [*division of unmatured defined contribution plan]* of the Act;
 - (b) in the case of a defined benefit plan that has not matured, directing the administrator to
 - (i) pay out the commuted value of the spouse's share from the plan in accordance with section 74 (a) [*transfer of proportionate share]* of the Act, or
 - (ii) create a separate pension from the plan in favour of the spouse in accordance with section 74 (b) [*separate pension]* of the Act;

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- (c) in the case of a matured pension, directing the administrator to pay to the spouse, as applicable,
 - (i) a proportionate share of benefits paid under the pension in accordance with section 76(1) [*benefit split of matured pension*] of the Act, or
 - (ii) a postretirement survivor benefit in accordance with section 76(2) [*designated beneficiary of postretirement survivor benefit*] of the Act;
 - (d) otherwise requiring compliance with the Act.
- (2) The administrator is a party to proceedings under subsection (1) and the petition or notice of motion must be served on the administrator.

Calculation of commuted value

5. (1) If the calculation of the commuted value of a pension or a portion of a pension is required, for the purposes of determining that value in accordance with the *Pension Benefits Standards Act*, the time in question is whichever of the following dates is applicable, as if the member terminated employment of that date:
- (a) in the case of a transfer under section 74(a) [*transfer of share of unmatured defined benefit plan*] of the Act, the date for which the spouse requests in accordance with that section the transfer of a share of an unmatured defined benefit plan;
 - (b) in the case of a transfer under section 78(1) [*death of member*] of the Act, the date of death of the member;
 - (c) in the case of a transfer under section 78(3) [*death of limited member*] of the Act, the date of death of the limited member;
 - (d) in the case of a transfer required by a plan under section 79 [*transfer required by plan*] of the Act, the date on which the plan notifies the spouse that it is requiring the transfer.
- (2) For certainty, a request by a spouse under subsection (1) applies whether or not the member would be entitled to request a transfer on the applicable date.

Calculation of proportionate share

6. (1) This section applies if the calculation of a proportionate share of a pension, benefit or commuted value is required under this regulation or under any of the following sections of the Act:
- (a) section 74 (a) [*transfer share of unmatured defined benefit plan*];
 - (b) section 76(1) [*benefit split of matured pension*];
 - (c) section 77(1) [*division of extraprovincial plan*];
 - (d) section 78(3) [*death of limited member*];
 - (e) section 79 [*transfer required by plan*].

- (2) Subject to subsection (3), the proportionate share must be determined in accordance with the following formula:

$$\text{proportionate share} = \frac{1}{2} (A / B)$$

where

A = the pensionable service accumulated by the member from the date of marriage to the entitlement date for the spouse, excluding any pensionable service for that period purchased by and credited to the member after that entitlement date;

B = the total pensionable service accumulated by the member to the date that

- (a) the spouse's share is transferred from the plan,
- (b) the spouse begins to receive a separate pension, or
- (c) the spouse begins to receive a payment of benefits from the member or the plan.

- (3) If the determination of a proportionate share of a preretirement survivor benefit is required under section 78(1) [*death of member*] of the Act, the proportionate share must be determined in accordance with the following formula:

$$\text{proportionate share} = A / B$$

where

- A = the pensionable service accumulated by the member from the date of marriage to the entitlement date for the spouse, excluding any pensionable service for that period purchased by and credited to the member after that entitlement date;**
- B = the total pensionable service accumulated by the member to the date of the member's death.**

Transfer from plan to locked in retirement plan

- 7. If the Act requires or authorizes a plan to transfer an amount to the credit of a spouse, the transfer must be made either**
- (a) in accordance with section 33 (2) of the *Pension Benefits Standards Act*, or**
 - (b) to another account in the plan, either existing or created to receive the transfer, on the same basis as a transfer to another plan under section 33 (2) of the *Pension Benefits Standards Act*.**

Adjustment of a member's pension under defined benefit plan

- 8. (1) A member's pension or benefits in a defined benefit plan subject to a division to which Part 6 of the Act applies must be adjusted in accordance with this section.**
- (2) The plan must adjust the member's pension or benefits under it in accordance with subsection (3) to reflect the transfer of the value to the spouse or the spouse's estate if, under the Act, a spouse or a spouse's estate receives from a defined benefit plan**
- (a) a separate pension, or**
 - (b) a transfer of a proportionate share of the commuted value of a pension.**
- (3) An adjustment under subsection (2) must be on a neutral basis to the plan and the member as follows:**
- (a) if all of the member's pension is vested, the adjustment must be done reducing the member's pensionable service;**

