



QUESTIONS AND ANSWERS ABOUT PENSION DIVISION ON THE BREAKDOWN OF A RELATIONSHIP IN BRITISH COLUMBIA

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

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Introductory Note

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

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

A third edition was prepared to address the changes to family law and the pension division rules introduced by the *Family Law Act*, S.B.C., 2011, c. 25. The *FLA* is a major restatement of family law that will have far-reaching repercussions for decades to come. The third edition was published at the same time as the *FLA* came into force (March, 2013).

We now have several years' experience with the *FLA*, so a review of the *Q&A* is timely for that reason, and also because a new *Pension Benefits Standards Act*, S.B.C. 2012, c. 30, came into force September 30th, 2015. The *PBSA* substantially revised the law that governs pension plans and benefits, and also introduced a series of corollary amendments to the *FLA* which need to be considered to determine whether those changes are substantive (or required solely so that the *FLA* works in harmony with the *PBSA*).

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

The materials address questions raised by plan members and their spouses, plan administrators, plan advisors, actuaries and lawyers. Not all of the information will be of interest to people in all of these groups. Plan administrators, for example, will see a great deal of information concerning how to determine reasonable shares between member and spouse on the breakdown of a relationship, but issues like these will be resolved long before the administrator is asked to assist in actually dividing

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the pension entitlement. The information has been sorted into Chapters based on whether the member's pension has commenced at the time of the breakdown of a relationship, the kind of plan, and other categories, but to divide the information so that it would be useful to specific groups, such as just plan administrators or just lawyers or just former spouses, would have led to a great deal of duplication.

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

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

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

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

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

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CHAPTER 1. INTRODUCTION, GENERAL INFORMATION AND BASIC CONCEPTS

In 1979, the British Columbia Family Relations Act ("FRA") was enacted. It provided that pensions were family assets that were divisible between spouses when their relationship ended, but detailed rules for dividing pension benefits were not available until 1995, when Part 6 of the FRA was enacted. Those rules provided for the assistance of plan administrators in dividing pension entitlement on the breakdown of a relationship. Although many parts of that legislation have been restated (and revised) in Part 6 of the Family Law Act ("FLA"), the outlines of pension division remain very familiar to those having experience under the FRA.

PLANS SUBJECT TO B.C. LEGISLATION

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

OVERVIEW OF B.C.'S PENSION DIVISION RULES

The rules for pension division make distinctions for dividing benefits depending upon whether or not (1) the pension has commenced at the time the pension division arrangements are finalized, and (2) the kind of plan. (The rules are set out in a convenient table-- see Table 2 below in this Chapter.)

TYPES OF PLANS

Pension plans take one of two basic forms. If benefits are determined by a formula (such as $1.5\% \times \text{pensionable service} \times \text{highest average earnings}$), this is referred to as a "benefit formula provision". If benefits are determined by contributions and investment returns, this is referred to as a "defined contribution provision".

DIVIDING BENEFITS DETERMINED BY A BENEFIT FORMULA PROVISION

If the benefits are determined by a benefit formula provision and the pension has not commenced when the pension division arrangements are finalized, division is deferred until the member is eligible to have the pension commence. The spouse is designated a "limited member" of the plan. After the member is eligible under the terms of the plan to have the pension commence (usually at age 55), the limited member may choose between receiving a specified share of the benefits by either (a) a separate pension payable for the limited member's lifetime, or (b) a transfer of the commuted value of the limited member's share from the plan. (Depending on the circumstances, the transfer may be made to an RRSP, a LIRA, a LIF, another pension plan, another account in the

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same pension plan or used to purchase an annuity). [See Chapter 2] [See Chapter 10 for more information about transfers from a plan.]

DIVIDING BENEFITS DETERMINED BY A DEFINED CONTRIBUTION PROVISION

If the benefits are in a defined contribution account, division takes place immediately. The administrator transfers half of the portion of the benefits acquired during the relationship (plus net investment returns on that portion) from the plan (to, for example, an RRSP, a LIRA, a LIF, or another pension plan) for the spouse. In some cases, the former spouse can become a limited member and keep the benefits in the plan. [See Chapter 3] [See Chapter 10 for more information about transfers from a plan.]

These rules apply equally to benefits in a pooled registered pension plan, which is a type of plan in which benefits are determined by a defined contribution provision. [Pooled Registered Pension Plans Act, S.B.C. 2014, c. 17; Pooled Registered Pension Plans Act, S.C. 2012, c. 16]

IF THE PENSION HAS COMMENCED

If the member's pension has commenced, the pension is said to be "matured." The pension division rules change if the pension division arrangements are not finalized until after the pension has commenced. Instead of the former spouse receiving a separate share of the pension entitlement, the only option available is to divide the income stream between the parties. [See Chapter 5] The former spouse must become a limited member of the plan, and the administrator will be required to divide each monthly payment, make separate tax withholdings for member and spouse, and pay each of them their respective shares separately. The limited member will receive a share of the pension until the earliest of the death of the limited member, the member, or the termination of the pension.

FORMS

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

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

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

- *The Family Law Act Transition Guide (a publication of Continuing*

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Legal Education of British Columbia)

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

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

Yes. [FLA, s. 3] Family property, including benefits under pension plans, are divisible between legally married spouses and spouses who have lived in a marriage-like relationship of at least 2 years. See para. 13.22-3 and 13.26.

(This was not the case under the FRA. Under the FRA, unmarried spouses were not automatically entitled to a share of pension benefits, but only if the parties agreed to divide them, or entitlement could be established based on principles of unjust enrichment: see para. 1.1 of the 2001 Q&A).

1.1A Spouse defined (2) Does “spouse” in Part 6 of the FLA include someone who is separated or divorced from their partner?

Yes, a “spouse” includes a “former spouse”. [FLA, s. 3(2)]

1.2 Can an annuity be divided between the parties? If the pension is being provided through an annuity purchased from an insurance company, does Part 6 apply?

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

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**1.3 Need for
professional
advice?**

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

There is no requirement to involve professionals. All that is really needed is a very simple agreement made between former spouses, that:

- (a) contains sufficient information to identify the plan or respecting the employment under which the member accrued the benefits,
- (b) provides that the benefits are to be divided between the parties (it helps to refer to Part 6, but Part 6 will apply even if not specifically referred to in the agreement), and
- (c) sets out the dates for determining the spouse's share of the benefits.

[See para. 2.22, 11.3 and 13.12] If the agreement does not set out a percentage, then the parties will each receive a 50% share of the benefits that accrued during the specified period. Form P9 in the *Division of Pensions Regulation* is an agreement that can be used if the parties choose.

The pension division agreement would be sent to the administrator of the plan with prescribed Forms.

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

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

**1.4 Need for a plan
amendment?**

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

No. Pension plans are governed by the *Pension Benefits Standards Act*, S.B.C. 2012, c. 30 (the "PBSA") and the *Pension Benefits Standards Regulation*, B.C. Reg. 71/2015.

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The required provisions for pension plans are specified in Part 3 of the *PBSA*. There is no requirement in the *PBSA* for a plan to contain provisions with respect to the division of pension benefits upon the breakdown of a relationship. But a plan must not contain anything in derogation of the provisions of the *PBSA* or the *FLA* with respect to the division of pension benefits. The *PBSA* expressly provides that benefits under a pension plan are subject to an order or agreement made under Part 6 of the *FLA* (*PBSA*, s. 77). The *PBSA* also provides that the prohibition against assigning or charging benefits does not apply to an agreement or court order dividing benefits because of the breakdown of a relationship (*PBSA*, s. 70(3)(c)).

[See, however, para. 5.13]

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

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

Yes. *FLA*, s. 134 requires that an agreement or order must be sent to the administrator in order to divide the benefits. And *FLA*, s. 111(2) provides that if an order or agreement representing a final property settlement is silent about entitlement to benefits, the benefits are deemed to be allocated to the member. [See para. 6.15, 11.17 and 14.14 for the general rule, and para. 13.24 for what the court can do if the agreement is silent about the pension entitlement.]

1.6 *Will Part 6 apply in every case?*

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

No.

In every case, an option open to the member and spouse is for them to agree that the spouse will waive entitlement to benefits [*FLA*, s. 127(1)(b)].

Usually the spouse's waiver will be in exchange for a compensation payment, the transfer of another asset, or the member waiving rights to an asset owned by the spouse. If the spouse waives entitlement, Part 6 becomes irrelevant, except with respect to rules for valuing the compensation payment. [*FLA*, s. 128, Reg., s. 27]

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

- i. the spouse's share of the pension benefits is very small (because of a short relationship or because the member has not earned very much entitlement),
- ii. the member wants to keep the pension benefits, or the spouse wants to receive other assets instead (such as the family residence), and an overall equal division of assets can be achieved by dividing other property, or
- iii. the spouse has separate pension entitlement of similar value (or any difference in value between the parties' benefits can be adjusted by a compensation payment).

Determining an appropriate compensation payment can be quite complicated and often requires the assistance of an actuary.

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

If the parties have started the process of dividing pension benefits by sending documents and other Forms to the administrator, but later decide not to divide the pension benefits: *see* para. 15.40.

1.7 Referring to Part 6

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

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

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

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

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The easiest way is to check with the plan administrator, who should be able to confirm this for you. As well, many provincial pension regulators maintain publicly-accessible online registries of registered pension plans. For example, the Financial Institutions Commission of B.C. (“FICOM”) maintains an online list of all pension plans registered in British Columbia.

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

“Local plan” is a defined term. [*FLA*, s. 110] Basically, a “local plan” is:

- (a) any B.C. public sector plan, and
- (b) any private sector plan registered in B.C. under the *PBSA*, or registered in another jurisdiction but the member earned pension entitlement while employed in B.C. (A person is deemed to be employed in the province where the employer has an establishment to which the person is required to report for work: *PBSA*, s. 1(7). See, however, *PBSA*, s. 1(8), if the person is not required to work at the employer's establishment.)

“Local plan” would also include any plan with members employed in B.C. (para (b) of the definition).

“Local plan,” also includes:

- (c) a private sector plan registered under the federal *Pension Benefits Standards Act*, [see para. 1.11] but does not include a federal public sector plan.

Federal Public Sector Plans - Federal Pension Benefits Division Act

Public sector pension benefits under the following federal statutes are divisible under the federal *Pension Benefits Division Act*:

- *Canadian Forces Superannuation Act*
- *Defense Services Pension Continuation Act*
- *Diplomatic Service (Special) Superannuation Act*
- *Governor General Act*
- *Lieutenant Governors Superannuation Act*

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- *Members of Parliament Retiring Allowances Act*
- *Public Service Superannuation Act*
- *Royal Canadian Mounted Police Pension Continuation Act*
- *Royal Canadian Mounted Police Superannuation Act*

An all too common error (sometimes even made by judges) is to assume that the *Pension Benefits Division Act* applies to all federally regulated plans. It does not. For example, the *PBDA* does not apply to the Canada Post Plan, nor the Air Canada Pension Plans. These are examples of federally regulated *private occupational* plans (as opposed to *public sector* plans).

If the benefits under federally regulated private occupational plans were earned through employment in B.C., they are subject to Part 6 of the *FLA*.

1.9 Working in different provinces

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

Alberta: 1980-1995
Saskatchewan: 1995-2000
B.C.: 2000-2012

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

Usually, where a member accrues benefits under a single plan, but from employment in different provinces over a period of years, the applicable pension and family law will be determined by the province where the member was accruing benefits when the relationship ended.

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

1. which province’s courts have jurisdiction to hear the matter?
2. which province’s laws determine entitlement to family property when a relationship ends?
3. which province’s laws determine how to divide the benefits?

Most of the provinces have adopted the same rule that applies under the B.C. *PBSA* for determining which province’s pension legislation applies. Even if the benefits have been earned in a number of different jurisdictions, the whole of the benefits

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are subject to the laws of the province where pension entitlement was last earned before the “event” (such as pension commencement, or the breakdown of a relationship) takes place. [*PBSA*, s. 1(9)]

The rules for determining the applicable family law are different, but often reach a similar result. Suppose, for example, that the member lives and works in Alberta and acquires benefits under a plan with members in Alberta and B.C. The member and the member's spouse separate and the member's spouse moves to B.C. After living in B.C. for some years, the former spouse commences proceedings in B.C. for a divorce, support and a share of family property, including the pension benefits. A B.C. court would have jurisdiction to hear the matter if the spouse is “habitually resident” in B.C. [*FLA*, s. 106(2)(c)], and the plan would qualify as a “local plan” because of its B.C. members. [*FLA*, s. 110, definition of “local plan” para. (b)(ii), see para. 1.8] But the B.C. court would not necessarily take jurisdiction over the matter unless it considered that there was a real and substantial connection with B.C. Even if the B.C. court accepts jurisdiction, it would not automatically apply B.C. law. It would apply to the relationship the law of the jurisdiction where the parties habitually resided together (in this case Alberta). And it would also determine entitlement to assets using Alberta law. [*See* para. 1.15]

B.C. has signed the 2016 Agreement Respecting Multi-Jurisdictional Pension Plans. The other signatories are, from west to east, Saskatchewan, Ontario, Quebec and Nova Scotia. The 2016 Agreement may affect the discussion above, but since it is such a recent development, its scope is yet to be explored. In the absence of the 2016 Agreement, plans with members in more than one jurisdiction would have to face the supervisory and regulatory burden imposed by each of those jurisdictions. The object of the 2016 Agreement is to specify the pension rules that apply to a multi-jurisdictional plan, and provide for a single pension supervisory authority to exercise all of the supervisory and regulatory powers over that plan. Section 7 of the 2016 Agreement selects the applicable pension legislation for determining pension benefits by the pension legislation that applied:

- (a) at the time the person's benefits were determined, if the person was still accruing benefits under the plan at that time; or
- (b) at the time the person ceased accruing benefits under the plan, if the person was no longer accruing benefits under the plan at the time the person's benefits were determined.

While the 2016 Agreement provides rules for determining the applicable pension legislation, it does not specify which family property regime applies to multi-

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jurisdictional plans. Some jurisdictions set out the pension division rules in their pension legislation, so this may not be an issue in those jurisdictions. But B.C.'s pension division rules are in the *FLA*. An additional complication is that the remaining provincial jurisdictions--Alberta, Manitoba, New Brunswick and Newfoundland and Labrador--remain subject to the 1968 Memorandum of Reciprocal Agreement and plans with federal members are subject to the 2000 bilateral agreement between Canada and British Columbia.

This is, therefore, an area where the legal principles are still in flux.

1.10 Employment termination benefits

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

No. Part 6 applies to benefits in pension plans (and its main significance is that it requires the assistance of the plan administrator in dividing those pension benefits).

Courts have held that various termination or severance benefits payable by an employer are divisible between the parties when the relationship ends (under Part 5). [See, for example]

But assisting in the division of severance benefits, or other benefits payable on the termination of employment, that are not part of the pension plan, is not the responsibility of the plan administrator. [See *Pensions and Benefits: Fundamentals of Pensions and Pension Division for Family Lawyers* (B.C. Continuing Legal Education Society, 2011) at XXI, "Other Employment Benefits"]

1.11 Federal PBSA

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

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

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

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

The reason the federal *PBSA* provides that provincial pension division law applies is because of Canada's constitutional law, which carefully defines matters that are within federal jurisdiction and matters that are within provincial jurisdiction. Issues of “property and civil rights” are exclusively a provincial matter and this category includes family law and, as such, the division of family property. The division of pension benefits between former spouses when the relationship ends is therefore an issue of “property and civil rights.”. Section 25(2) of the federal *PBSA* merely stipulates what Canadian constitutional law requires. Any other position would render this aspect of the federal *PBSA* unenforceable because it would be unconstitutional.

As a matter of constitutional law, the federal government has express legislative authority over federal undertakings. It is ancillary to that legislative authority to deal with related issues (such as pension benefits for employees working in the federally regulated undertakings). So the federal government has legislative authority to deal with these types of benefits. But it cannot use that legislative authority to override provincial jurisdiction.

Some have taken the position that if there is a conflict between the provisions of B.C. law and federal law respecting pension division issues, the federal law necessarily prevails. This is incorrect.

If both jurisdictions are competent to legislate in the area in question, then often conflicts can be dealt with through the application of principles of “paramountcy,” which are much more nuanced than most people who are not constitutional experts expect, and is not simply a question of saying that one Act trumps another. It is an approach to constitutional law which typically allows provincial and federal law to co-exist unless something permitted under one set of laws is prohibited under the other.

Where there is some kind of unavoidable conflict, principles of paramountcy do not automatically provide that federal law outweighs provincial law. That question is

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determined by the constitutional arrangements allocating how powers were allocated between the federal and provincial governments.

To the extent that there is an operational conflict between federal and provincial legislation on a question of pension division where the provisions cannot co-exist, it is possible that federal legislation would be found to govern based on principles of paramountcy, but this question does not need to be addressed because the federal *PBSA* expressly says that provincial pension division law governs.

Provincial competence in this sphere extends to both legislation and regulations pertaining to pension division on the breakdown of a relationship. Any administrator, for example, that ignores the obligations imposed by a Form P1 on the basis that it is a regulatory provision is incurring substantial risk. Also, the whole point of B.C.'s Forms is to reduce the administrator's exposure to risk and liability, so declining to use them based on arguments of paramountcy, even if legitimate, would not be a sensible practice.