- (b) in other cases, the adjustment must be done by deducting from the pension or benefits the present value, at the time of adjustment, of the amount paid or transferred to the credit of the spouse or the spouse's estate.
- (4) As an example of the applicant of subsection (3) (a), if the spouse's share of the member's pension is calculated using the proportionate share determined under section 6 (2) of this regulation and the proportionate share has not been modified by court order or agreement, the member's pensionable service is to be reduced by one-half of the pensionable service accumulated by the member from the date of marriage to the entitlement date for the spouse.
- (5) A reduction under subsection (3) (a) is only for the purposes of an adjustment under this section and does not affect the member's eligibility in relation to the pension or benefits.
- (6) If a spouse receives from a defined benefit plan a proportionate share of benefits under a pension, including pre-retirement survivor benefits, the person entitled to the benefits, but for the operation of Part 6 of the Act, receives the remainder of the benefits after the payment of the proportionate share.

Transfer of share from a defined contribution plan that is unmatured

9. (1) If, under section 73 [*division of unmatured defined contribution plan*] of the Act, a local plan that is a defined contribution plan is required to transfer an amount to the credit of a spouse of a member, the amount must be calculated in accordance with the following formula:

$$\text{transfer amount} = \frac{1}{2} (A-B)$$

where

A = the total of

- (a) the contributions to the plan to the credit of the member on the entitlement date for the spouse, and
- (b) the net investment returns allocated, or that are to be allocated, in respect of those contributions to the date the spouse's share is transferred by the plan;

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- B = the total of**
- (a) the contributions, if any, to the credit of the member on the date of marriage for the member and spouse, and**
 - (b) the net investment returns allocated, or that are to be allocated, in respect of those contributions to the date the spouse's share is transferred by the plan.**

- (2) If an administrator cannot otherwise make the calculation under subsection (1) for contributions made to a plan before Part 6 of the Act came into force, the administrator must determine the amount in relation to those contributions in accordance with the following formula and calculate the amount, if any, in relation to other contributions in accordance with subsection (1):**

$$\text{transfer amount} = \frac{1}{2} A \times C - B$$

where

- A = the months and parts of months from the date of marriage for the member and spouse or the date on which the member entered the plan, whichever is later, until the date on which Part 6 came into force;**
- B = the months and parts of months for which contributions to the plan are credited to the member until the date on which Part 6 came into force;**
- C = the total of**
- (a) the contributions to the plan to the credit of the member on the date Part 6 came into force, and**
 - (b) the net investment returns allocated, or that are to be allocated, in respect of those contributions to the date the spouse's share is transferred by the plan.**

Limited member's separate pension in a local defined benefit plan

- 10. A separate pension in favour of a spouse as a limited member under section 74 (b) [division of unmaturred defined benefit plan] of the Act must be**

- (a) based on a proportionate share 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,
- (b) converted into
 - (i) a single life pension, or
 - (ii) another form or combination of forms of pension that members of the plan may elect,such that the total actuarial present value of the separate pension is not less than the actuarial present value of the proportionate share credited to the spouse of the member's pension as if that share was a pension in the unadjusted normal form provided under the plan, and
- (c) adjusted in accordance with actuarial principles to take into account any difference between the age of the spouse and the member.

Calculation of a compensation payment

- 11. (1) This section applies if provision is made for satisfaction of pension entitlement by any of the following:
 - (a) a compensation payment under section 66 [*determination of ownership, possession or division of property*] of the Act;
 - (b) a compensation payment under section 80(1)(d) [*written agreements between member and spouse*] of the Act;
 - (c) a compensation payment or amount transferred under section 80(4) [*agreement between plan and spouse*] of the Act.
- (2) A compensation payment or transfer referred to in subsection (1) must be determined as a proportionate share of an amount equal to the present value of the future pension benefits payable to the member.
- (3) Without limiting the contingencies that may be considered in making a determination under subsection (2), the determination must make reasonable provision for the following contingencies:
 - (a) the possibility that the member may terminate employment or die before retirement;

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- (b) the possibility that the member may retire at an early, late or normal retirement date;
 - (c) the possibility that benefits being divided as family assets and paid under the plan will increase, whether by an automatic formula or on an ad hoc basis, after the date selected for valuing the benefits;
 - (d) to the extent that benefits being divided as family assets are related to future salary levels, the possibility that salary levels will increase after the date selected for valuing the benefits.
- (4) If the pension is not a vested pension at the date of valuation, the spouse may elect to
- (a) postpone valuation until it is ascertained whether the pension vests, or
 - (b) have the valuation proceed assuming the pension will vest, but adjusting it to take into account the contingency that the member may die or leave employment before vesting.

Age at which disability pensions to be dealt with as matured pension

12. The payment of a disability pension to a member after the member reaches age 60 is a matured pension for the purposes of Part 6 of the Act and this regulation.

Administrative costs

13. The amount to be paid to a plan by the spouse and member under section 81(1) *[administrative costs]* of the Act must not exceed whichever of the following is applicable:
- (a) \$500 for a defined benefit plan;
 - (b) \$150 for a defined contribution plan;
 - (c) \$650 for a hybrid plan.

Information to be provided by plan

14. (1) Within 60 days after receipt of a written request from a spouse who is entitled to information under section 81(1) [*information from plan*] of the Act, the plan must provide the spouse with any information necessary to value the interest of the applicable member in the pension, subject to the limit that, after the information is provided once to the spouse,
- (a) the plan is only required to provide the spouse with information that updates the information previously provided under this subsection, and
 - (b) the plan is only required to provide information referred to in paragraph (a) once in each calendar year.
- (2) At least once in each calendar year, a plan must provide the following information to a limited member:
- (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 pension;
 - (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 pension.
- (3) As an exception to subsection (2), after a limited member is in receipt of a separate pension under the Act, the limited member is entitled to information from the plan only in respect of the separate pension.
- (4) On written request of a spouse who
- (a) has delivered a notice under section 81(1) [*information from plan*] of the Act, and
 - (b) continues to have an interest in the pension,
- a plan must provide to the spouse the information referred to in subsection (2), subject to the limit that the plan is not required to provide the information more than once in any calendar year.
- (5) If information or notice is required to be given under this section, it must be given by ordinary mail sent to the last address provided by the person entitled to receive it.

Plan must give notice to spouse if member's interest may be affected

15. A plan must give a spouse who is entitled to information under section 81(1) *[information from plan]* of the Act, either as a limited member or as a spouse who has delivered a notice under that section, 30 days advance notice of any transaction relating to the applicable member's interest in the pension by reason of
- (a) the death of the member,
 - (b) retirement of the member, or
 - (c) direction given to the plan by the member.

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Note:

- These forms substantially follow the forms to the regulations published in Volume 38, No. 6 pp. 95 - 100 of the printed version of Part II of the British Columbia Gazette, although there may be some variation in formatting.
- The official version of these forms have not been officially updated to reflect the renumbering caused by the 1996 amendments to the *Family Relations Act*. They have been updated in this unofficial version, for convenience and may be used in this form.

The *Interpretation Act*, R.S.B.C. 1996, 238 provides:

28 (1) Where a form is prescribed by or under an enactment, deviations from it not affecting the substance or calculated to mislead, do not invalidate the form used.

FORM 1: Claim of Spouse to Interest in Member's Pension

Family Relations Act, section 82

To: Administrator of pension plan
Name of Plan: _____
Address of Plan: _____
(please print) _____

From: Spouse of member (Note: "spouse" includes a former spouse.)
Name: _____
Address: _____
Telephone: (home) _____ (work) _____
Social Insurance No.: _____

In relation to: Plan member
Name of member: _____
Address: _____
Telephone: (home) _____ (work) _____
Social Insurance or Pension Plan Identity Number: _____
Employer: _____

Declaration of Spouse Claiming Interest

I, _____ (name of spouse) declare that
(a) I was married to the member named above on _____ (date),
(b) I was separated from the member on _____ (date), and
(c) I am claiming an interest in the member's pension based on section 56 (1) of the
Family Relations Act (see below).