Some administrators of federally regulated plans have taken the position that they are free to ignore provincial law as it applies to pension division issues, but have lost every case in which this issue has been raised and are risking the possibility of incurring possibly substantial legal liability. The federal Superintendent of Pensions has confirmed that provincial law applies to federally regulated occupational plans for dividing benefits when a relationship ends, and confirmed that the plan must administer an agreement or order that divides the benefits in accordance with provincial property law. [*InfoPensions Issue 13*, May 20, 2015]

While most federally regulated private occupational plans have accepted that provincial law applies in these cases, there were a few hold outs. But, in recent years, most of those have finally revised their administrative policies and have begun to administer pension divisions in accordance with Part 6 of the *FLA*.

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

Some plans regulated under the federal *PBSA* have taken the position that there is no legal obligation on them to assist in the division of pension benefits if the member's pension commenced before the current federal *PBSA* was enacted (in

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1987) finally allowing for pension division. But in *Robertson v. C.N.R.*, (2000) 79 B.C.L.R. (3d) 168, 9 R.F.L. (5th) 368 (S.C.) it was held that even if:

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

before the current federal *PBSA* came into force, the terms of the pension division are enforceable against the plan administrator. *See* also para. 7.5.

1.12 Extra-provincial Plans

What is an example of an extraprovincial plan?

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

Federal public sector plans, and the Canada Pension Plan, are also regarded as “extraprovincial plans.” [*Elliston v. Elliston*, 2015 BCCA 274, para.; *H.E.D.C. v. R.M.C.*, 2003 BCCA 420, para 43-44; *Baker v. Baker*, (1998) 34 R.F.L. (4th) 364 (BCSC); *Coulter v. Coulter*, (1998) 60 B.C.L.R. (3d) 6 (C.A.)]

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

Federal public sector plans, and the Canada Pension Plan, are also regarded as “extraprovincial plans.” [*Elliston v. Elliston*, 2015 BCCA 274, para.; *H.E.D.C. v. R.M.C.*, 2003 BCCA 420, para 43-44; *Baker v. Baker*, (1998) 34 R.F.L. (4th) 364 (BCSC); *Coulter v. Coulter*, (1998) 60 B.C.L.R. (3d) 6 (C.A.)]

A common mistake about Part 6 of the *FLA* is to assume that any plan located outside B.C. is an extraprovincial plan. Many plans located outside the province, even those registered in other provinces (or subject to federal legislation) will, nevertheless, qualify as local plans.

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

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

Most cases involving extraprovincial plans will involve a spouse and member who moved to B.C. after the member retired and the pension commenced. (In these cases, if the plan has any B.C. members, it will qualify as a “local plan”, but that does not mean that a B.C. court will automatically apply B.C. law to dividing the benefits: see the commentary at para. 1.8 and 1.9.)

[See further Chapter 7]

1.13 A plan registered in another province

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

Yes (because the member is earning benefits from employment in B.C.)

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1.14 *A plan registered in the U.S.*

My spouse earned pension benefits working in B.C., but the plan is registered in the United States. Is it a “local plan?”

If the member's benefits accrued from employment in B.C., yes, it is. However, U.S. federal legislation provides methods of dividing U.S. pension benefits which must be taken into account when dividing those benefits. A B.C. court will not make an order applying B.C. law to assets in another jurisdiction if that order is not enforceable in the other jurisdiction. [*FLA*, s. 106(5)(e)(ii)]

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

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

It depends on where the member and spouse live and where the member worked while accruing pension entitlement.

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

If the example is changed so that the member and spouse live in Alberta, Alberta family law will determine how to divide their assets, including the pension benefits. [See para. 1.9]

1.16 *Pre-March 18, 2013 arrangements*

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

[See Chapter 14]

1.17 *Income tax and pension division*

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

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

**1.18 RRSPs and
locked-in funds
in a LIRA**

Do the Part 6 rules regarding the division of benefits apply to Registered Retirement Savings Plans (“RRSPs”) and Locked-In Retirement Accounts (“LIRAs”)?

RRSPs and LIRAs are family property under Part 5 of the *FLA*. [*FLA*, s. 84(2)(e)]. Part 6 does not apply to benefits in RRSPs or in LIRAs. *See*, for example, *Lade v. Perreault*, 2016 BCSC 535.

(The new *PBSA* has changed terminology. Previously, locked-in retirement savings plans were referred to as “locked-in RRSPs”, but are now referred to as Locked-in Retirement Accounts or LIRAs, a term common in other parts of Canada.) [For the meaning of “locked-in” *see* para. 10.4]

RRSPs and LIRAs are Divisible Under Part 5 of the FLA

Although Part 6 doesn’t apply to RRSPs and LIRAs, this presents no practical problem for dividing benefits in these types of plans.

The *Income Tax Act* accommodates transfers from RRSP’s. [*See ITA* Form 2220 *ITA* ss. 146(16) (b) and 146.3(14). For transfers from a registered plan to registered savings or income plan, *see* para 2.74.]

It is the locking-in rules that transform RRSPs into LIRAs. Locking in rules are not defined by the *ITA*, but by the governing pension standards legislation. So far as the *ITA* is concerned, for the purposes of transferring benefits between former spouses when their relationship ends, a LIRA is an RRSP.

B.C. pension division rules do not replace or otherwise affect the options for dividing the account balance of an RRSP or LIRA between former spouses permitted under the *ITA*.

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If the benefits are locked-in, however, the transferred funds would be subject to the same locking-in rules. [See para. 10.4 for information about locked-in benefits and Chapter 10 in general for information about transferring benefits from a plan.]

1.19 RRIFs and LIFs **What rules apply to the division of benefits in a Registered Retirement Income Fund (RRIF) or a Life Income Fund (LIF)?**

RRIFs and LIFs are family property under Part 5 of the *FLA*. [*FLA*, s. 84(2)(e)]. Part 6 does not apply to benefits in RRIFs or in LIFs. See, for example, *Lade v. Perreault*, 2016 BCSC 535.

RRIFs and LIFs are Divisible Under Part 5 of the FLA

Although Part 6 doesn't apply to RRIFs and LIFs, this presents no practical problem for dividing benefits in these types of plans.

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

B.C. pension division rules do not replace or otherwise affect the options for dividing the account balance of a RRIF or LIF between former spouses permitted under the *ITA*.

If the benefits are locked-in, however, the transferred funds would be subject to the same locking-in rules. [See para. 10.4 for information about locked-in benefits and Chapter 10 in general for information about transferring benefits from a plan.]

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1.20 Valuation date

What valuation date is used for dividing benefits in an RRSP, LIRA, RRIF or LIRA?

The *FLA* provides that the valuation date for these types of family property is the date the agreement dividing the benefits is made, or if they are divided by court order, the date of the hearing. [*FLA*, s. 87. Different dates are specified under the *Division of Pensions Regulation* for dividing pension benefits.]

But another date can be used by agreement, or court order. In many cases, because of events taking place after separation (withdrawals from an account for example, or investment volatility) the date of separation may produce a fairer result, particularly where both parties have family property that is being divided: *J.S.P. v. J.H.S.*, 2015 BCSC 1239, para. 254, rev'd on appeal, but not on this point, 2016 BCCA 344. The trial court ordered that the parties each keep their respective RRSPs, pension plan benefits, and investment accounts because the values in the hands of each party were similar at the time of separation.

1.21 Old Age Security

What rules apply to the division of Old Age Security benefits?

Old Age Security benefits were considered to be family assets under the *FRA* by definition (*FRA*, s. 58(3) provided that “family asset” included “(d) the right of a spouse under an annuity or pension, home ownership or retirement savings plan”). [See *Lattey v. Lattey* (1989), 21 R.F.L. (3d) 229 (B.C.S.C.). The B.C. Court of Appeal has referred to the question, but not considered it: *O'Bryan v. O'Bryan* (1997), 43 B.C.L.R. (3d) 296 (C.A.). Different approaches have been adopted in other parts of Canada. See, for example, *Podemski v. Podemski* (1994), 6 R.F.L. (4th) 131 (Alta. Q.B.) where it was held that OAS benefits were not divisible property.]

The *FLA* carries forward a similar definition of “family property” (*FLA*, s. 84(2)(e) provides that family property includes: “a spouse's entitlement under an annuity, a pension plan, a retirement savings plan or an income plan”). It is likely, therefore that courts will adopt the same approach as under the *FRA*.

Even if OAS benefits are considered to be family property, however, there is no method of dividing OAS benefits at source. They do not come within Part 6 and the *Old Age Security Act* does not provide a mechanism for dividing the benefits between former spouses.

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In practice under the *FRA*, because both spouses were usually entitled to similar levels of OAS benefits, each kept their own benefits. Where there was a significant discrepancy between the parties' entitlement (such as where one party was much younger and therefore would have to wait a period of years to receive the benefits, or residency differences meant one spouse's benefits were lower) adjustments were often made through support. In rare cases, an actuary would be retained to place a value on the difference between the parties' benefits, and then address the issue through a compensation payment or by adjusting property entitlement.

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

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

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

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Table 2 - Summary of Canadian Pension Division Legislation

Kind of Plan	Governing Legislation	Method of Division
Pension in a federal public sector plan, <i>for example</i> a plan under the <ul style="list-style-type: none"> • <i>Canadian Forces Superannuation Act</i> • <i>Defense Services Pension Continuation Act</i> • <i>Diplomatic Service (Special) Superannuation Act</i> • <i>Governor General's Act</i> • <i>Lieutenant Governors Superannuation Act</i> • <i>Members of Parliament Retiring Allowances Act</i> • <i>Public Service Superannuation Act</i> • <i>Royal Canadian Mounted Police Pension Continuation Act</i> • <i>Royal Canadian Mounted Police Superannuation Act</i> • <i>Special Retirement Arrangements Act</i> 	<i>Pension Benefits Division Act</i> (Can.), S.C. 1992, c. 46	<p>The spouse is entitled to a share of the commuted value of the benefits that accrued during cohabitation (unless another period is specified by court order).</p> <p>This share would be transferred to the spouse's credit (to, for example, an RRSP or RRIF, if the benefits are not locked-in, or a LIRA or LIF for locked-in benefits).</p>
Benefits in a federally regulated private occupational plan where entitlement is earned from employment in B.C.	<i>Federal Pension Benefits Standards Act, s. 25. Family Law Act</i> (B.C.)	<i>See Table 1 - Is the Plan a Local Plan?</i>
Benefits in a provincially regulated plan (one that is subject to the B.C. <i>Pension Benefit Standards Act</i> , or the equivalent Act in another Canadian province or territory).	<i>Family Law Act</i> (B.C.) (if B.C. law applies, otherwise, the equivalent legislation in the province whose laws govern the disposition of family property when a relationship ends)	<i>See Table 1 - Is the Plan a Local Plan?</i>
Benefits under the Canada Pension Plan	<i>Canada Pension Plan Act</i>	Unadjusted pensionable earnings accruing during cohabitation are equalized.
Old Age Security	<i>Family Law Act</i> (B.C.)	Considered family property under Part 5, but no pension division mechanism.

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Table 3 - B.C. Pension Division Methods

Kind of plan	Method of division if benefits are Not yet being paid	Method of division if benefits are being paid
Benefits Deter- mined by Benefit Formula Provision	<p>The spouse becomes a “limited member” of the plan, who is entitled, after the member is eligible for the pension to commence, to choose between</p> <p>(a) having the commuted value of the spouse’s share transferred to an RRSP, LIRA, RRIF, LIF, annuity or another pension plan [<i>PBSA</i>, s.88], or</p> <p>(b) receiving the share in the form of a separate pension payable for the limited member's lifetime.</p> <p>(see Chapter 2)</p>	<p>The spouse becomes a “limited member” of the plan and receives a share of each monthly payment from the plan.</p> <p>(see Chapter 5)</p>
Benefits in Defined Contribution Ac- count	<p>The spouse is entitled to half of the de- fined contribution account earned during the relationship (plus net investment re- turns on that portion).</p> <p>The spouse’s share is transferred to an RRSP, LIRA, RRIF, LIF, annuity or an- other pension plan [<i>PBSA</i>, s.88] or, if the administrator consents, to another ac- count in the plan. If the funds are kept in the plan, the spouse must become a lim- ited member of the plan.</p> <p>(see Chapter 3)</p>	<p>If the benefits remain in the de- fined contribution account, the spouse receives a share of the ac- count by the same rules that apply before pension commencement.</p> <p>If the funds in the account have been used to purchase an annuity for the member, the spouse be- comes a “limited member” and re- ceives a share of each monthly payment under the annuity.</p> <p>(see Chapter 5)</p>
Benefits in Supple- mental Pension Plan	<p>The spouse becomes a “limited member” of the plan, who is entitled, when the member's pension commences, to receive a separate pension payable for the limited member's lifetime.</p>	<p>The spouse becomes a “limited member” of the plan and receives a share of each monthly payment from the plan.</p> <p>(see Chapters 5 and 6)</p>

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Kind of plan	Method of division if benefits are Not yet being paid	Method of division if benefits are being paid
	Other options are available with administrator consent. (see Chapter 6)	
Benefits in Individual Pension Plan	The spouse becomes a “limited member” of the plan, who is entitled, when the member's pension commences, to receive a separate pension payable for the limited member's lifetime. Other options are available with administrator consent. (see Chapter 6)	The spouse becomes a “limited member” of the plan and receives a share of each monthly payment from the plan. (see Chapter 5 and 6)
Disability Benefits paid Under a Pension Plan		The spouse becomes a “limited member” of the plan and receives a share of each monthly payment from the plan. (see Chapter 9)
Annuity		The spouse becomes a “limited member” of the plan and receives a share of each monthly payment from the plan. (see Chapter 5)
Benefits in Extraprovincial Plan	Divided by methods applied in the plan’s jurisdiction (unless that would produce an unfair result under B.C. law). Otherwise, the spouse waits until the member's pension commences and receives a share of each monthly pension payment from the plan administrator. (see Chapter 7)	Divided by methods applied in the plan’s jurisdiction (unless that would produce an unfair result under B.C. law). Otherwise, the spouse waits until the member's pension commences and receives a share of each monthly pension payment from the plan administrator. (see Chapter 7)

CHAPTER 2. DIVIDING UNMATURED BENEFITS DETERMINED BY A BENEFIT FORMULA PROVISION (FLA, s. 115)

Different pension division rules apply depending on the type of plan.

If the benefits are determined by the contributions made to the plan, and investment returns on those contributions, the benefits are in a “Defined Contribution Account”. Rules that apply to Defined Contribution Accounts are discussed in Chapter 3.

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

If the member belongs to a plan that uses a benefit formula provision, and the member's pension has not commenced at the time the pension division arrangements are finalized, the benefits are divided by designating the spouse to be a kind of member of the plan, called a “limited member.”

To become a limited member, the spouse would send to the plan the agreement or court order dividing the benefits, together with a Form P2. [FLA, Reg., s. 4(1)(b)] The limited member is entitled (at any time after the earliest date that the member could elect to have a pension commence) to receive either:

- (a) a share of the benefits (a “proportionate share” of the “commuted value” of the benefits) transferred to the credit of the spouse, or*
- (b) a separate pension from the plan payable for the former spouse's lifetime. (Under the FRA, the separate pension option was available only if the former spouse waited until the member's pension commenced).*

Unless the plan administrator adopts a different approach as permitted under Part 6, the limited member's separate pension is based on a valuation of the benefits assuming the member's pension commenced at the later of the member's actual age and the average age of retirement for the plan. [FLA, Reg., s. 24]

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

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

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

2.1 *Rights of a limited member*

What rights does a limited member have?

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

- (a) to receive from the administrator direct payment of a separate pension or a proportionate share of benefits paid under the pension,
- (b) to enforce rights against the administrator and recover damages for losses suffered as a result of a breach of a duty owed by the administrator to the limited member,
- (c) except as modified by Part 6 of the *FLA*, all of the rights of a member under the *PBSA*,
- (d) to receive directly from the administrator information about the member's benefits and the limited member's share in it. [*FLA*, s. 133; *Reg.*, Part 3, *Administrator's Duty to Provide Information*; see para. 15.18 to 15.22]

See also para 10.6.

2.2 *Sharing in benefit upgrades*

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

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

2.3 *Rights a limited member doesn't have*

What rights doesn't a limited member have?

A limited member would not, for example, 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.

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

- (a) the former spouse or
- (b) the former spouse's interest in the member's pension benefits.

2.4 *The member's elections*

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

The member is free to make elections (and beneficiary designations) that protect the new family with respect to the member's share of the benefits, unless restricted by the terms of the court order or agreement dividing the benefits. [FLA, s. 125]

[See further Chapter 8]

2.5 *Changing the beneficiary designation*

The member has not yet commenced receiving a pension. Before the breakdown of the relationship, the member designated the former spouse to be beneficiary of any survivor benefit under the pension plan. The benefits are now subject to a pension division agreement under Part 6 of the FLA. The survivor benefits exceed the share of the pension benefits to which the former spouse is entitled. Can the member take any steps to make sure that the portion of the survivor benefit that exceeds the former spouse's share goes to his new spouse?