Signed (spouse) Date of declaration

Signed (Witness to signature of Spouse)
Name of Witness: _____
Address of Witness: _____

Family Relations Act, section 56:

- (1) Subject to this Part and Part 6, each spouse is entitled to an interest in each family asset on or after March 31, 1979, when
- (a) a separation agreement,
 - (b) a declaratory judgment under section 57, respecting the marriage is first made.
 - (c) an order for dissolution of marriage or judicial separation, or
 - (d) an order declaring the marriage null and void

FORM 2: Request for Designation as Limited Member of Pension Plan

Family Relations Act,
section 72

(Note: This form is for use in relation to ! a matured pension; ! an unmatured pension in a defined benefit plan; ! an agreement under s. 80(2) of the *Family Relations Act*.)

To: Administrator of pension plan
Name of Plan: _____
Address of Plan: _____
(please print) _____

From: Spouse of member (Note: "spouse" includes a former spouse.)
Name: _____
Address: _____
Telephone: (home) _____ (work) _____
Social Insurance No.: _____ Date of Birth: _____

In relation to: Plan member
Name of member: _____
Address: _____
Telephone: (home) _____ (work) _____
Social Insurance or Pension Plan Identity Number: _____
Employer: _____

Other required information:

! Date of marriage _____ ! Entitlement Date* for Spouse: _____

*(Note: This is the date on which the spouse became entitled to an interest in the member's pension in accordance with s. 56 (1) of the *Family Relations Act* (see below).)

! A copy of the separation agreement or court order on which the entitlement date is based**

** (Note: to be attached to or enclosed with this Form.)

Request: I request that I be designated as a limited member of your pension plan.
(If the pension is matured on the date of this request, this will also act as a request for the Plan to administer a benefit split of the pension in accordance with s. 76 (1) of the *Family Relations Act*.)

Signed (*Spouse*)

Date

Signed (*Witness to signature of Spouse*)

Name of Witness: _____

Address of Witness: _____

Family Relations Act, section 56:

- (1) Subject to this Part and Part 6, each spouse is entitled to an interest in each family asset on or after March 31, 1979, when
- | | |
|----------------------------------------------|---------------------------------------------------------------------|
| (a) a separation agreement, | (c) an order for dissolution of marriage or judicial separation, or |
| (b) a declaratory judgment under section 57, | (d) an order declaring the marriage null and void |
- respecting the marriage is first made.

FORM 3:**Request for Transfer from
Unmatured Defined Contribution Plan***Family Relations Act, section 73***To: Administrator of pension plan**

Name of Plan: _____

Address of Plan: _____

(please print) _____**From: Spouse of member** *(Note: "spouse" includes a former spouse.)*

Name: _____

Address: _____

Telephone: (home) _____ (work) _____

Social Insurance No.: _____

In relation to: Plan member

Name of member: _____

Address: _____

Telephone: (home) _____ (work) _____

Social Insurance or Pension Plan Identity Number: _____

Employer: _____

Other required information:

! Date of marriage _____ ! Entitlement Date* for Spouse: _____

*(Note: This is the date on which the spouse became entitled to an interest in the member's pension in accordance with s. 56 (1) of the *Family Relations Act* (see below).)

! A copy of the separation agreement or court order on which the entitlement date is based**

** (Note: to be attached to or enclosed with this Form.)**Request:** I request that you

- (a) transfer my share of the member's account balance by a transfer that is permitted by s. 33 (2) of the *Pension Benefits Standards Act*, and
- (b) advise me in writing of the information that you require in order to do this.

Signed (*Spouse*)_____
Date_____
Signed (*Witness to signature of Spouse*)

Name of Witness: _____

Address of Witness: _____

Family Relations Act, section 56:

- (1) Subject to this Part and Part 6, each spouse is entitled to an interest in each family asset on or after March 31, 1979, when
- (a) a separation agreement,
 - (b) a declaratory judgment under section 57,
 - (c) an order for dissolution of marriage or judicial separation, or
 - (d) an order declaring the marriage null and void respecting the marriage is first made.

FORM 4: Request by Limited Member for Transfer or Pension

Family Relations Act,
section 74 (Note: This form is for use in relation to an unmatred pension in a defined benefit Plan.)

To: Administrator of pension plan

Name of Plan: _____
Address of Plan: _____
(please print) _____

From: Spouse of member (Note: "spouse" includes a former spouse.)

Name: _____
Address: _____
Telephone: (home) _____ (work) _____
Social Insurance No.: _____ Date of Birth: _____

In relation to: Plan member

Name of member: _____
Address: _____
Telephone: (home) _____ (work) _____
Social Insurance or Pension Plan Identity Number: _____
Employer: _____

Request:

As the limited member named above, I request: (check the applicable request)

that you

- (a) transfer my share of the member's pension value by a transfer that is permitted under section 33 (2) of the *Pension Benefits Standards Act*, and
- (b) advise me in writing of the information that you require in order to do this.

**(Note: This option is only available if the member is eligible to retire but has not retired.)*

that you provide me with a separate pension from the plan when the member retires.

Signed (Limited Member)

Date

Signed (Witness to signature of Limited Member)

Name of Witness: _____

Address of Witness: _____

**FORM 5: Request in relation to a Matured Pension Divided
under an Agreement or Court Order Made Before July 1, 1995
! for Designation as Limited Member,
and**

Family Relations Act, section 76 (4) ! **for Payment of Benefits**

To: Administrator of pension plan

Name of Plan: _____
Address of Plan: _____
(please print) _____

From: Spouse of member *(Note: "spouse" includes a former spouse.)*

Name: _____
Address: _____
Telephone: (home) _____ (work) _____
Social Insurance No.: _____ Date of Birth: _____

In relation to: Plan member

Name of member: _____
Address: _____
Telephone: (home) _____ (work) _____
Social Insurance or Pension Plan Identity Number: _____
Employer: _____

Other required information:

! Date of marriage _____ ! Entitlement Date* for Spouse: _____

*(Note: This is the date on which the spouse became entitled to an interest in the member's pension in accordance with s. 56 (1) of the *Family Relations Act* (see below).)

! A copy of the separation agreement or court order on which the entitlement date is based**

** (Note: to be attached to or enclosed with this Form.)

Request: I request that

- (a) I be designated as a limited member of your pension Plan, and
- (b) you administer the division of the member's matured pension by providing me with separate payment of benefits in accordance with s. 76 (4) of the *Family Relations Act*.

Signed (*Spouse*) _____ Date

Signed (*Witness to signature of Spouse*)
Name of Witness: _____
Address of Witness: _____

Family Relations Act, section 56:

- (1) Subject to this Part and Part 6, each spouse is entitled to an interest in each family asset on or after March 31, 1979, when
 - (a) a separation agreement,
 - (c) an order for dissolution of marriage or judicial separation, or

(b) a declaratory judgment under section 57,
respecting the marriage is first made.

(d) an order declaring the marriage null and void

Form 6: Notice of Receipt

Family Relations Act, Part 6

To: Plan Member

Name of Member: _____

Address: _____

(please print) _____

Social Insurance or Pension Plan Identity Number: _____

Employer: _____

From: Pension Plan

Name of Pension Plan: _____

Address of Plan: _____

Contact Person: _____

Telephone: _____

Receipt of Notice:

We have received the following notice under the *Family Relations Act* in relation to your membership in our pension Plan:

- Form 1: Claim of Spouse to Interest in Member's Pension
- Form 2: Request for Designation as Limited Member of Pension Plan
- Form 3: Request for Transfer from Unmatured Defined Contribution Plan
- Form 4: Request by Limited Member for Transfer or Pension
- Form 5: Request in relation to a Matured Pension Divided under an Agreement or Court Order Made Before July 1, 1995 for Designation as Limited Member and for Payment of Benefits

From: _____

(name as shown on notice)

Dated: _____
(*date of notice*)

APPENDIX C
CHECKLIST FOR PLAN ADMINISTRATORS

**Overview of
Pension Division Under
Part 6 of the Family Relations Act**

Section references are to the *Family Relations Act* R.S.B.C. 1996, c. 128, as amended.

Regulation references are to the *Division of Pensions Regulation*, B.C. Reg. 77/95.

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 a pension and the word “spouse” is used to refer to the person who claims a share of the pension.

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.

Plans 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:

- ! what the spouse is entitled to
- ! what the Plan will do
- ! what the spouse must do to come within Part 6 of the *FRA*:
which forms to file and what else the Plan requires

Have a supply of the forms handy.