If the member dies before the benefits are divided, the limited member's proportionate share of the pension benefits would be determined just before the member's death (see para. 2.9) and the limited member would still be entitled to receive the share by a separate pension or a lump sum transfer.

After the former spouse receives the share, the administrator must reduce the member's remaining entitlement to reflect the pension division. Survivor benefits under the member's reduced share would then be paid to the person entitled to them (for example, the member's surviving spouse, designated beneficiary or estate). [FLA, ss. 124(2), 125. Reg., s. 22] See para. 2.4.

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

[See Chapter 8, particularly para. 8.18-20]

Under the *PBSA*, a “spouse” is automatically entitled to the survivor benefits, whatever beneficiary designation the member makes, but spousal status is lost if married spouses separate for more than 2 years, and if unmarried spouses cease living in a marriage-like relationship: *PBSA*, s. 1(3).

Under the FRA

The position was more complicated under the *FRA*. If the member died before the pension benefits were divided with the limited member, instead of receiving a share of the pension valued before the member’s death, the limited member received a share of the survivor benefits. In some cases, this would diminish the limited member’s entitlement (if the survivor benefits had less value than the pension benefits) and the form of the survivor benefits restricted options available to the limited member for receiving the share. To deal with these problems, it was sometimes necessary to make special beneficiary designations protecting the former spouse (such as providing for the former spouse to receive a larger share of the survivor benefits).

The *FLA* has resolved these problems by providing that the new approach (determining the former spouse’s share as of before the member’s death) applies even if the pension division arrangements were made before the *FLA* came into force. See Chapter 8.

An issue also formerly arose with respect to survivor benefits payable under non-contributory plans regulated under the federal *PBSA*. [See para. 8.13] But this problem has also been addressed by the new *FLA* rules (and also changes to the federal *PBSA*).

2.6 Why are DB
provisions treated

Why is the method for dividing a defined contribution account not used for unmaturing benefits determined by a benefit formula provision?

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*differently from
DC Accounts?*

Benefits in a defined contribution account are determined by contributions made by the employer (and, perhaps, the member) plus net earnings made from investing those contributions. The value of a defined contribution account is its current balance.

The value of benefits determined by a benefit formula provision, on the other hand, because they depend on a formula, may differ from the total of contributions and investment returns.

Between these two types of plans, it is more difficult to value benefits determined by a benefit formula provision because assumptions must be made about a number of future events (when will the member's pension commence, for example, and how long is the member likely to live?) And it is highly unlikely that contributions made to the plan up to the time of the breakdown of a relationship would be enough to satisfy the estimate of the future benefit's value. Even if there is enough money, it may not be fair to one or more of the member, spouse, plan or other plan members in the circumstances to base the spouse's share on the particular assumptions that are made. That is because the valuation will necessarily be based on predictions about the average experiences of a group. No approach to valuation based on average experiences can possibly be fair in every *individual* situation that can arise.

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

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

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2.3A *Member is still working*

Can a limited member choose to receive the share of the benefits while the member is still accruing benefits under the plan? The member wouldn't be eligible to receive a pension until the member terminates employment. Why should the limited member be able to take the share if the member is still working?

Yes, the limited member can choose to take the share of the benefits, even if the member is still working. Part 6 is structured to permit both parties to use their respective shares of the benefits to suit their individual needs. Confining the limited member's entitlement to benefits payable only after the member terminates employment and commences receiving a pension would prejudice the limited member. (The limited member typically requires income to start earlier than the plan member, who is prepared to defer receiving pension benefits because any loss in value is more than compensated by employment income). Part 6 provides that the options available to the limited member for receiving the share of benefits are available no earlier than the earliest date that the member could elect to have the member's pension commence [*FLA*, s. 115(3)]. The earliest date is determined by the pension eligibility provisions under the specific pension plan, regardless of whether the plan member actually decides to retire, or to keep working and continue to earn benefits under the plan.

2.7 *Why not use a Rutherford split?*

Why does Part 6 provide for the limited member receiving a separate pension (or transfer of the commuted value) instead of using the approach under a *Rutherford* Order (where, after pension commencement, the member gives part of each monthly pension payment to the spouse)? [*Rutherford v. Rutherford*, (1981) 23 R.F.L. (2d) 337 (BCCA) *add'l reasons* 44 B.C.L.R. 279]

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The options permitted under B.C.'s pension division legislation are more effective than a *Rutherford* Order in separating the financial interests of the spouse and member. Also, plan administered divisions provide a former spouse with more certainty that the payments will be made on time and in the correct amount. The tax issues are more easily dealt with because the parties are responsible for taxes on their respective shares. It's also advantageous to the parties for the spouse and member to be able to make separate elections that meet their individual requirements. Suppose the member has remarried. Under the *Rutherford* Order, it would usually not be possible for the member to make elections that would provide both the former spouse and the current spouse with security for payments after the death of the member.

In contrast, if the pension has not yet commenced, the lump sum transfer and separate pension options under the *FLA* provide a former spouse with security for the share of the benefits, and the member can use the member's share to provide security for a current spouse. (If the pension has commenced, then the only real difference between the Part 6 rules and the *Rutherford* split is that, under Part 6, the pension fundholder pays the former spouse the former spouse's share of each monthly pension payment (less tax withholdings) instead of the member doing this: see Chapter 5.)

2.8 Dividing a pension in a flat benefit plan

How is a former spouse's proportionate share of pension benefits determined if the rates of accrual on benefits differ for different periods (which may be the case, for example, with flat benefit plans)?

Part 6 uses the same approach, whether the plan is a flat benefit plan, a career average plan, a final average plan or a target benefit plan.

The former spouse receives a share of the whole of the benefits 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 benefits have at that time, assuming the member's pension will commence at the later of the member's actual age and the average age of retirement for the plan. [See para. 2.55 and 2.65 concerning alternatives to using the average age of retirement and para. 15.31 and 15.31A concerning adjusting the member's benefits after division. See para. 2.32 if pensionable service is not expressed in terms of months, but other units of time.]

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2.9 *The member dies
before the spouse
receives a share*

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

Yes. The limited member receives the share of the benefits calculated the day before the member's death: *see* para. 8.2. [*FLA*, s. 124(2)]

As a practical matter, it may be difficult for a plan to calculate benefits as of a specific day, so the *Division of Pensions Regulation* permits the plan administrator to calculate the benefits as of the end of the month immediately preceding the day before the death of the member. This means, for example, that if the member dies on Feb. 2nd, the plan administrator may calculate the benefits as of Jan. 31st. If the member dies on Feb. 1st, the plan administrator may calculate the benefits as of Dec. 31st. [*Reg.*, s. 23(3)(c)]

[*See further* para. 2.5, 2.41, 8.2 and 8.13 and Chapter 8 generally]

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

If the member dies before the former spouse becomes a limited member, then protecting rights in the pension benefits becomes complicated. The former spouse is entitled to survivor benefits if he or she qualifies as a “spouse” under the *PBSA*, but spousal status under that Act is lost after 2 years' separation for married spouses, and immediately after separation for parties whose relationship was based on a 2 year marriage-like relationship. [*PBSA*, s. 1(3)] Property rights under the *FLA*, however, arise on separation, so the surviving former spouse may be able to pursue a claim to pension benefits under Part 6, but would have to move quickly to protect that claim: *see Howland Estate v. Sikora*, 2015 BCSC 2248. What this means in practice is that, in order to gain the full protection of Part 6 a former spouse should not delay in becoming a limited member. *See also* para. 8.12.

2.10 *The member
terminates
employment (1)*

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

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Yes. If the limited member has not yet received the limited member's proportionate share of the benefits, the member's direction to transfer the benefits ends the deferral of the division. [FLA, s. 115(6)] The limited member's share must be transferred from the plan (to, for example, a LIRA or LIF) unless the administrator consents to keeping the share in the plan, or the limited member is already receiving a separate pension. (If the member's benefits exceed the maximum transfer value under the *ITA*, see para. 10.7.)

If a plan administrator receives a request from a member to transfer the commuted value of pension entitlement, it must give the limited member 30 days' advance notice. [Reg., s. 9(1)] See para. 15.26B and 15.26C for information about calculating the notice period and determining when notice is deemed to be received.

If the member can elect to have the pension commence at the date of the transfer, the limited member would also be entitled, within the 30 day notice period, to select receiving a separate pension. [FLA, s. 115(2)(a)]

The value of the limited member's share would be calculated in accordance with Reg., s. 23, assuming pension commencement at the later of the member's actual age and the average age of retirement for the plan. [Reg., s. 23(3)(b)] For alternatives to using the average age of retirement, see para. 2.55 and 2.65.

2.11 The member terminates employment (2)

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

In addition to the options permitted under Part 6 (and FLA, s. 115 in particular), if the member is eligible on employment termination to request a transfer of the commuted value of the benefits to another plan, the limited member can also make that choice. [FLA, s. 113(3)(c); PBSA, s. 88] A limited member has all of the rights of a member, except as modified under the FLA.

2.12 Member transfers entitlement to another plan

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

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The limited member can require plan1 to retain the limited member's share only if (a) the limited member's separate pension has already commenced, or (b) the member is in a position to elect to have the pension commence and the limited member chooses the separate pension option. (The limited member has a 30 day window, resulting from the statutory obligation on the administrator to give advance notice of any direction received with respect to the benefits.) [*Reg.*, s. 9(1). *See* para. 15.28] *See* para. 15.26B and 15.26C for information about calculating the notice period and determining when notice is deemed to be received.

Otherwise, the limited member's share would be transferred at the same time as the member's share (to, for example, a LIRA or LIF in the limited member's name, or any of the other options permitted under *PBSA*, s. 88.)

It is open to the administrator, however, to consent to continue to administer the benefits in the plan. [*FLA*, s. 115(6)(a)]

*2.13 The plan is
terminated or
partially
terminated*

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

The limited member would be subject to the same conditions that apply to the member on plan termination or partial termination.

The method used for dividing unmatured benefits determined by a benefit formula provision requires the limited member to wait to receive the share. The limited member's share is a proportionate share of the value at the deferred date (adjusted to take into account specified assumptions about when the benefits commence).

If, while waiting, events occur that enhance or diminish the member's benefits, the limited member's share is proportionately enhanced or diminished. The limited member would be subject to the same conditions that apply to the member on plan termination or partial termination.

*2.14 Plan surplus or
actuarial excess*

Is a limited member entitled to share in surplus or actuarial excess declared by the plan?

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Yes, to the extent that the member is entitled to share in surplus or actuarial excess.

The current *PBSA* distinguishes between excess assets over liabilities in an ongoing plan (“actuarial excess”) and excess assets over liabilities in a plan that has been terminated (“surplus”), but the limited member’s rights are the same in either case.

The limited member would have the same rights as other members: if the limited member is receiving a separate pension, then to the extent that any portion of the surplus or actuarial excess is paid out to retired members or taken into account in calculating the benefits for retired members, the limited member enjoys the same rights as other members. [*FLA*, s. 113]

Similarly, if the limited member decides to take a separate pension or a transfer of the commuted value of the benefits, the limited member’s entitlement would include any share of actuarial excess or surplus to the same extent that it would be taken into account in determining the member’s benefits. However, a limited member who received the share by a lump sum transfer is not entitled to any further share of the pension benefits, including surplus or actuarial excess, arising after the transfer is completed.

The *FLA* excludes actuarial excess and surplus from the definition of “benefit” (adopting the same policy as under the *PBSA*). But this does not mean that a spouse who has not yet become a limited member cannot claim a share of actuarial excess and surplus received by the member. The *FLA* expressly provides that a spouse who is entitled to a share of the member’s pension benefits is also entitled to a share of those additional amounts. [*FLA*, s. 111(4)]

2.15 *The plan has a solvency deficiency*

If the plan has a solvency deficiency, does that affect the limited member’s entitlement?

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A limited member would be subject to the same restrictions that apply to transfers by plan members. [*Jordison v. Jordison*, [1996] B.C.J. No. 2694 (S.C.)]

If a limited member decides to receive the share by a commuted value transfer, and the plan has a solvency deficiency, then a portion of the commuted value can be transferred and the balance would be transferred when the solvency deficiency is corrected. [*PBSA Reg.*, s. 80.]

If benefits have not been divided, and the plan is subject to termination, then see *PBSA, Reg.* s. 132 (but note that these *PBSA* rules do not apply to negotiated cost plans, jointly sponsored plans or target benefit plans, where benefits can be reduced if the circumstances of the plan require reduced benefits: *PBSA Reg.*, s. 20.

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

How is the limited member's share of benefits determined?

The limited member is entitled to a pro rata share of the benefits calculated as of the date they are to be divided. The fraction is called the "proportionate share."

**2.17 Determining the
proportionate
share**

How is the limited member's proportionate share determined?

Reg., s. 17 sets out the formula for determining the limited member's proportionate share of benefits. This formula applies unless the spouse and member agree upon, or the court orders, another approach. [See *FLA*, s. 110, definition of "proportionate share"; *Reg.*, s. 17(2)]

Basically, the limited member's share is half of

(pensionable service during entitlement period)

divided by

(total pensionable service)

The "entitlement period" is determined by dates specified in the agreement or court order, usually determined by the date the relationship began and the date

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of separation, but other dates can be used. [*Reg.*, s. 1(1) definition of “entitlement period”, *Reg.*, s. 17(2)]

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

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

- (a) the date the limited member's share is transferred from the plan (in which case, that would be the end date for determining total pensionable service), [*see* para. 2.17A for more information]
- (b) the date the limited member begins receiving a separate pension (in which case, the end date would be the beginning of the month in which the separate pension commences), [*see* also para. 2.17A]
- (c) for a matured pension, the end date would be the date the limited member begins receiving a share of the income stream (however, in these cases, pensionable service would ordinarily have stopped accruing when the pension commenced), and
- (d) if the benefits have not been divided and the member dies before pension commencement, the end date would be the day immediately preceding the day of the member's death. [*Reg.*, s. 17(3)]

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

2.17A Proportionate share when benefits are transferred from the plan

The limited member has requested a transfer of the limited member's share from the plan. *Reg.*, s. 17(3)(a) directs that total pensionable service be determined by reference to the date that the share is transferred, but we won't know that until the transfer is actually made, and it's difficult to anticipate how much time will be involved in calculating the share, giving instructions to the fund holder, and the fund holder being able to finalize the transfer. How do we determine the proportionate share in this case?

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The date of transfer can be estimated, and any difference between the estimated date, and the actual date of transfer, can be adjusted for through interest.

As a practical matter, many plans have adopted a practice of using a date not earlier than the end of the month immediately preceding the expected date of the transfer, the approach required for calculating the commuted value of benefits under *Reg.*, s. 23(3)(b) and, again, adjust for any delay by adding interest. Adopting this approach ensures consistency, and avoids any problems that might arise from using two different dates (one for the proportionate share and one for calculating the commuted value).

**2.18 Proportionate
share of a
matured pension**

***Reg.*, s. 17 provides the formula for the proportionate share. For a matured pension it provides that the numerator is determined by pensionable service accruing up to the spouse's "entitlement date" (*Reg.*, s. 1(1), definition of "entitlement period"). In this case, the entitlement date is January, 2015. The member's pension commenced in 2012. How do we calculate the proportionate share?**

Since the member would have earned no more pensionable service after pension commencement (subject to phased retirement considerations – see *FLA*, s. 115(5), *Reg.*, s. 19, and para. 15.15), the proportionate share stops changing at the date of pension commencement. In these situations, as a practical matter, it is the pension commencement date that would determine the pensionable service to be used in the numerator and denominator of the proportionate share formula in *Reg.*, s. 17.

**2.19 Proportionate
share and
purchased service**

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

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

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The policy adopted is that service purchased *during the relationship* increases the former spouse's share of the pension benefits (*see, for example, Sutherland v. Sutherland*, 2008 BCSC 1283). Service purchased *after the end of the relationship*, even if it is referable to the relationship, does not increase the former spouse's share of the benefits.

Since property acquired before the relationship is excluded property under the *FLA* (s. 85), the same policy applies to service purchased *before* the entitlement period.

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

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

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

For example:

Jan. 1, 1975	member joins plan
July 1, 1975	member begins cohabiting with his or her spouse
Dec. 31, 1978	member terminates employment and withdraws the benefits (the equivalent of 4 years of service)
Jan. 1, 1980	member resumes employment and rejoins the plan
July 1, 1995	member and the spouse separate
Dec. 1, 1999	member buys back part of the pensionable service withdrawn in 1978 (the equivalent of 2 years' service)
Jan. 1, 2005	member's pension commences and the member's former spouse receives a share of the pension in the form of a separate annuity.

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

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

$$(\frac{1}{2}) \times (19.5/29)$$

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

Had the member not bought back any service, the denominator would be 25 years. However, the member did buy back some service. The portion bought (2 years) is included in the denominator. The denominator is 27 years. The spouse's proportionate share of the benefits, consequently, would be determined as:

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

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

[See para. 2.27-2.29]

2.20 Flexible benefits
and enhanced
pension
entitlement
upgrades

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

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

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

2.21 Proportionate share and benefit upgrades

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

The way the former spouse's proportionate share is applied means that benefit upgrades credited after the entitlement period are included in the spouse's share of the benefits.

The spouse's proportionate share is applied to the whole of the benefits at the date the spouse's share is determined.

If the spouse selects a lump sum transfer of commuted value (under s. 115(2)(b)), the spouse's proportionate share is determined on the whole of the value the benefits have at the date of the transfer.

If the spouse chooses to take a separate pension (s. 115(2)(a)), the separate pension is based on the pension payable to the member at that date (although adjusted assuming pension commencement at the later of the member's actual age and the average age of retirement for the plan. For alternatives to using the average age of retirement, *see* para. 2.55 and 2.65).

Consequently, changes in the value of the benefits following the entitlement period that are attributable to benefit upgrades are divided between the spouse and member. (The contributions required by the plan text that members must make would not constitute purchase by the member.) [*See*, para. 2.20, 2.32, 2.66 and 2.67]

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2.22 *What is the entitlement date?*

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

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

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

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

The *FRA* provided rules for determining the entitlement date, if it was not specified in the agreement or court order. The position is different under the *FLA* where, in order to divide the benefits, the administrator must be advised of the entitlement date. It can be specified in the court order, or in the parties' agreement. If the order or agreement is silent, this can usually be addressed by the parties signing a further agreement in the form of joint directions, providing the missing information. [*Reg.*, s. 1, definition of "entitlement date", *FLA*, s. 137] The reference in the *FLA* and the *Division of Pensions Regulation* to a single order or agreement does not mean that these issues cannot be addressed in a combination of agreements or court orders. In an enactment, words in the singular include words in the plural. [*Interpretation Act*, R.S.B.C. 1996, c. 238, s. 28(3)]

The parties must provide the administrator with information about the entitlement date in writing before the benefits can be divided.

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

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2.23 Pre-relationship accruals

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

No.

Mailhot held that all of the pension benefits accruing up to the breakdown of a relationship, including pre-relationship accruals, constitute a family asset to be divided equally between the spouses. After *Mailhot* was decided, however, B.C. pension division legislation was revised to divide only those benefits earned during the relationship, and this policy has been carried forward in the *FLA* rules about excluded property. [*FLA*, s. 85] The result is that the principle in the *Mailhot* case has been reversed by legislation (as explained in *Park v. Park*, (2000) 73 B.C.L.R. (3d) 153 (C.A.)).

Mailhot, however, would still apply to agreements or orders made before July 1, 1995, the date B.C. pension division legislation was first revised to exclude pre-relationship benefits from automatic division. [See para. 2.26 and 14.2]

Pre-relationship accruals can be divided between the member and spouse, however, if:

- (a) the parties agree to do so, or
- (b) if a court holds that it would be unfair to exclude that portion of the pension benefits from being divided [*FLA*, s. 95(1)(b)], or

if to do so would produce a better result than awarding ongoing support [*FLA*, s. 129].

2.24 Drafting a clause to divide pre- relationship accruals

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

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

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**2.25 When to divide
pre-relationship
accruals**

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

The main factor identified under the *FLA* is where, after the relationship ends, it is appropriate for the parties to have similar standards of living but to achieve that result would require the member paying support. [*FLA*, s. 129]. This was also a factor under the *FRA*: *Parent v. Parent*, 2012 BCSC 723.

Case law under the *FRA* suggests some other circumstances where benefits earned before the parties commenced living in a marriage-like relationship should be divided (although it remains to be seen whether these will continue to be considered relevant). Two examples:

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

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2.26 *Pension accruals and cohabitation*

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

This was a question considered by the courts a number of times under the *FRA* and it was eventually decided that, in most cases, benefits earned during prior cohabitation should be divided.

Under the *FLA*, the starting point is that benefits earned during cohabitation in a marriage-like relationship are divisible. But it is still necessary for the commencement date of the relationship to be specified by agreement or court order. It is not the administrator's responsibility to determine when a marriage-like relationship commences.

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

See para. 14.25.

2.27 *Dividing purchased pension entitlement*

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

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

The *Division of Pensions Regulation* provides a formula for determining the former spouse's “proportionate share” for dividing the pension benefits. [*Reg.*, s. 17] It is based on pensionable service accumulated (including purchased) by the member during the relationship. Any pensionable service accumulated after the

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former spouse's entitlement date, even pensionable service attributable to the relationship that was purchased by and credited to the member after the entitlement date, is excluded from the numerator. [*FLA, Reg.*, s. 18] See para. 2.32 for examples.

It is possible that there will be exceptions to the general rule. For example, a former spouse might be able to make a claim to pension entitlement purchased after the breakdown of a relationship if it can be established that it was purchased using family property. Similarly, the member may have committed to purchase service before the relationship began, but payments for the service are made during the relationship, and again it may be appropriate for the former spouse to share in the purchased service (*see* para. 2.29).

But these would not be questions that an administrator would have to answer. They would be addressed in the agreement or court order dividing the benefits. [*See also* para. 2.19 and 2.20]

A situation in which member's contributions are increased would not qualify as purchasing service. *See* para. 2.66 and 2.67.

**2.28 Pension
entitlement
purchased during
the relationship**

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

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

**2.29 Pension
entitlement
purchased on
instalment plan**

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

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

As between member and spouse, their property division arrangements may address responsibility for the debt, but the administrator does not have to worry about that issue. Under the *FRA*, the approach adopted by courts was that a debt obligation associated with a family asset was taken into account when determining entitlement to the family asset, and this policy has been carried forward in the *FLA* [*FLA*, ss. 81, 86]. Typically, this would mean that the unpaid portion of the entitlement would be dealt with by reducing the spouse's share of other assets in recognition that the member is responsible for paying the debt.

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

- (a) make the spouse share responsibility for the debt (the spouse could be required to pay a share to the member immediately, or by instalments), or:
- (b) adjust entitlement to the pension benefits to reflect the debt. [*See also* para. 2.19 and 15.8]

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

2.30 Prior service credit

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

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

**2.31 Court orders
member to
restore service**

The member withdrew part of the pension benefits during the relationship. It is possible to restore the lost service. The court has ordered the member to do so, and also ordered that the spouse’s share of the pension entitlement be based on the restored service. What is the plan’s obligation?

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

**2.32 Special cases:
Cap on service,
banked credits,
flex benefits,
service measured
in hours**

Some cases are not clearly addressed under the *Division of Pensions Regulation*. What should the plan do if:

- 1) *the plan sets a cap on service* (for example, the plan provides that the maximum pension is earned by a member upon completing 35 years of service)? How does that affect the “proportionate share?” Does that cap the denominator for determining the spouse’s share?**
- 2) *the member uses banked credits*, earned during the relationship, to acquire pension entitlement at a later date? Is service that is acquired with banked credits considered to be acquired during the relationship, or after the entitlement date?**
- 3) *as part of a flex benefits package*, the member may choose to give up, for example, a dental plan in exchange for enhanced pension entitlement, or decide on smaller pension benefits in exchange for other benefits. How do the member’s choices affect the limited member’s interest in the benefits?**
- 4) *pensionable service is measured by the plan in terms of hours, or bands of hours, worked*, rather than months or parts of months? How is this accommodated by the formula for the proportionate share?**

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

- (a) suggesting an approach in keeping with the spirit of the legislation for dealing with the issue, or
- (b) requesting the member and spouse to agree on an approach and advise the plan administrator in writing. [*Reg.*, s. 7(2)]

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

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

1. *cap on service*: the cap must be applied to both the numerator and the denominator of the formula. If the cap is 35 years, then neither the numerator nor the denominator can exceed that amount. If the relationship continues after the cap is reached, the numerator would stop growing at that point. See para. 2.33, and *Rutherford v. Rutherford*, (1981) 23 R.F.L. (2d) 337 (BCCA) where the cap was applied to determining the former spouse's proportionate share. Typically, this is an issue that the parties expressly address and is often settled by choosing a midpoint, so that the member is compensated for some portion of the unused service. If the parties have a long relationship, and the cap is an issue, it is likely that the question of the former spouse's proportionate share will be determined having regard to support considerations (under *FLA*, s. 129) rather than by any consideration of the application of the cap.
2. *banked credits*: credits earned during the relationship qualify as family property. Courts will follow a family asset and recognize a claim to an asset substituted for the family asset. Where a member has banked credits earned during the entitlement period and uses them after the entitlement date to acquire pensionable service, the spouse would probably be entitled to a share of that pensionable service (*that is*, it should be included in the numerator of the formula for the proportionate share). As a practical matter, however, it may not be possible to trace the banked credits and determine whether they were in fact used.
3. *flex benefits*: the flex package will define a base pension. The spouse's rights before the breakdown of a relationship would be determined by past elections. The spouse's future rights should be determined by

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

4. *hours or bands of hours*: the *Division of Pensions Regulation* provides that the proportionate share is calculated using the units of time specified under the plan text. [Reg., s. 1, definition of “pensionable service”] If benefits are based on hours worked, for example, then pensionable service in the proportionate share formula would be based on those hours. If other units are used to define entitlement, those units would be used in the formula.

2.33 Pensionable service increases without increasing pension value

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

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

2.34 Dividing a divided portion

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

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

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2.35 *The spouse's share is small*

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

The plan text can permit the plan administrator to require a member to take a pay out instead of receive a pension if the commuted value of the benefit is less than 20% of the Year's Maximum Pensionable Earnings as established by the Canada Revenue Agency. [*PBSA*, s. 89(2); *PBSA Reg.*, s. 82]

The *FLA* provides that an administrator can require a former spouse to take a transfer in any situation in which it could have required a member to take a transfer [*FLA*, s. 139(b), *Reg.*, s.26]

If the basis for requiring the former spouse to receive a transfer is that it is less than the prescribed amount, when dealing with benefits that will increase in value over time (as with a final average plan) this test cannot be applied until the spouse's share is to be determined (which would not be until the limited member decides to take the share).

2.35A *Unlocking spouse's share*

In what circumstances can a former spouse who has received a share of a member's pension benefits by a transfer to a locked-in plan (such as a LIRA or LIF) unlock those benefits and cash out the entitlement?

The locking-in rules apply to pension benefits in the hands of a former spouse to the same extent as they apply to plan members, whether the benefits remain in the plan or are transferred from the plan to another financial vehicle. [See Chapter 10, and para. 10.4 in particular.]

2.35B *Unlocking spouse's share: to what extent is the member's personal situation relevant*

If limited members have the same rights as members, does that mean that a limited member only has the right to unlock benefits if the member whose benefits have been divided has the right to unlock? For example, if the limited member takes a share of the benefits by a lump sum transfer to a LIRA, and at some later date can establish grounds for unlocking benefits on the basis of shortened life expectancy, is that available to the limited member if the member has no health issues?

Limited members have rights enjoyed by plan members in general, with respect to the benefits that are being divided, but those rights are not confined by the personal position of the specific member. If the limited member transfers the share in a lump sum to a LIRA, the unlocking options available to owners of

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LIRAs would be available to the limited member, based on the limited member's personal position. For example, benefits can be unlocked if the owner of the account is a non-resident. If the limited member is a non-resident, this option would be available to the limited member, even if the member is still a Canadian resident. [See Chapter 10, and para. 10.6 in particular]

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

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

The limited member's portion would be determined as a proportionate share of the commuted value of the benefits calculated assuming the pension commences at the later of the member's actual age and the average age of retirement for the plan [Reg., 2. 23(4)], and in accordance with accepted actuarial practice in Canada, consistent with the Canadian Institute of Actuaries commuted value Standard Of Practice. [FLA, s. 110, definition of "commuted value;" PBSA Reg., s. 9. Different rules apply for calculating the commuted value of benefits determined by a target benefit provision: PBSA Reg., s. 9(2). See para. 2.71]

See also para. 2.55 and 2.65 (for alternatives to using the average age of retirement), para. 3.11-12 and Chapter 10.

**2.37 Who chooses?
Limited member
or plan?**

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

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

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2.38 Elections by the spouse

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

Under the *FRA*, the spouse was required to wait until the member's pension commenced before receiving a separate pension.

As a very general rule of thumb, usually the overall value of the pension benefits is greater the earlier the pension commencement date and, even if that weren't the case, a former spouse who has no alternative sources of income may need to access the benefits as soon as possible. Members don't usually wish to take early retirement, however, because the income they make from employment usually more than compensates for any loss in value that results from deferring retirement and pension commencement. To deal with this conflict between the needs and interests of the member and former spouse, the *FRA* gave the former spouse the option of accessing the pension benefits at an earlier date by choosing the lump sum transfer option.

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

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

2.39 Transfer to where?

The limited member has applied for a transfer of the proportionate share of the commuted value of the member's benefits. The limited member has directed the plan to transfer the share to a separate account in the plan. What are the administrator's responsibilities?

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The plan is not obligated to set up a separate account for the limited member. If the limited member decides to have the share transferred once the member becomes eligible to have the pension commence, the share is transferred in accordance with *FLA*, s. 139, *Reg.*, s. 26, and *PBSA*, s. 88. A transfer to another pension plan, or to a separate account within the same plan, is available only if the plan text document of the plan permits it and the administrator of the plan in question is willing to accept the transfer. [*PBSA*, s. 88, *FLA*, s. 115(6), *Reg.*, s. 26]

**2.40 Transfer
alternatives**

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

Yes, a plan administrator may make this option available to a spouse. [*FLA*, s. 115(6), *Reg.*, s. 26]

**2.40 Reasons for
taking the
transfer of
commuted value**

When would the spouse choose to take the transfer of commuted value instead of the separate pension?

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

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

In some cases, the former spouse is concerned about ensuring financial resources are available for a dependent after the former spouse's death, which might be better realized through the lump sum transfer (and a beneficiary designation in favor of the dependent) than through a separate pension with a guarantee option. The lump sum transfer option may also offer more flexibility about the amount of income received than the separate pension option (if, for example, the rules that apply permit a significant portion to be unlocked).

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

2.42 Reasons for taking the separate pension

When would the spouse choose to take a separate pension?

Most people in this position choose the separate pension. Many see leaving the benefits in the plan as likely to result in better returns and a more reliable lifetime income. A person with a family history of longevity would also see a lifetime pension as producing higher value. Even if it is expected that similar returns could be achieved by investing a lump sum, most spouses would choose a separate pension to avoid the responsibility of administering the investment of the funds to produce a life income. Even under the *FRA*, where the separate pension was available only when the member's pension commenced, many former spouses chose to wait to receive the share for this reason. Another reason the spouse might elect the pension option is if they are under the age at which locked-in funds can be used to produce a life income.

2.43 Need to value before making the election?

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

The decision is often made without knowing the actual value of the benefits. For example, a spouse who requires income is more concerned about getting the income started than the actual dollar amount that will be paid. Usually the spouse needs only a general idea of the potential income, and it is often possible to come up with a reasonable estimate of the monthly separate pension based on the annual pension statement about the member's entitlement (taking into account that adjustments will be made).

But there are many reasons why a well-advised spouse should arrange for an independent valuation by an actuary.

In some cases, waiting to take the pension share will increase the income available to the spouse.

Or the administrator may, in error, adopt conservative assumptions and place a lower value on the lump sum transfer option than the application of normally accepted actuarial standards, so the plan may be prepared to transfer, for

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example, \$150,000, while the expected value of the separate pension is closer to \$170,000. Or it may be a case where accepted actuarial standards permit more than one approach. Retaining an independent actuary can ensure that the share has been valued correctly.

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

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

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

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

Division of Pensions Regulation, s. 23(4)(a)(iii) makes this clear. It says that the former spouse's proportionate share is of the commuted value of the pension the member would have received had there been no division under the Act and had "the member elected a pension in the unadjusted normal form" provided under the plan. The member's spousal status at the time the limited member receives the share is determinative.

**2.45 Subsidized early
retirement and
trustee consent**

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

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

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2.46 *Immediate transfer not available*

Why isn't a transfer of a share of benefits that are determined by a benefit formula provision automatically available as of the date of separation?

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

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

2.47 *If plan offers immediate transfer option*

The plan would like to offer the spouse the option of accepting an immediate payment to a Locked-In Retirement Account. Is that option available?

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

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

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

2.48 *Proportionate share and deemed retirement*

The spouse has waited until the member's pension commences to claim a separate pension. The member objects to using the proportionate share set out in the agreement. In 1994, the spouse relied upon a "deemed retirement" clause in the agreement and required the member to begin paying the spouse's share when the member was first eligible to retire. The

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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 is how the payments the member has been making to the spouse were calculated in the first place).

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

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

The limited member has selected a "separate pension." How is the separate pension determined?

See FLA, Reg., s. 23 and 24. The commuted value of the benefits is determined under *Reg., s. 23*, based on the pension payable to the member assuming pension commencement at the later of the member's actual age and the average age of retirement for the plan: *see para. 2.55 and 2.65* for more information about the average age of retirement and alternatives to this approach.

The limited member's proportionate share of the commuted value is used to determine the separate pension payable to the limited member for the limited member's lifetime. The limited member can choose a single life pension or any other form of pension available to plan members.