Checklists For Plan Administrators

Administrator Checklist 1: Form 1 is Received

The Plan receives Form 1: Claim of Spouse to Interest in Member's Pension: What is the Plan supposed to do?

1. The form does not request the Plan to divide the pension.
 2. The pension may end up being divided without the Plan's involvement at all. (*e.g.*, by the member transferring other property to satisfy the spouse's share).
 3. Form 1 simply places the Plan on notice that the spouse is claiming an interest. A Plan can charge a fee for dividing a pension, but the administrative fee can't be charged at this point (not until the plan receives a Form 2 or 3).
 4. Filing a Form 1 with a Plan places two responsibilities on the Plan:
 - ! the Plan must provide the spouse with information about the member's pension within 60 days of a request by the spouse. The spouse cannot request information more often than once in each calendar year. [Regulation 14]
 - ! the Plan must not act upon a direction about the member's pension (*e.g.*, by reason of death, employment termination, retirement) that will prejudice the spouse's interest without first giving the spouse 30 days notice that the transaction is going to take place. [Regulation 15]
 5. Notice is sent to the address the spouse provides on Form 1, unless the spouse has provided the Plan with a change of address. [Regulation 14(5)]
 6. The Plan must
 - ! notify the member that Form 1 has been received, using Form 6.
 - ! be able to track a Form 1 by reference to the member's pension, so that when any instruction is received with respect to the pension, notice can be given to the spouse.
-

Checklists For Plan Administrators

[The Plan will want to remove the spouse's name from the system if the pension is not divided under Part 6. There is no form for this. A letter from the spouse should be satisfactory.]

Checklists For Plan Administrators

Administrator Checklist 2: Form 2 is Received

Unmatured Pension in a Defined Benefit Plan

Unmatured Pension in a Hybrid Plan

Any Matured Pension

The Plan Receives Form 2: Request for Designation as Limited Member of Pension Plan: What is the Plan Supposed to Do?

1. Form 2 is a request by the spouse to be designated a “limited member” of the Plan. It must be accompanied by the separation agreement or court order that gives the spouse an interest in the pension.

2. *If the member has not yet retired*, the Plan must
 - (a) give notice to the member in Form 6 that the Form 2 has been received.

 - (b) record the spouse’s interest in the member’s pension [s. 72] so that when anything takes place with respect to the member’s pension the limited member’s interest is not overlooked. Paying out the limited member’s share in the pension is deferred. [See 2(d) of this Checklist]

 - (c) be able to give the limited member once a year the same information about the Plan given to members. [Regulation 14(2)]

 - (d) pay out the limited member’s share when one of the following events takes place:
 - ! the limited member dies before member retires: the share is paid to the limited member’s estate. [s. 78(3)]

 - ! the member dies before retiring: the limited member is entitled to a share of the death benefit. [s. 78(1)]

 - ! the member reaches a retirement age, but chooses not to retire: the limited member can elect to have the share transferred to a pension vehicle, such as an RRSP. [s. 74(a); Form 4]

Checklists For Plan Administrators

Regulation 7 sets out the transfer options: *e.g.*, to purchase an annuity, or to transfer to another pension plan, locked-in RRSP, or an account in the same Plan.

If the pension is vested, the funds are transferred on a locked-in basis.

! the member retires: if the limited member still has not received a share, at this time the limited member is entitled to a separate pension from the Plan. [s. 74(b); Regulation 10; Form 4]

(f) when the limited member's share is paid out, adjust the member's remaining interest in the pension. [Regulation 8]

3. *If the member has already retired*, the Plan must:

(a) give the member Notice in Form 6 that the Form 2 was received.

(b) record the spouse as a limited member.

(c) pay directly to the limited member a share of each payment made to the member, making appropriate withholding deductions. [s. 72(2); s. 76(1)]

Checklists For Plan Administrators

Administrator Checklist 3: Form 3 is Received

Unmatured Pension in a Defined Contribution Plan

The Plan Receives a Form 3: Request for Transfer From Unmatured Defined Contribution Plan: What is the Plan Supposed to Do?