2.49A S. 115(2)(a):
*what unisex mix
should be used?*

The limited member has selected a "separate pension." Our actuary has asked for directions concerning how to determine the limited member's entitlement on a gender neutral basis: are we to use the unisex mix we use for the general plan (which is 60% Male, 40% Female)? or should the unisex mix be flipped for the spouse (i.e. to 40% Male, 60% Female), the same approach we adopt for determining benefits payable to the spouse under our plan in non-marriage breakdown cases?

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The requirement of *FLA, Reg.*, s. 24(1)(b) is to use accepted actuarial standards. In this case, the unisex mix used for the general plan would be used to determine the commuted value of the member's entitlement. The spouse's value would be a proportionate share of the commuted value.

After the value of the spouse's share is determined, if it is to be converted into a pension payable for the lifetime of the spouse, an accepted practice is for the calculation to be based on actuarial factors where the unisex mix used for the general plan is inverted (or flipped).

But some plan administrators apply the same unisex mix used for the general plan for this purpose as well.

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

The spouse. The policy is that the limited member enjoys this right in common with members. [*FLA*, s. 113] The plan is protected since whatever option the spouse selects is adjusted on an actuarial basis. [*FLA, Reg.*, s. 24(1)]

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

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

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

Yes. Benefits in a supplemental pension plan are divisible under Part 6 [*FLA*, ss. 119, and 110, definition of "supplemental pension plan"], but the rules that apply

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are different from those that apply to benefits in a registered local plan. *See* Chapter 6.

2.53 *When the member takes early retirement*

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

Both options are still available to the limited member. Once the administrator is advised that the member intends to have the pension commence, the administrator is under an obligation to give the limited member 30 days' advance notice [*FLA, Reg.*, s.9]. This would allow the spouse to choose between the options. *See* para. 15.26B and 15.26C for information about calculating the notice period and determining when notice is deemed to be received.

2.54 *Age adjustment*

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

The former spouse's share of the member's benefits is based on the commuted value of those benefits and determined on an actuarial basis [*Reg.*, s. 23]. One factor for calculating the commuted value will be assumptions about how long the pension would be paid to a person of the same age as the member at the date assumed for pension commencement. The member's pension is assumed to commence at the later of the member's actual age and the average age of retirement for the plan (for the meaning of average age of retirement, and for alternatives to using the average age of retirement, *see* para. 2.55 and 2.65).

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

Part 6, however does not set out how the age adjustment is to be made. The adjustment must be made using accepted actuarial methods [*FLA*, s. 110, *Reg.*, s. 24, and *PBSA*, s. 1, definition of "commuted value"]. B.C. legislation also requires that the adjustment be made on a gender neutral basis. [*PBSA*, s. 10. *See* para. 2.49A]

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2.55 “Average age of retirement”

Division of Pensions Regulation, s. 23 sets out rules for determining the commuted value of a member's benefits. One assumption is that the member's pension commences at the later of the member's actual age and the date the member reaches the “average age of retirement” for the plan. What does “average of retirement” mean?

An administrator of a plan is required to file a funding actuarial valuation report with the superintendent. The report will specify an assumed age of retirement for plan members [*Reg.*, s. 1, definition of “average age of retirement”]

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

The plan may have established average age of retirement assumptions that are based on age and service of members. If so, the average age of retirement would be determined by the age and service referable to the member.

Some plans will specify an average age of retirement for female members and a different average age of retirement for male members. However, under B.C. law, an administrator cannot discriminate based on differences of gender. [*See*, for example, B.C. *PBSA*, s. 10]. In these cases, the average age of retirement should be determined on a uni-sex basis (just as mortality is determined on this basis, and it would be appropriate to use the same uni-sex weighting that the administrator applies to mortality).

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

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

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

2.56 Average age of retirement or actual age

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

The average age of retirement (unless the plan has adopted a different approach under *Reg.*, s. 23(5): *see* para. 2.55).

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

2.56A Actual or projected service?

We are using the average age of retirement to calculate the limited member's share, but not sure what service we are to use. Is it the service that has accrued to the date that the limited member's share is being calculated? Or is it projected service to the average age of retirement? In the case we have, if we use the actual accrued service, the pension would be reduced to reflect early retirement. If the spouse waits for another two years, however, there would be no reduction.

The calculation uses the actual service accrued to the date of calculation.

If the plan provides an unreduced pension based on the member's age and service, it would use the member's age as of the average age of retirement, but service at the date of calculation.

For example:

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- the plan allows an unreduced pension starting as early as age 60 for a member with at least 12 years of continuous service since date of hire, but applies a reduction of 6% per year for each year the pension starts before age 65 if the member has less than 12 years of continuous service,
- the average retirement age for the plan is 61, and
- the member is currently age 56 with 10 years of continuous service.

Under the *FLA* the plan would calculate the commuted value of the pension assuming a pension commencing at age 61 reduced by 24% (6% x 4 years), because the member does not have 12 years of continuous service as of the calculation date.

The administrator would not assume continued service up to the average age of retirement (because the plan would be prejudiced if that assumption proved untrue).

Although there is no specific obligation on the plan administrator to advise the former spouse about when to take the pension share, there is a general duty for plan administrators to inform members about options, and that would apply equally to limited members. In this case, the prudent course would be to inform the limited member that waiting for the member to accrue two more years of service would avoid the 24% reduction in benefits. *See* para. 2.63 and 15.20.

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

Yes. The *FLA* defines “benefit” as “a pension or other monetary amount a person is or may become entitled to receive under the plan...” which would include bridging benefits [*FLA*, s. 110. With respect to actuarial excess or surplus, however, *see* para. 2.14].

A limited member is entitled to a proportionate share of any benefit paid under the plan to the member. [*FLA*, ss. 113, 115(2), 117(2)]

Bridging benefits are a temporary monthly supplement designed to provide members with level income over the course of retirement. Probably the most common example is the CPP bridge benefit. This is an additional monthly payment that ceases at 65. The idea is that the member’s separate CPP

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entitlement, when combined with the pension, will produce adequate retirement income, and the bridge benefit is designed to provide level income in the meantime. Of course, the member can elect to take CPP before 65 in a reduced amount, or wait until after 65 and allow benefits to increase. The member's decision about CPP doesn't affect the payment of the bridge benefits. Some plans offer similar arrangements for Old Age Security benefits. (These adjustments are addressed in s. 74 of the *PBSA*.)

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

Although not referred to expressly in Part 6, bridging benefits are part of the pension benefits and, therefore, divisible under Part 6. [*Vestrup v. Vestrup*, [1999] B.C.J. No. 1057 (S.C.)].

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

*2.58 Limited member
doesn't provide
instructions or
plan can't locate
limited member*

We have a situation where the former spouse is a limited member who has not yet received a share of the benefits. The member has now decided to have the pension commence. We have given the limited member 30 days' notice before implementing the member's decision, but the limited member has not given us directions concerning the limited member's share. We have another file with similar facts, except the problem is that we cannot locate the limited member to give notice. What happens to the limited member's pension entitlement?

See 15.49 and 15.50.

*2.59 Elections: Limited
member remarries*

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

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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 retired members. [*PBSA*, s. 80] A limited member is not a retired member.

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

2.60 Indexing

If the spouse chooses to receive a separate pension when the member reaches age 55, but the plan does not provide for indexing of pensions until age 60, does indexing apply to the former spouse’s separate pension when the spouse reaches age 60, or when the member does?

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

2.61 Voluntary Contributions

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

Plan members are sometimes entitled to make additional, voluntary contributions to their plans. These are sometimes overlooked when pension benefits are divided. Voluntary contributions should be divided in the same fashion as those in a defined contribution account or RRSP's, 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. Essentially the benefits would be treated as if they are in a hybrid plan. *See* Chapter 4.

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

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

The member is eligible for pension commencement, but the limited member has not yet reached the required age under the plan text to begin receiving a pension. Can the limited member still choose to have the separate pension start right away? Or must the limited member wait until personally reaching the age required under the plan text?

There is no requirement for the limited member to reach the specified age. If the earliest that a pension may commence under the plan is 55, and the member has reached that age, the limited member may choose to receive a separate pension even if years younger.

The monthly amount payable to the limited member, however, will be adjusted having regard to the limited member's age, so that the plan will not end up paying more than if the benefits had not been divided (as specified under *FLA, Reg.*, ss. 23 and 24).

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

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

Yes, if the average age of retirement for the plan is before the age at which there is entitlement to unreduced benefits. In most cases, the average age of retirement for the plan will probably be at or after the unreduced age. If service determines whether there is a reduction at the average age of retirement, then this question would be determined based on service accrued to the date of calculation: *see* para. 2.55. Some administrators have chosen to continue to use the optimal age rather than the average age of retirement, in which case it is quite likely that an early retirement factor will continue to apply in the circumstances.

If, in the circumstances, there will be a reduction, it is open to the limited member to choose to postpone the application to receive a separate pension until a later date.

Whether the limited member would be better off taking the share right away, or waiting until a date after which no reduction would be made, is a question that the plan may be in a position to advise about. Or, if not, the plan administrator may be able to provide the limited member with information about the issue and

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suggest the limited member consult an independent actuary for advice. *See* para. 2.56A and 15.20.

It's important to note how and when the early retirement adjustment is made. Don't apply the early retirement adjustment twice! The early retirement reduction is applied when determining the member's pension under *FLA, Reg.*, s. 23. The limited member receives a proportionate share of that commuted value, which is converted to a separate pension for the limited member. [*FLA, Reg.*, s. 23(4), s. 24(1)] An early retirement reduction would not then be applied to the limited member's pension, because the limited member's pension has already been reduced to adjust for that on an actuarially equivalent basis.

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

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

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

2.65 Using the optimal age instead of the "average age of retirement"

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

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

Many plans provide in the funding valuation a rule or formula for determining the average age of retirement, so there is no objection if the administrator uses a different formula for determining the average age of retirement under the *FLA*,

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provided it is consistent with the *FLA* policy (that the specified average age of retirement not be greater than the age used in the funding valuation).

2.66 *Members
required to pay
increased
contributions*

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

No. An increase in the contributions that a member is required to make does *not* constitute purchasing additional service (additional service purchased after the entitlement period would be excluded from the division: *see* para. 2.19, 2.20 and 2.27).

In these cases, the policy of the *FLA* is to calculate the limited member's proportionate share of the benefits as of the date the share is being received by the limited member (by lump sum transfer or separate pension).

The member is protected because the member's increased contributions relate to the pensionable service that accrued after the limited member's entitlement date, all of which the member keeps. But the division takes place on a pro rata basis using current values.

2.67 *Members can
elect to pay
increased
contributions*

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

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

2.68 *Early retirement
and projections*

The limited member has decided to receive a separate pension and the member is some years from the average age of retirement. It seems

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*about future
service and
benefits*

reasonable in this case to calculate the limited member's share taking into account future increases in the value of the benefits between now and the average age of retirement. Is that permitted?

No. *Reg.*, s. 23(4)(ii) provides that the limited member's entitlement is based only on the benefits accrued to the valuation date. (In this context, the valuation date is the end of the month immediately preceding the commencement date of the separate pension: *Reg.*, s. 23(3)(a)).

*2.69 Pre-retirement
indexing*

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

Yes, limited members have essentially the same rights as members. *See* para. 2.1 and 2.2.

*2.70 Dealing with
conflicting
legislative
requirements*

Our plan is federally regulated and we are concerned that if we comply with B.C., law, we may be offside federal requirements. For example:

(a) under the federal *PBSA*, either the member or former spouse can apply for pension division. But under B.C. law it appears that only the former spouse can apply,

(b) under the federal *PBSA*, we cannot act on a court order until the time for appealing the order has expired, but there is no similar requirement under B.C. law which provides that the division must take place within 60 days of receiving the required information, and

(c) under the federal *PBSA*, a joint annuity can be divided into two single life pensions, but the B.C. rule provides only for dividing the income stream.

How do we avoid running afoul of the two regulatory regimes?

There is no real conflict in any of these circumstances.

Filing by member: In fact, both the *FLA* and the federal *PBSA* permit the member to file the required Forms. [*FLA*, s. 113(2), federal *PBSA*, s. 25(5)]

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Neither Act would permit a member to make any elections on behalf of the former spouse. (The *FLA* permits the member to file a Form P2 for the spouse to become a limited member. Federal *PBSA*, s. 25(5) refers to the materials filed by the member as requiring the administrator to act in accordance with the order or agreement as prescribed under the governing legislation.)

Relying on an order before the appeal period has expired: Similarly, there is no real conflict between the two Acts regarding acting on an order that may be subject to an appeal. An order dividing pension benefits must be appealed within 30 days of pronouncement, so the 60 days required under *Reg.*, s. 16 to implement a pension division would not apply if an appeal was launched and a stay of the court order was issued.

Commuting a joint annuity: The federal *PBSA* permits a plan to amend the plan text document to permit, when a relationship breaks down, commuting a joint annuity into two single life pensions. While the *FLA* does not expressly provide for this, nothing in the *FLA* prohibits a plan from providing that option. The *FLA* sets out minimum standards that must be observed. As a matter of policy, matured pensions are left intact to avoid any possibility of prejudice to a plan from intervening with settled arrangements (*see* para 5.6 and 5.14). However, if the plan has already voluntarily provided for commuting the joint annuity, there is no reason why the former spouse cannot take advantage of that opportunity.

2.71 Target benefit plan

How are benefits in a target benefit plan divided?

A target benefit plan is a plan that determines benefits using a benefit formula provision, but which limits the employer's liability to fixed contributions so that benefits must be reduced (or employee contributions increased) if the plan's resources do not meet the levels required to fund the benefits. (Under this arrangement, the plan cannot pay out benefits that exceed its financial resources, and there would be no call on the participating employer to increase contributions to cover a shortfall.)

Before pension commencement, the benefits would be divided in the same way as other plans using a benefit formula provision. [*FLA*, s. 110, definitions of "benefit formula provision", "target benefit provision", and s. 115]

Special rules apply to calculating the commuted value of benefits determined by a target benefit provision: *PBSA*, s. 86.; *PBSA Reg.*, s. 9(2)] The amount is limited

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based on the “target benefit funded ratio” (TBFR) as defined in the *PBSA*. The value that may be transferred is the product of the value of the member’s benefits multiplied by the TBFR.

After pension commencement, the rules that apply to matured pensions would be used: *see* Chapter 5.

If a spouse is considering taking the share as a lump sum transfer, it may be prudent to consult an actuary. Because of the different rules, it appears that for plans that have converted to become target benefit plans, the commuted value calculations for benefits are significantly lower than they would have been before plan conversion.

2.72 *Target benefit provision: temporary improvement in benefits*

We administer a target benefit plan. The limited member chose to receive the share of the benefits by a separate pension. We have amended our plan to provide for a temporary improvement in benefits for retired members under *PBSA*, s. 21. How does this affect the entitlement of the limited member under the separate pension? What about the entitlement of former limited members who received their share by a lump sum transfer from the plan?

See para 5.25.

2.73 *Defined benefit provision and target benefit provision*

The definition of “defined benefit provision” in *FLA*, s. 110 expressly does not include a “target benefit provision”. What is the significance of that exclusion? Does it mean that benefits in a target benefit plan are divided differently from benefits in a defined benefit plan?

No, the same pension division rules apply to plans that use a defined benefit provision and those that use a target benefit provision. The *FLA* has been revised to follow the terminology under the *PBSA*, which uses the term “benefit formula provision” as the general term (including plans that use a defined benefit formula, and those that use a target benefit formula). The *PBSA* then distinguishes between these two plans with respect to how they are funded and how changes in benefits are made.

For the purposes of dividing benefits under the *FLA*, both types of benefit formula provisions are treated in the same way. Before pension commencement,

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both are divided under *FLA*, s. 115, which applies if “...the benefits to be divided are under a local plan and are determined under a benefit formula provision...” [*FLA*, s. 115(1)(a)] After pension commencement, both are divided under *FLA*, s. 117, discussed in more detail in Chapter 5.

**2.74 Headnotes,
reference aids and
clarifications**

The head note to s. 115 is “Benefits determined under defined benefit formula provision.” Also, whenever s. 115 is referred to elsewhere in the *FLA*, the reference is followed by this same phrase, italicize in brackets. Doesn’t this limit the application of s. 115 (and related sections) to plans using a defined benefit formula provision and exclude plans that use target benefit provisions?

No, headnotes, reference aids and clarifications like these are expressly not part of the enactment. They have been added editorially for convenience of reference only and do not in any way restrict the application of the legislation itself. [See *Interpretation Act*, R.S.B.C. c. 238, s. 11(1) and (2)]

These references should have been, but were not, updated when the *FLA* terminology was revised to track the new *PBSA*, and it is hoped that they can be revised soon (to refer to “Benefits determined under a benefit formula provision” instead).

**2.75 *ITA* Forms used
when transferring
benefits from a
pension plan**

What tax forms are used to transfer benefits from a registered pension plan to a registered savings or income plan?

It is not possible to provide any tax advice in this publication and if tax issues arise, qualified professionals should be consulted. However, as a general principle, the *Income Tax Act* accommodates transfers from registered pension plans to other registered pension plans, or registered savings or income plans, because of a breakdown of a marriage or common-law partnership. [See *ITA* Form T2151, *ITA* s. 147.3(5)]

It is a good idea to ask both the plan administrator making the transfer and the financial institution accepting the transfer (or plan administrator if it is a plan-to-plan transfer) to confirm the forms they require.