1. *If the member has not yet retired*, the Plan must:
 - (a) give the member Notice in Form 6 that the Form 3 was received.
 - (b) request directions from the spouse concerning where the spouse's share is to be paid (*e.g.*, to purchase an annuity, to transfer to another pension plan, locked-in RRSP, or an account in the same Plan). [Regulation 7] If the pension is vested, the funds are transferred on a locked-in basis.
 - (c) pay out the spouse's share as directed.

Note: in order to calculate the division, Plans must keep information that will allow them to value pensions at relevant past dates starting from July 1, 1995. Plans that are unable to value pensions at dates before July 1, 1995 may estimate the value according to a pro-rata formula set out in Regulation 9(2).

2. *If the member has already retired*, the Plan must:
 - (a) require a Form 2. (Form 3 would not be used. The pension has matured. The transfer option is no longer available. 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 2 is received, give the member Notice in Form 6 that the Form 2 was received.
 - (c) record the spouse as a limited member.
 - (d) pay directly to the limited member a share of each payment made to the member, making appropriate withholding deductions. [s. 72(2); s. 76(1)]

APPENDIX D
CHECKLISTS FOR LAWYERS

Pension Division Under
Part 6 of the Family Relations Act

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.

Overview :

Section references are to the *Family Relations Act*, R.S.B.C. 1996, c. 128, as amended.

Regulation references are to the *Division of Pensions Regulation*, B.C. Reg. 77/95.

References to Forms are to the forms set out in the *Division of Pensions Regulation*.

Unless clearly indicated, “member” means the person who has a pension. “Spouse” means the person claiming a share of the pension.

1. Checklists:

- ! Checklist1: Dividing a Matured Pension under Part 6 of the *FRA*
- ! Checklist2: **If the member has retired** and the client already has an agreement or court order made before July 1, 1995 dividing the pension by a benefit split
- ! Checklist3: Dividing an Unmatured Pension in a Defined Contribution Plan under Part 6 of the *FRA*
- ! Checklist4: Dividing an Unmatured Pension in a Defined Benefit Plan under Part 6 of the *FRA*
- ! Checklist5: **If the member has not yet retired**, but the client already has an agreement or court order made before July 1, 1995 dividing the pension by a benefit split

Checklist1: Dividing a Matured Pension (i.e., the member has already retired)

Checklists for Lawyers

[Agreement/Order made after June 30, 1995]

1. prepare *Form 1: Claim of Spouse to Interest in Member's Pension* and deliver it to the Plan (or annuity issuer) with
 - ! a certified copy of the spouse's marriage certificate and birth certificate,
 - ! authorization from the spouse for the Plan (or annuity issuer) to communicate with you or your nominee, and
 - ! request information from the Plan respecting the pension. [FRA, s. 82, Reg. 14]
2. negotiate or litigate the division of the pension 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 2: Request for Designation as Limited Member of Pension Plan*, attach the agreement or court order, and deliver it to the Plan (or annuity issuer). [Ss. 72 and 76]
4. the Plan may require payment of an administrative fee. [Reg. 13 sets out the maximum amounts that may be charged]

[The pension will be divided by a benefit split administered by the Plan.]

Checklists for Lawyers

Checklist2: If the member has retired and the client already has an agreement or court order made before July 1, 1995 dividing the pension by a benefit split

Part 6 of the FRA applies to court orders or agreements made on or after July 1, 1995. [S. 71]

Part 6, however, can also apply in some cases to court orders or agreements made before July 1, 1995.

If the member has retired and the division is being carried out by a benefit split administered by the member, the Plan can be required to administer the benefit split.

1. prepare Form 5: *Request in relation to a Matured Pension Divided under an Agreement or Court Order Made Before July 1, 1995*, attach the agreement or court order which set up the benefit split, and deliver it to the Plan. [S. 76(4)]
2. the Plan may require payment of an administrative fee. [Reg. 13 sets out the maximum amounts that may be charged]

If the pension division is working smoothly, the spouse may decide not to opt in, particularly if the Plan is charging an administrative fee.

[The pension will be divided by a benefit split administered by the Plan.]