CHAPTER 3. DIVIDING BENEFITS IN A DEFINED CONTRIBUTION ACCOUNT (FLA, s. 114)

If the benefits are determined by the contributions made to the plan, and net investment returns on those contributions, the plan uses a “defined contribution provision”. (The contributions to the member’s account may be made by the employer or by both the employer and the employee, and the value of the account consists of the contributions plus investment returns, less administrative expenses.)

If the member’s benefits are in a defined contribution account, the benefits are divided by transferring to the credit of the spouse a share of the amount in the defined contribution account accumulated during the relationship. [FLA, s. 114, Reg., s. 20] The spouse would send to the plan administrator the agreement or court order dividing the benefits, together with a Form P3. [FLA, Reg., s.4(1)(c)] The administrator would then request the spouse to direct where the funds are to be transferred (usually to a Locked-In Retirement Account, but the funds could also be used to purchase an annuity or transferred to another pension plan, with the consent of that plan’s administrator). [FLA, Reg., s. 26] Additional tax forms (see para. 2.74) will be required to complete the transfer and the benefits are subject to “locking-in rules” (which are discussed in Chapter 10. For the meaning of “locked-in” see para. 10.4).

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

3.1 Subject to the FLA? **Is the pension plan subject to the FLA?**

[See para. 1.8, and Chapter 1 generally]

3.2 Pre-March 18, 2013 arrangements **Does the FLA apply to an agreement or court order made before the FLA comes into force?**

[See Chapter 14]

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**3.3 Why divide DC
Account by
immediately
transferring
spouse's share?**

Why is a former spouse entitled to receive a share of a defined contribution account immediately, when benefits determined by a benefit formula provision are divided on a deferred basis?

A defined contribution account is like a bank account or an RRSP. Any future changes in its value will be because more contributions are made to it (and from investment returns), so it is relatively straightforward to divide the account balance immediately between the parties.

(In contrast, when benefits are determined by a benefit formula provision, their value increases by other factors that usually cannot be fully assessed until a future date. For that reason, benefits determined by a benefit formula provision are divided on a deferred basis, until those factors, or more of them, are known, as described in Chapter 2).

**3.4 Spouse's share in a
DC Account**

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

The former spouse is entitled to a share of the account balance that accrued during the parties' relationship. The actual period is determined by dates specified in the agreement or court order for the beginning of the relationship (the "commencement date") and the end of the relationship (the "entitlement date") [See para. 2.22, and *Reg.*, s. 1(1) definition of "commencement date" and "entitlement date" and *Reg.*, s. 20]

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

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

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

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The “pre-relationship contributions” referred to in the *Division of Pensions Regulation* are the value of the defined contribution account at the commencement date and also include investment returns from the commencement date to the date the former spouse's share is transferred from the account [Reg., s. 20]. The commencement date is usually the date that the parties' relationship began (which is the earlier of the date that their marriage-like relationship began, and the date of their marriage: FLA, s. 3(3)). The parties can agree upon, and the court can direct, that a different date be used for the commencement date used to divide pension benefits.

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

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

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

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

$$\begin{aligned} & \frac{1}{2} (\text{account balance} - \text{pre-relationship contributions}) \\ &= \frac{1}{2} ((\$90,000 \text{ plus } \$5,000) - (\$40,000 \text{ plus } \$20,000)) \end{aligned}$$

This works out to $\frac{1}{2} (\$95,000 - \$60,000) = \frac{1}{2} (\$35,000) = \$17,500$.

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

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3.5 “Net investment returns” and commission expenses

Does “investment returns” include commission expenses?

Yes.

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

3.6 Employer contributions

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

The policy adopted under Part 6 is that employer contributions not vested by the date of division are not divided between the spouses.

Reg., s. 9 divides “contributions to the plan to the credit of the member.” Until they are vested, contributions to the plan are not credited to the member because, if they do not vest, the member will never become entitled to them. The *PBSA* introduced immediate vesting effective September 30, 2015.

Immediate vesting means that a plan member is entitled to receive any benefit earned from the time the member joined the plan (for all service accrued after January 1, 1993, the date when pension benefits legislation was first enacted in B.C.).

The *FLA* rules relating to contributions that are not yet vested, however, would still apply to plans that are not subject to B.C.’s *PBSA*. Where the unvested contributions are sizeable, a spouse may seek to divide the benefits by a compensation payment from the member. [*FLA*, s. 97] Under the *Division of Pensions Regulation*, s. 27(4), a spouse may choose to either (a) postpone valuation of a compensation payment until it is determined whether unvested entitlement vests, or (b) have the valuation proceed “assuming the entitlement will vest, but adjusting it to take into account the contingency that the member may die or leave employment before vesting.”

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

3.7 Record keeping: pre-relationship value

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

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

3.8 Are daily records required?

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

No.

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

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

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- 3.9 Retaining records** **How long must a plan retain records to determine the pre-relationship contributions?**
- To discharge the obligations imposed on plan administrators with respect to pension division means that in some cases records must be retained indefinitely. However, where other legislation specifies record retention periods, then there will be cases where plan administrators will have to estimate benefits based on the information that is available.
- 3.10 Records for non-B.C. members** **Suppose a plan has members in a number of provinces. If a member moves to B.C. and pension division is required, must the plan produce past records to establish the pre-relationship contributions?**
- No. There is no requirement on a plan to retain records for members that earn pension entitlement outside of B.C. The pre-relationship contributions would have to be estimated on a pro-rata basis. [See para. 3.7]
- 3.11 Locked-in transfers: when made** **What unlocking rules apply to the former spouse's share?**
- The B.C. *PBSA* provides that all pension benefits earned are “locked-in” (that is, must be used to produce life income at a later date: see para. 10.4). [*PBSA*, s. 68] This rule applies equally to a share of the benefits received by a former spouse when a relationship ends.
- (Immediate locking-in of a member's benefits represents a change to the former position, which provided that benefits vested after 2 years of continuous plan membership. The new locking-in rule applies to all benefits earned after January 1, 1993, the date that pension benefits standards legislation was first enacted in B.C.)
- Different locking-in rules apply depending on the legislation governing the plan. Federal rules differ from provincial rules. Make sure you know which rules apply. See further Chapter 10, particularly para. 10.5.
- There are a number of situations in which locked-in benefits can be unlocked, and the B.C. unlocking rules would apply equally to pension benefits in the hands of a former spouse. [*PBSA*, s. 69] One of these situations is that pension benefits that are less than a prescribed amount can be unlocked.

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For example, suppose that before the benefits are divided, the total amount is above the prescribed amount. The former spouse's share is transferred to a LIRA in the former spouse's name. If, after division, the former spouse's share is beneath the prescribed amount, then those benefits can be unlocked, and can be transferred to the former spouse on a non-locked-in basis.

For more information, see Chapter 10.

3.12 Pre and Post Jan. 1993 Contributions

Part of the member's benefits 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 choose to have the spouse's share paid only from the pre-1993 contributions?

In previous editions of this *Q&A*, the view was adopted that the formula for division could not be manipulated in this way, mainly 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]

However, with experience under the legislation, it is clear that, where the parties have more than one plan, or a plan consists of more than one component, the parties can choose how to allocate the former spouse's entitlement. It depends on how the plan is structured.

If the plan administrator is able, without undue difficulty, to segregate the former spouse's share and allocate it against a discrete part of the member's benefits, then there is nothing under Part 6 preventing that result.

This would be fairly straightforward to do when dealing with benefits in a defined contribution account, an identifiable part of which is not locked-in. Things become more complicated, however, when dealing with benefits that are determined by a defined benefit provision or in a hybrid plan, where the former spouse is entitled to a pro-rata share and division is based on service. In those cases, it is unlikely that the plan administrator would be able to segregate the former spouse's share and allocate it against a discrete part of the member's benefits.

3.12A Plan has 2 separate components

The member has terminated employment and has decided to keep the benefits in the plan and make regular Life Income Type Benefit ("LITB") withdrawals. The LITB account consists of two different parts, one of which is locked-in and the other not. Can the agreement or court order divide

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these two parts in different percentages? (In this case, the parties want to divide the locked-in portion 50-50, but give the former spouse a larger share of the non-locked-in portion).

If the plan consists of two or more different components, the parties may use different approaches for quantifying the former spouse's proportionate share of each component of a plan. *See* also para. 3.12 and 5.22.

3.13 Transfer options What transfer options are available to a former spouse?

[See Chapter 10]

3.14 [Deleted]

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

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

3.16 Variable benefits The member has terminated employment and has decided to keep the benefits in the plan and make regular Life Income Type Benefit ("LITB") withdrawals (sometimes called a "variable pension" or "variable benefits"). Does *FLA*, s. 117 apply, so all the former spouse can receive is a share of the withdrawals? Or can the former spouse still receive the share of the defined contribution account by a transfer from the plan?

No, the former spouse would not be entitled to a share of the withdrawals made by the member. The former spouse would still receive the share of the defined contribution account by a transfer from the plan. The rules for dividing defined contribution accounts continue to apply so long as there are funds in the account, even after a member begins making withdrawals from the account. [*FLA*, s. 114(1)(b)]

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At one time, the only option available to a member who terminated employment was to use the funds in the defined contribution account to purchase a lifetime annuity (the reason these plans are often called “money purchase plans”). However, the *ITA* was amended to permit other options (such as transferring the funds to a Life Income Fund from which regular withdrawals can be made subject to prescribed annual minimum and maximum amounts, or keeping the funds in the plan and receiving benefits in the same way: *see PBSA Reg.*, s. 74).

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

3.17 Terms for dividing variable benefits

The member has terminated employment and has decided to keep the benefits in the plan and make regular Life Income Type Benefit (“LITB”) withdrawals. What information needs to be in the agreement or court order to divide these benefits?

In most cases, the agreement or court order will specify the dates to be used, and the benefits will be divided in accordance with *FLA*, s. 114(2) and *Division of Pensions Regulation*, s. 20. [See para. 3.4] If there are sufficient funds in the account to satisfy the former spouse's share, no problems are caused by the fact that the member has been making LITB withdrawals in the meantime.

However, there will be cases where LITB withdrawals will leave a balance in the account that is less than the former spouse's share. In those cases, the administrator would be required to:

- (a) advise the former spouse concerning the amount of the former spouse's share, and
- (b) transfer as much of that share as is available as directed by the former spouse (to a financial vehicle as permitted under *PBSA*, s. 88, such as a LIRA or LIF). The former spouse would have to look to the member for compensation for the deficiency.

If the parties are well advised, the agreement or court order will address this issue in advance. For example, the pension division arrangements could:

- (a) instead of relying on the formula set out in *Division of Pensions Regulation*, s. 20, specify a percentage of the account balance as of a specified date (this would be the preferred approach from the plan

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administrator's perspective). Another option would be to express the former spouse's share as a dollar amount (although this approach can cause problems, if the markets are volatile and investment values plunge, which are avoided by using a percentage amount), and

- (b) if it is anticipated that LITB withdrawals will reduce the former spouse's share, require the member to compensate the former spouse for the former spouse's share of LITB withdrawals received by the member until the former spouse's share is transferred, or to compensate the former spouse for any shortfall caused by the member's LITB withdrawals.

**3.18 Changing
beneficiary
designation of
LITB account**

The member has terminated employment and has decided to keep the benefits in the plan and make regular Life Income Type Benefit ("LITB") withdrawals. The former spouse's share has now been transferred from the plan. The member wants to change the beneficiary of the plan so that it no longer goes to the former spouse if there is any balance remaining on his death. What document must the member provide the administrator to allow the beneficiary designation to be changed? Is a Form P5 ("Waiver of Survivor Benefits after Pension Commencement") required.

The entitlements of the former spouse have been paid from the plan, so a Form P5 is not required. The pension division arrangements trigger the operation of *FLA*, s. 145. The former spouse no longer qualifies as a spouse under the *PBSA*, and no further waivers are required to permit the member to change the beneficiary of the plan.

The member can change the beneficiary designation:

- (a) if there is a pension division arrangement in place with respect to the account (which may include an agreement or order that waives division of the benefits) [*FLA*, s. 145, *PBSA Reg.*, s. 74(11) (b)], or, if not
- (b) the spouse waives the survivor rights to LITB benefits (using *PBSA* Form 2 (Waiver C) of Schedule 3: *PBSA Reg.*, s. 74(11) (a)). (Form 2 can be used to waive survivor rights even after payments have started, provided the Form is completed before the member's death).

The administrator can act on the member's directions once the member provides the administrator with a signed *PBSA* Form 4, or with satisfactory evidence that *FLA*, s. 145 applies (usually by the member providing a copy of the agreement or order addressing entitlement to the benefits).

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Some administrators, out of an abundance of caution, require the former spouse to also provide a signed Form P5, and that is a sensible practice given that experience with LITB accounts is still relatively limited.

But, technically, a Form P5 is not required to allow the member to change the beneficiary designation. A Form P5 is used where “a spouse is entitled to receive or is receiving, survivor benefits.” [FLA, s. 126(2), s. 136. See para. 5.20] In the case we are discussing, however, the spouse ceases to be entitled to survivor benefits under the LITB account once the requirements of PBSA Reg., s. 74(11) are satisfied, so Form P5 is no longer required. See also para. 8.14A.

3.19 Allocating withdrawals to the LITB account

The member has terminated employment and has decided to keep the benefits in the plan and make regular Life Income Type Benefit (“LITB”) withdrawals. We have received an agreement dividing the account with a former spouse where the entitlement date is a couple of years ago, and in the meantime the member has made regular withdrawals from the account. How do we allocate those withdrawals? Do they come from the member's share? Or should they be applied pro rata to both parties' shares?

There is no formal allocation between the parties' shares, but in effect they are coming out of the member's portion.

If there are sufficient funds in the account to satisfy the former spouse's share, then the plan administrator has no problem implementing the pension division arrangements. If there are insufficient funds to do this, however, *see* para. 3.17.

3.20 Not enough funds in LITB account to pay out former spouse's share

The member has terminated employment and has decided to keep the benefits in the plan and make regular Life Income Type Benefit (“LITB”) withdrawals. The withdrawals have reduced the account balance to an amount less than required to satisfy the former spouse's share. What happens in that case?

See para. 3.17.

3.21 Variable benefits

The member has terminated employment and has decided to keep the benefits in the plan and make regular Life Income Type Benefit (“LITB”) withdrawals. The former spouse has now received the required share of

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the account. How does this impact the member's annual withdrawal limits?

The plan should leave the current limits (*ITA* minimum and *PBSA* maximum) in place until the following year when they would be updated as part of normal process.

**3.22 Flexible benefits
plan**

How are defined benefit flexi-benefits divided?

See para. 2.20.

**3.23 Pooled
Registered
Pension Plans**

How are benefits in a pooled registered pension plan divided?

The *FLA* applies to the division of benefits in a pooled registered pension plan account. [*FLA*, s. 110, definition of “local plan”]

A PRPP is a type of plan in which benefits are determined under a defined contribution provision, so the benefits would be divisible under *FLA*, s. 114 (and in accordance with the principles discussed in this Chapter).

Transfers from the account would be to another pooled registered pension plan, to a pension plan, if that plan administrator permits, to a locked-in savings or income plan, or used to purchase an immediate or deferred life annuity. (For BC members, the transfer would be to a federally regulated locked-in savings or income plans, although these plans are subject to the usual creditor protection rules that apply under provincial pension standards legislation to all provincial locked-in savings and income plans.)

For more information regarding the rules for PRPPs refer to the governing legislation. [*Pooled Registered Pension Plans Act*, S.B.C. 2014, c. 17; *Pooled Registered Pension Plans Act*, S.C. 2012, c. 16]

Also, information for B.C. members is (or will soon be) available on the website of the federal Office of the Superintendent of Financial Institutions. (At the time of writing, OSFI was developing a Member Guide for each participating jurisdiction).

CHAPTER 4. DIVIDING UNMATURED BENEFITS IN A HYBRID PLAN (FLA, s. 116)

*A hybrid plan is a plan that determines a member's benefits by a combination of defined contribution and defined benefit provisions [definition of "hybrid plan", FLA, s. 110]
If the member's benefits are in a hybrid plan, and the member's pension has not commenced at the time of the breakdown of a relationship, it is divided in two steps. [FLA, s. 116]*

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

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

- | | |
|-------------------------------------|---|
| 4.1 Subject to FLA? | Is the plan subject to the FLA?

[See para. 1.8 and Chapter 1 generally] |
| 4.2 Pre-March 18, 2013 arrangements | Does the FLA apply to an agreement or court order made before the FLA comes into force?

[See Chapter 14] |
| 4.3 Alternatives to hybrid split | The member's benefits are in a hybrid plan. The plan administrator has offered the spouse the option of leaving the portion that is based on the defined contribution provisions in the plan and dividing the whole of the pension benefits on a deferred basis, using the benefits in the defined contribution account at a later date to purchase additional, or enhanced, pension entitlement. May the spouse accept that option?

Yes. This is expressly permitted under Part 6. [FLA, s. 116(2)(b)] |

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*4.4 Is our plan a
hybrid plan?*

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

Yes, the rules under *FLA*, s. 116 that apply to hybrid plans would govern the division of the benefits. The defined contribution account would be divided by an immediate transfer to, for example, a LIRA or LIF for the former spouse [*PBSA*, s. 88] (subject to the option discussed under para. 4.3 and 4.5), and the former spouse would become a limited member with respect to the benefits determined under the benefit formula provision. [See Chapter 10 for more information about transfers from a plan.]

*4.5 Charging the
admin. fee*

Benefits under our plan are determined primarily by a benefit formula provision, but there is a defined contribution component that is used to purchase additional pension entitlement when the member elects to have the pension commence. When we divide the defined contribution component, instead of transferring the former spouse's share from the plan, we permit the former spouse to keep the share in a separate account in the plan and use it in the same way as members, to purchase additional pension entitlement. What administrative fee would we charge for this?

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

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

*4.6 Minimum defined
benefit*

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

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

CHAPTER 5. DIVIDING A PENSION THAT HAS COMMENCED (FLA, s. 117)

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

If the pension division arrangements are not finalized until after the pension has commenced, the benefits are divided by the former spouse becoming a limited member of the plan (by filing a Form P2 together with a copy of the agreement or order dividing the benefits). [FLA, ss. 117, 118, Reg., s. 4(1)(b)] This approach is also used if an annuity has been purchased by or on behalf of the member, whether or not the funds used for the purchase come from a pension plan. [FLA, s. 118]

The limited member is entitled to a proportionate share of each benefit paid out under the plan until the earliest of the death of the member, the death of the limited member, and the termination of benefits under the plan. (The calculation of a proportionate share of a matured pension is discussed at para. 2.18).

This method of pension division is completely different from the methods used for dividing benefits in local plans where the pension has not yet commenced (which were discussed in Chapters 2, 3 and 4). Before pension commencement, the former spouse is entitled to receive a separate share of the member's benefits (although the division is deferred for benefits determined by a benefit formula provision).

For matured pensions, in contrast, the pension is left intact and it is the income stream that is divided. (The federal PBSA, s. 25(7), however, permits a plan to amend its text to permit dividing a matured pension into two single life pensions--see para. 2.70--and some other provinces also permit this).

If the member is close to retirement when the parties' relationship ends, the former spouse should act quickly to preserve the methods that apply to divide benefits before pension commencement, or take steps to preserve rights: see para. 5.3B and 15.35.

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

Chapter 5
Dividing a Pension that has Commenced (FLA, s. 117)

5.1 What is a matured pension? What is a matured pension?

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

Technically, if a member is making Life Income Type Benefit (“LITB”) withdrawals from a defined contribution account (sometimes referred to as receiving a “variable pension” or “variable benefits”) this would qualify as a matured pension. But the rules that apply to matured pensions do not apply if the benefits remain in a defined contribution account, because they can still be directly divided with the former spouse without prejudicing third parties. [FLA, s. 114(1)] See para. 3.15.

5.2 Subject to FLA? Is the plan subject to the FLA?

[See para. 1.8 and Chapter 1 generally]

5.3 Pre-March 18,2013 arrangements Does the FLA apply to an agreement or court order made before the FLA comes into force?

[See Chapter 14]

5.3B Parties separate before pension commencement but finalize pension division arrangements after The parties separated before the member’s pension commenced, but the pension division arrangements were not finalized until after. Why don’t the rules that apply before pension commencement continue to apply? (In this case, the former spouse wants a lifetime separate pension, not a share of the monthly benefits which will end when the member dies. That certainly seems like a fairer result for both parties).

The policy under Part 6 balances the interests of the member, spouse and plan. It is difficult to undo the pension arrangements that have already been put in place: see para. 5.6. For that reason, the member and spouse must deal with the circumstances that exist when they finally get around to finalizing their property arrangements: see also para. 5.14. It is certainly true that the rules that apply before pension commencement usually provide the former spouse with better financial security. But if the former spouse wants them to apply, the former spouse must act before pension commencement, or make arrangements to

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preserve those rights (such as seeking the agreement of the member to postpone pension commencement or, if that agreement cannot be reached, by obtaining a court order to that effect). The *FLA* permits arrangements for implementing the pension division retroactively. [*FLA*, s. 132; *see para.* 15.35] But, again, it is necessary that the former spouse not delay in protecting rights to the benefits.

5.4 *When does a pension "terminate"?*

Section 117(2) says the spouse gets a share of benefits during the member's lifetime until the earlier of the termination of benefits under the plan or the death of the spouse. When do benefits "terminate"?

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

If there is a survivor benefit payable (to anyone) when the member dies, the benefits do not terminate until the survivor benefit terminates. However, s. 117(2) restricts the former spouse's entitlement to benefits paid "during the member's lifetime".

Consequently, if the agreement or order does not provide to the contrary, on the death of the member, the division of the benefits ends. If the spouse is the beneficiary of the survivor benefit, then the spouse would receive the survivor benefit as a result of the beneficiary designation. [*FLA*, s. 117(4)] If the spouse is not the beneficiary of the survivor benefit, on the death of the member the spouse would cease receiving a proportionate share of the amount payable to the beneficiary. [*See Chapter 8*]

Under the *FRA*, the former spouse was automatically entitled to continue to receive a share of any survivor benefits paid under the plan. The *FLA* drafting represents a change of policy. It is, however, open to the parties, or the court, to provide for continued payments to the limited member: *see para* 5.5.

In this situation, when acting on behalf of a former spouse, best practice would be to contact the plan administrator to request confirmation in writing about whether the proportionate share will continue to be paid if the member dies first.

5.5 *The member has died and the LM's*

We have been paying a limited member a share of the member's matured pension. The member has now died and there is a 60% survivor benefit payable to the member's current spouse. The agreement provides that the limited member is entitled to continue receiving the pro rata share, but s.

Chapter 5
Dividing a Pension that has Commenced (FLA, s. 117)

not the joint annuitant

117(2) restricts payments to the limited member to those made during the member's lifetime. What happens now?

This is an unusual situation. *See* para. 5.9 for circumstances in which this type of arrangement might arise.

The *FLA* rules fill in gaps, where the pension division arrangements have not addressed particular issues. It is open to the parties, or the court, however, to provide directions in many of these cases. [*FLA*, s. 111(1)]

If the pension division arrangements were finalized after the pension matured, then continued division with the limited member would require:

- (a) if an agreement is used, that the joint annuitant be a party to the agreement, or
- (b) if in a court order, that the joint annuitant be a party to the proceedings.

Otherwise, the agreement or court order could not affect the rights of the joint annuitant.

5.6 The spouse is the joint annuitant

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

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

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

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

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

- 1) any other approach would require opening up the pension and setting aside elections already made. Some, but not all, administrators would be

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capable of doing this. It would be difficult, for example, to open up the matured pension where an annuity has been purchased from a third party.

- 2) in the example the limited member receives more money when the member dies, but that will not always be the case. More commonly, where the limited member's only source of income is the pension, the member may have been paying support, which ends when the member dies.
- 3) the arrangement, more often than not, will be a fair one. The member and spouse, in happier times, addressed their minds to the income needs of the survivor. They agreed to accept a slightly smaller pension during their joint lives to ensure that the survivor had an acceptable level of income after. The breakdown of a relationship probably affects not at all the level of income needed by the survivor.
- 4) the member is advantaged 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.

**5.7 Can the
survivorship
election be
changed?**

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

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

The idea is that, whatever form of pension chosen by the member at pension commencement, the overall payments required under the plan will have the same value.

But this would not be the case if the member could change the beneficiary of the survivor benefits at some later date. If the survivor benefits were based on the member's spouse being 50 at the date of pension commencement, changing the beneficiary of the survivor benefit to someone who is 5 years younger (and therefore likely to live 5 years longer than the original spouse) would substantially alter the plan's financial obligations.

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So it is not a simple thing to change who is entitled to survivor benefits on the death of a member. It would involve commuting the pension, and recalculating everything again to determine the amounts payable, based on the life expectancies of the member and the new beneficiary. B.C. law does not require an administrator to commute a joint annuity (but see para 5.23 for situations where this would still be permitted under B.C. law).

It is uncommon, but legislation in a few other jurisdictions does provide for commuting a joint annuity, or at least permitting an administrator to amend the plan text to provide for that.

In some cases, an administrator will permit a limited window after pension commencement (60 days, for example) for the member to select another option.

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

5.8 Spouse1 v. Spouse2

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?

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

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

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

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

If the member dies first, spouse1 receives the entire survivor benefit, \$720/mo. Because spouse2's interest arose after spouse1 became the joint annuitant, spouse2 would receive no share of the survivor benefit payable on the member's death. Spouse2's share ends when the member dies. (This scenario is different from the case where the former spouse is seeking a share of survivor benefits with respect to benefits that accrued during the parties' relationship, discussed in para. 5.9).

5.9 Spouse2 v. Spouse1

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?

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

Because spouse1 delayed in advancing rights, the situation has become somewhat complicated. Under the legislation, spouse1 is entitled to become a limited member of the plan and receive a proportionate share of the pension paid during the member's lifetime. [FLA, s. 117(2)] It is possible to continue the pension division arrangements after the death of the member, if the agreement or court order provides for that, and if spouse2 is a party to the agreement, or proceedings, as the case may be. See para. 5.5.

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

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benefits under the rules that apply before pension commencement (discussed in Chapters 2-4).

With respect to preserving the rules that apply before pension commencement where more time is needed to finalize a claim, see para. 15.35.

See para. 15.26B and 15.26C for information about calculating the notice period and determining when notice is deemed to be received.

5.10 *After the limited member dies*

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

No.

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

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

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

5.11 *Dividing the unexpired guarantee period*

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?

Only if the limited member is also beneficiary of the guarantee period. The division of matured benefits ends on the death of the member. If a third party is the beneficiary of the guarantee period, the third party would be entitled to all of the guarantee period, subject to the terms of the agreement or court order dividing the benefits. [FLA, s. 117(2); see para. 5.5]

5.12 *Beneficiary of the unexpired guarantee period*

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

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The member cannot lawfully change the beneficiary designation of the guarantee period unless spouse1 signed *PBSA*, Form 2, Waiver B. Under *PBSA*, s. 80(5) and (6), a spouse who waives the minimum 60% survivor benefits (using *PBSA*, Form 2, Waiver A) is still entitled to whatever benefits are payable on the death of the member unless Waiver B is signed.

If the member can lawfully change the beneficiary designation, and the agreement or court order does not otherwise provide for continued division, then the division of the benefits ends on the death of the member. [*FLA*, s. 117(2)] See para. 3.18, 5.4 and 5.5.

If spouse1 did not sign Waiver B at pension commencement, it is still possible to sign it before the member dies to allow a change of beneficiary: *see* para. 5.20A.

Even if spouse1 did not sign Form 2, Waiver B, however, the beneficiary designation is effective if spouse1 predeceased the member. [*FLA*, s. 80(7)]

**5.13 The member files
a false statement**

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

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

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

Some plans are considering amending their plan text to allow the trustees discretion to extend the period for changing elections as may be needed in any situation where there is non-disclosure by the member.

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This kind of problem is usually avoided by record-keeping practices. Plans typically keep records about whether members have spouses. When a member retires, a plan that has a record of the existence of a spouse should require a good deal of convincing if the member purports to be unmarried. It may be necessary for the administrator to have the retiring member sign a declaration confirming that the member has no current spouse, and no former spouse who is entitled to any share of the benefits under family law. Or, if there is a record of a spouse on file, sending the spouse 30 days' notice to provide a copy of an agreement or court order dividing the benefits. *See* also para. 8.24.

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

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

The legislation adopts the policy that once the member's pension has commenced, undoing the arrangements made when the member retired would prejudice the plan too much. For example, in many cases, an annuity will have been purchased from a third party. Moreover, in most cases appropriate elections will have been made protecting both spouse and member. [*See* para. 5.6]

5.15 Why not use a *Rutherford* split?

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

The legislation requires the administrator to be responsible for dividing the monthly payments between the member and former spouse. In contrast, a *Rutherford* Order requires the member to administer the benefit split. A plan-administered benefit split is better because the spouse doesn't have to rely upon the member. In too many cases under the law that applied before B.C. adopted pension division legislation, a former spouse was required to bring further proceedings to enforce the division because the member declined to pay. In contrast, under Part 6, the spouse looks directly to the administrator for all entitlement to the pension. *See* para. 2.7.

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5.16 *The plan's obligations when the parties separate before pension commencement but P1 received after*

The member and spouse separated before the member's pension commenced. The member has now retired with a pension that pays the required 60% survivor benefit. The spouse has finally sent in Form P1. What obligations does the plan have?

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

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

The fact that the parties separated before pension commencement does not change the rules that apply if the pension division arrangements are not finalized until after pension commencement. There is no obligation on the administrator to undo the joint annuity election. [*See* para. 5.6, 5.7, 5.9 and 5.20]

If the spouse had acted quickly enough before pension commencement, however, it might have been possible to preserve the pension division rules that apply before pension commencement: *see* para. 15.35.

5.17 *Annuity and tax withholdings*

We are an insurance company and one spouse purchased an annuity from us. The funds did not come from a pension plan or RRSP. The other spouse is claiming an interest in the annuity. What rules apply in that case?

The *FLA* provides that the rules that apply to matured pensions (under *FLA*, s. 117) also apply to any annuity, even one that is purchased using funds that are not derived from a pension plan. [*FLA*, s. 118]. The policy reflects that such annuities are so similar to pensions, that they should be treated in the same way.

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

5.18 Implementing division of pension in pay

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

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

5.19 Implementing division of pension in pay

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

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

5.20 Waiving the 60% survivor benefit

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

B.C. law does not provide for the administrator commuting the pension and changing the beneficiary of the survivor benefits: *see* para. 5.7. Even if it were possible (under the plan text or governing legislation), the consent of the former spouse would be required. An agreement or court order where the spouse

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waives a share of pension benefits would not constitute a waiver of the survivor benefits. These are separate aspects of the pension. The survivor benefits are regarded as the property of the former spouse [*FLA*, s. 124(5). *Tarr Estate v. Tarr*, 2014 BCCA 315], so a waiver of the benefits paid during the member's lifetime would not extend to the survivor benefits payable to the spouse after the death of the member.

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

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

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

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

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

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

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a number of other pitfalls best to avoid entirely, such as tax issues). The Pension Corporation, for example, will not accept a Form P5.

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

If a Form P5 has been delivered to the plan administrator, this cannot be withdrawn by using Form P7, “Withdrawal of Notice/Waiver of Claim”: *see* para. 8.11, 11.15 and 15.43.

5.20A Waiving the guarantee period

The spouse at the plan member’s retirement waived the right to the minimum 60% lifetime survivor’s benefit (signing *PBSA*, Form 2, Waiver A). The member chose a single life pension guaranteed for 15 years. The parties have now separated and formed new relationships. The member wants to change the beneficiary of the guarantee period to his new spouse. Can he do that? The former spouse is agreeable (she has her own pension benefits).

Yes, the former spouse can waive entitlement to the guarantee period, using Waiver “B” of *PBSA*, Form 2. *See* also para. 8.16.

5.21 Are survivor benefits affected by changed spousal status?

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

Both the federal *PBSA* (s. 22(2)) and the B.C. *PBSA* (s. 80) require that the pension in favor of a member who is retiring pay a survivor benefit where the member has a spouse *at the date the pension commenced*: *Smiley v. Ontario Pension Board* (1994), 4 R.F.L. (4th) 275 (Ont. Gen. Div.).

This is a common provision in pension standards legislation. The member can choose another form of pension at pension commencement, but since it is the spouse that is entitled to the survivor benefits, electing another form of pension is only possible if the spouse signs a waiver prescribed under the pension standards legislation.

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The general rule in B.C. is that even where a waiver is signed:

- if the member chose a pension that provided some form of survivor benefits for the spouse, and
- the spouse qualified as the member's spouse at the date the member began to receive the pension, then
- a subsequent change of spousal status does not deprive the former spouse of the right to receive the survivor benefit whatever the plan text provides. [PBSA, s. 81(2)]

The position may be different for plans that are not subject to B.C. law. [See para. 8.8]

5.22 Dividing bridge benefits using a different formula

In addition to a lifetime pension, the member is receiving bridge benefits that will end when the member reaches 65. The parties want the member, who is younger, to keep all of the bridge benefits (this will allow the parties to have equal retirement income, since the former spouse will be receiving Old Age Security benefits before the member). Can the pension division arrangements specify different proportionate shares for the lifetime pension and the bridge benefits.

Yes. The *FLA* refers to “a proportionate share”, but this is not restrictive. In an enactment, words in the singular include words in the plural. [Interpretation Act, R.S.B.C. 1996, c. 238, s. 28(3)] The parties can specify different proportionate shares that apply to discrete parts of the benefit, subject to the plan administrator’s ability to implement this approach (depending on plan design, it is conceivable that this approach would impose too great an administrative burden on the plan to implement). This will probably only be difficult where divisions are automated and the plan systems do not have the capacity to apply different percentages to different components of the pension. Check with the plan administrator.