Checklists for Lawyers

Checklist 3: Dividing an Unmatured Pension (i.e., member has not yet retired) in a Defined Contribution Plan [Agreement/Order made after June 30, 1995]

1. prepare *Form 1: Claim of Spouse to Interest in Member's Pension* and deliver it to the Plan with
 - ! a certified copy of the spouse's marriage certificate and birth certificate,
 - ! authorization from the spouse for the Plan to communicate with you or your nominee, and
 - ! request information from the Plan respecting the pension. [FRA, s. 82, Reg. 14]
2. negotiate or litigate the division of the pension 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 3: Request for Transfer from Unmatured Defined Contribution Plan*, attach the agreement or court order, and deliver it to the Plan. [S. 73, Reg. 9]
4. the Plan may require payment of an administrative fee. [Reg. 13 sets out the maximum amounts that may be charged]

[The pension will be divided by transferring to the credit of the spouse a share of contributions plus investment returns accumulated during the marriage to a prescribed pension vehicle, such as an RRSP. In most cases, the funds will be locked-in, meaning they can't simply be withdrawn, but must be used to provide a life income.]

Checklists for Lawyers

Checklist 4: Dividing an Unmatured Pension (i.e., the member has not yet retired) in a Defined Benefit Plan [Agreement/Order made after June 30, 1995]

1. prepare *Form 1: Claim of Spouse to Interest in Member's Pension* and deliver it to the Plan with
 - ! a certified copy of the spouse's marriage certificate and birth certificate, and
 - ! authorization from the spouse for the Plan to communicate with you or your nominee, and
 - ! request information from the Plan respecting the pension. [FRA, s. 82, Reg. 14]
2. negotiate or litigate the division of the pension 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 2: Request for Designation as Limited Member of Pension Plan*, attach the agreement or court order, and deliver it to the Plan [Ss. 72 and 74]
4. the Plan may require payment of an administrative fee. [Reg. 13 sets out the maximum amounts that may be charged]
5. provide the spouse with a copy of *Form 4: Request by Limited Member for Transfer of Pension* and advise about the future election between (a) taking a transfer of commuted value on or after the member becomes eligible to retire, or (b) waiting until the member retires and taking a separate pension. [S. 74, Reg. 5, Reg. 10]

[The pension will be divided by the Plan either (a) transferring a portion of commuted value to the credit of the spouse to a prescribed pension vehicle, such as an RRSP, or (b) providing the spouse with a separate pension. If the spouse elects the transfer of the commuted value, in most cases, the funds will be locked-in, meaning they can't simply be withdrawn, but must be used to provide a life income.]

Checklists for Lawyers

Checklist5: If the member has not yet retired, but the client already has an agreement or court order made before July 1, 1995 dividing the pension by a benefit split

Part 6 of the FRA applies to court orders or agreements made on or after July 1, 1995. [S. 71]

Part 6, however, can also apply in some cases to court orders or agreements made before July 1, 1995.

If the member has not yet retired, the member and spouse can agree to have Part 6 of the legislation apply to the agreement or court order dividing the pension. [S. 80(2)]

If the agreement or court order requires the member to sever the spouse's interest when that becomes possible, the parties are deemed to have agreed to opt-in to Part 6. [S. 80(2.2)]

1. prepare the new agreement to opt into Part 6 (if the parties are not deemed to have agreed to opt in).
2. prepare *Form 2: Request for Designation as Limited Member of Pension Plan*, attach original agreement or court order setting up the pension division.
3. deliver to the Plan the Opting-in Agreement (if needed), the *Form 2*, and a certified copy of the spouse's marriage certificate and birth certificate. [Ss. 72 and 74]
4. the Plan may require payment of an administrative fee. [Reg. 13 sets out the maximum amounts that may be charged]
5. *if the pension is in a defined contribution plan*, the spouse's share will be transferred immediately (e.g., to an RRSP). *If the pension is in a defined benefit plan*, provide the spouse with a copy of *Form 4: Request by Limited Member for Transfer of Pension* and advise about the future election between (a) taking a transfer of commuted value on or after the member becomes eligible to retire, or (b) waiting until the member retires and taking a separate pension.[S.

74, Reg. 5, Reg. 10]

[The pension will be divided by either (a) transferring a portion of commuted value to the credit of the spouse to a prescribed pension vehicle, such as an RRSP, or (b) the Plan providing a the spouse with a separate pension. If the spouse's share is in the form of a transfer of commuted value, in most cases, the funds will be locked-in, meaning they can't simply be withdrawn, but must be used to provide a life income.]

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