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Dividing a Pension that has Commenced (FLA, s. 117)

5.23 *Commuting the mature pension into a different form*

The FLA does not provide for commuting a matured pension into two separate pensions for the parties, but our plan would like to offer that option. Can we do it?

If the plan is dealing with a pension that has commenced, this would fall under *FLA*, s. 117, which provides only for dividing the income stream.

The former spouse cannot compel the plan to provide options in addition to those under s. 117. However, the plan can commute a matured pension into a different form in these cases:

- (a) where legislation expressly permits this (which is not the case in B.C. for its general pension division legislation, but the B.C. legislature can adopt different rules in specific situations, such as where there are insolvency and restructuring proceedings. If the plan is regulated under other legislation, such as the federal *PBSA*, which permits commuting in this situation, then nothing in the *FLA* restricts that option),
- (b) where the plan administrator implemented the pension in accordance with the member's directions but (1) the member misled the plan (for example, stating that there was no one who qualified as a spouse at the date of pension commencement when there was), or (2) the plan failed to give the spouse or limited member required advance notice about the pension commencement (or otherwise failed to carry out due diligence), or
- (c) where the plan text permits this option.

5.24 *Proportionate share of a matured pension*

How is the proportionate share of a matured pension calculated?

See para. 2.16 to 2.20 (particularly para. 2.18).

5.25 *Target benefit provision: temporary improvement in benefits*

We administer a target benefit plan. The limited member chose to receive the share of the benefits by a separate pension. We have amended our plan to provide for a temporary improvement in benefits for retired members under *PBSA*, s. 21. How does this affect the entitlement of the limited member under the separate pension? What about the entitlement of

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former limited members who received their share by a lump sum transfer from the plan?

The limited member receiving the separate pension enjoys the same rights as other retired members to the temporary improvement in benefits. Similarly, any decrease in benefits to retired members would apply equally to the limited member's separate pension.

In contrast, the limited member who took the lump sum transfer is no longer entitled to any further share of the pension benefits after the transfer is completed (nor subject to any clawback if benefits are later reduced).

CHAPTER 6. OTHER TYPES OF PLANS - SUPPLEMENTAL BENEFITS AND BENEFITS FOR SPECIFIED INDIVIDUALS (FLA, ss. 119 AND 121)

Supplemental Benefits

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

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

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

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

Benefits for Specified Individuals

The Income Tax Act permits pension plans to be set up for specified individuals (in general terms, a person who has 10% or greater ownership interest in the company, or who is related to the owner). The ITA also provides that any member earning more than a specified amount is also a specified individual, which means that non-connected high-income employees can also come within the definition of specified individual (in ITA Reg. - 8515(4)(b)).

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

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

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

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

6.1 SPP

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 and represent the amount over and above the maximum amounts CRA will allow to be paid under registered pension plans. Are these divisible?

Benefits in a supplemental pension plan are divisible under Part 6 [*FLA*, ss. 119, and 110, definition of "supplemental pension plan"], but the rules that apply are different from those that apply to benefits in a registered local plan (which were discussed in Chapters 2 and 3).

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

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

Chapter 6
Other Types of Plans - Supplemental Benefits and Benefits for Specified Individuals
(FLA, ss. 119 and 121)

6.2 *Why are options for dividing SPP restricted?*

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

The fact that other options are not automatically available recognizes that these types of plans are typically not funded, so requiring the administrator to pay out the former spouse's share before the member's pension commences could prejudice the plan, other plan members, or the plan sponsor. Any of the other options for dividing the benefits that are available with respect to registered plans, however, are available with the consent of the administrator [FLA, s. 119(3)(a), (b) and (c)].

6.3 *SPP is a DC Account*

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

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

If the administrator consents to an immediate transfer, it must be realized that because supplemental pension plans are not registered under the *ITA*, the rules that apply to the roll-over of the tax incidences of registered pension benefits would not apply. The payment would be made to the former spouse in cash and subject to taxation in the year received.

6.4 *Lifetime pension*

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

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S. 117 applies. [FLA, s. 119(3)(a)] The former spouse becomes a limited member of the plan and entitled to receive a proportionate share of the monthly benefit paid to the member until the earliest of the death of the member, the death of the former spouse and the termination of benefits under the plan.

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

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

6.5 Instalment payments

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

S. 117 applies. See para. 6.4.

Payments to the former spouse would continue until the earliest of the death of the member, the death of the former spouse and the termination of benefits under the plan.

In this case, the benefits would terminate when the 10 years of instalment payments are completed.

With respect to the possibility that the member may die before the instalments are fully paid, see para. 5.4 and 5.5.

6.6 Forfeiture

The member was receiving a supplemental pension, and the former spouse was receiving a proportionate share of the monthly payments being made, under FLA, s. 119. But the payments were forfeited when the member took employment with a competitor of the plan sponsor. How does this affect the former spouse's entitlement?

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

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

**6.7 Forfeiture of
separate pension**

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

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

6.8 Admin. fee

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

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

**6.9 Proportionate
share of SPP**

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

If the agreement or court order providing for the division does not address how the former spouse's proportionate share is determined, it would be determined in accordance with the *Division of Pensions Regulation*.

If the supplemental benefits have matured into a pension, or if they are unmatured and in a plan that uses a benefit formula provision, the former spouse is entitled to a pro rata share calculated using pensionable service. [Reg., s. 17] See para. 2.17. This will produce the same result as the limited member's share

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of the registered pension, unless benefits under the supplemental pension plan are determined by a formula that differs from the registered plan. *See* para. 6.11.

If the benefits are in a plan that uses a defined contribution provision, the former spouse would receive a share of the account balance. [*Reg.*, s. 20] *See* para. 3.4.

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

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

Yes, that option can be made available to the limited member. [*FLA*, s. 119(3)(d)] Adopting that approach would avoid the problem discussed in para. 6.12.

*6.11 Formula for SPP
is different from
formula for RPP*

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

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

*6.12 Benefits migrate
from SPP to RPP*

Isn't there a problem calculating entitlement to the registered benefits and the supplemental benefits at different dates? The CRA ceiling changes over time, and this means that benefits that at one time would have been paid under the supplemental pension plan could, at a later date, be considered paid under the registered pension. How is this dealt with?

Yes, in some cases, this migration of benefits occurs between the registered and supplemental pension plans as a factor of plan design. The default rules do not directly address this issue, beyond the general principle that the limited member

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is entitled to a proportionate share of all of the benefits under each of the plans. See para. 6.10 for one solution. Otherwise, the directions of the parties on this issue should be requested.

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

See para. 8.13.

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

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

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

The usual rule is that, if an agreement or order representing a final settlement is silent about benefits, the benefits are deemed to be allocated 100% to the member. [*FLA*, s. 111(2); see para. 1.5, 6.15, 11.17 and 14.14 for the general rule, and para. 13.24 for legal options available to a former spouse if the agreement is silent about the pension entitlement.]

However, another principle also applies in these cases. If the supplemental benefits are not expressly referred to, but they are integrated with a registered pension that is to be divided under the agreement or court order, then that would usually be sufficient to require the supplemental benefits to be included in the division (unless the order or agreement clearly provided that they were excluded): *Thoburn v. Thoburn*, (1993), 46 R.F.L. (3d) 265 (BCSC).

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Best practice is for the parties to address this issue in the pension division arrangements. The first step would be to confirm expressly with the plan administrator whether the member is entitled to supplemental benefits, when the Form P1 is sent in.

6.16 Dividing an IPP

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

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

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

**6.17 Why are options
for dividing IPP
restricted?**

Why isn't the former spouse entitled to choose to receive a separate pension at any time after the earliest date that the member could do that? If that option is fair for benefits in other registered plans, why is it not appropriate for an Individual Pension Plan?

The fact that other options are not automatically available is in recognition that these types of plans are set up for 1 to 3 members. Dividing benefits before pension commencement for a plan with few members may cause problems for plan funding, and may prejudice other members. For this reason, the former spouse's entitlement is to receive a separate pension when the member chooses to have the pension commence. Any of the other options for dividing benefits that are available with respect to registered plans, however, are available with the consent of the administrator. [*FLA*, s. 121(3)]

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

The death of the member ends the deferral of the pension division arrangements and the former spouse would receive the share at that time. *See* para. 8.2.

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

Regulation, s. 8515(4), which deals with pension plans, applies.

This was a question that was raised when the *FLA* was first enacted. But there was no real question because *ITA*, s. 120.1 has no relevance or application to dividing benefits under Part 6.

Any residual confusion on this point, however, has been addressed by an ancillary amendment introduced by the new *PBSA*, which revised the *FLA*, s. 110 definition of “specified individuals” so that it expressly refers to *ITA*, Reg., s. 8515(4).

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

The ability of the administrator, under *Reg.*, s. 24(5), to select an age, was designed to deal with this issue. *See* para. 2.55 and 6.14

CHAPTER 7. DIVIDING BENEFITS IN AN EXTRAPROVINCIAL PLAN (FLA, s. 123)

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

At the time of publication, no Forms have been prescribed for use with extraprovincial plans.

Pension benefits in an extraprovincial plan are divided by legislated methods applied in the plan's jurisdiction.

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

7.1 Extraprovincial plan defined

What is an extraprovincial plan?

An "extraprovincial plan" is a plan that is not a "local plan."

The definition of "local plan" in *FLA*, s. 110 is broad, and includes private plans registered outside B.C., and federally regulated private occupational plans (as opposed to public sector 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 jump to the conclusion that benefits are in an extraprovincial plan (and therefore not subject to the rules that apply to local plans) just because the plan is registered outside of B.C. Many plans registered outside B.C. will qualify as local plans. [See para. 1.12 and Chapter 1 generally]

7.2 Dividing benefits in an extraprovincial plan

How are benefits in an extraprovincial plan divided?

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

If the governing legislation does not provide a method of pension division, the benefits are divided by waiting until the pension commences and the

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administrator paying the former spouse a proportionate share of each monthly pension payment (sometimes referred to as a “plan administered benefit split”). [FLA, s. 123(2)(b)]

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

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

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

7.3 *CPP is an
extraprovincial
plan*

Is the Canada Pension Plan an extraprovincial plan?

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

7.4 *Federal public
service plans are
extraprovincial
plans*

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

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

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Dividing Benefits in an Extraprovincial Plan (FLA, s. 123)

*7.5 Benefits earned
from employment
in B.C.*

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

No. In these circumstances (because the benefits were earned from employment in B.C.) it would qualify as a local plan.

The Canada Post Plan is not a public sector plan. It is governed by the federal *Pension Benefits Standards Act*. That Act provides that provincial law governs the division of pension benefits (although it also permits benefits to be divided by an assignment to the former spouse under s. 25(4)). The definition of “local plan” in *FLA*, s. 110 includes plans that, under their governing legislation, are subject to provincial law. *See* para. 1.11.

*7.6 Security for
spouse’s interest?*

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

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

CHAPTER 8. DEATH AND SURVIVOR BENEFITS (FLA, ss. 124-126)

Pension entitlement does not simply vanish when a member dies. Survivor benefits are usually payable when a member dies before pension commencement and may also be payable when a retired member dies.

Survivor Benefits if the Member Dies Before Pension Commencement

Survivor benefits payable when a member dies before pension commencement may take one of two forms: a pension or a lump sum. If the member is survived by a spouse (as defined under the PBSA), the spouse has the option of receiving the survivor benefits in the form of a pension, unless the plan administrator requires the spouse to transfer the benefits out of the plan [PBSA, s. 79(1)(a)(i)(A) and (3)] If the member is not survived by a spouse, the 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. 79(1)(c)]

Many plans provide for survivor benefits that, depending upon vesting rules and length of pensionable service, have the same commuted value as the pension would have (this is the case, for example, for B.C. public sector plans, and also federal public sector plans, and is now a requirement under the current PBSA for all private occupational plans registered under it).

Survivor Benefits Payable After the Pension Commences

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

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

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

Competition Between Limited Member and Others

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

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

8.1 Limited member dies before the member

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

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

The limited member's share is based on the commuted value of the benefits at the date of the limited member's death, assuming the pension commences at the later of the member's actual age and the average age of retirement for the plan. [Reg., s. 23(3)(d) and (4)] (Alternatives to using the average age of retirement are discussed at para. 2.55 and 2.65.)

8.1A Can a Limited member designate a beneficiary

Does a limited member have the right to designate a beneficiary, who would receive the limited member's share of the benefits if the limited member dies before the benefits are divided?

There is no provision in the FLA that permits a beneficiary designation to be made by a limited member before receiving a share of the benefits. The *Wills, Estates and Succession Act*, S.B.C. 2009, c. 13, however, appears to permit a designation to be made, since the beneficiary designation rules specified under that Act apply to pension plans, whether or not the plan gives the person entitled to a benefit the right to make a designation. (WESA, s. 84(1)) Some plan administrators, such as the Pension Corporation, have already taken this step and permit a limited member to make a beneficiary designation.

But even if this cannot be done directly, it can be achieved indirectly. If the limited member dies before the benefits are divided, the FLA provides that the limited member's share is paid to the limited member's estate. [FLA, s. 124(4)] The limited member can direct who is to receive those benefits by making a will.

Once the limited member receives the share (by a separate pension for example, or a lump sum transfer to a registered plan), the limited member would be able to designate a beneficiary.

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8.2 Member dies before benefits divided

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

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

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

Once the former spouse receives the share of the benefits, the member's benefits would then be adjusted to reflect the division. [*Reg.*, ss. 21 and 22].

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

[See Introduction to Chapter 8 and para. 2.9]

Position under the previous *PBSA*

Before B.C. changed its pension benefits legislation to provide that survivor benefits payable before pension commencement equal the value of the pension benefits, it was possible in some cases where the member was survived by a former spouse for the plan to end up paying out more than if the member died before pension commencement and there were no pension division arrangements.

For example, suppose that under the former *PBSA*, the plan was structured to provide a survivor benefit, if the member died before pension commencement, that was 60% of the commuted value of the pension benefits and:

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- (a) the pension benefits at the death of the member had a commuted value of \$100K,
- (b) the survivor benefits payable before pension commencement had a value of 60% of that, or \$60K,
- (c) the limited member was entitled to a 50% share of the benefits, and
- (d) the member had a new spouse who was entitled to the 60% survivor benefits.

In this scenario, under *FLA*, s. 124(2), the following would take place:

- (a) the limited member would be entitled to benefits with a commuted value of \$50K (either by a lump sum transfer or, if the member was eligible for pension commencement, as a separate pension),
- (b) the member's pension entitlement would be adjusted and reduced by half (to reflect the portion received by the limited member) so would have a commuted value of \$50K, and
- (c) the member's current spouse would receive a survivor benefit based on the member's remaining portion. Because of the plan design, this would be 60% of \$50K, or \$30K.

In this scenario, if the member had lived and taken the pension benefits, the benefits would have been worth \$100K. If the member had died, and there had been no pension division arrangements, the survivor benefits would have been worth \$60K. But, in the circumstances described, where there is a former spouse claiming benefits as a limited member, and a current spouse, the plan's total liability would have been \$50K plus \$30K = \$80K.

Where survivor benefits payable before pension commencement have the same value as the pension, however, the plan's total liability is the same in either case.

**8.3 Unchanged
beneficiary
designation**

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

The former spouse is entitled to all of the survivor benefits. Entitlement to survivor benefits is determined by the member's beneficiary designation

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(subject to the statutory priority of a new spouse under the *PBSA*). [*FLA*, s. 125] If the former spouse is the beneficiary of the survivor benefits, and there is no new spouse, the spouse will receive the whole of the survivor benefits.

There are a number of cases dealing with unchanged beneficiary designations after the breakdown of a relationship, so a remedy may be available (some of the case law in this respect was considered in *Tarr Estate v. Tarr*, 2014 BCCA 315).

Certainly, in most cases involving an unchanged beneficiary designation, the fairest resolution will probably be for the court order or agreement to provide that the former spouse receives only the former spouse's share of the benefits under Part 6, and no share of survivor benefits payable under the member's remaining share.

But it may not be possible to achieve this result if the member fails to change a beneficiary designation [See para. 2.5 and 11.3]

Leaving a beneficiary designation unchanged is completely different from where the member intentionally designates a former spouse to be beneficiary after their relationship ends, something that plan administrators advise is not all that uncommon. See, for example, para. 8.17.

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

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

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

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

This means that:

- if the member dies after the *FLA* comes into force,

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

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

The member's pension will then be adjusted to reflect the division. Survivor benefits based on the member's remaining share would be payable to the member's new spouse, designated beneficiary or estate, as the case may be.

Problems with the FRA approach

A problem with the *FRA* approach, which based the limited member's share on the preretirement survivor benefit, was that in some cases the limited member could receive substantially more and, in other cases, substantially less, than the share that would have been received had the pension benefits been divided during the parties' joint lifetimes. The *FLA* rule means that the limited member will receive the same share in either case.

Another problem with the *FRA* approach was that the default rules were based on the assumption that the survivor benefits would have a lower value than the pension, and so allocated all of the survivor benefits that accrued during the relationship to the surviving spouse. This worked reasonably well where the survivor benefits were reduced in value, but meant that the surviving spouse received double the share in any case where the survivor benefits equaled the commuted value of the benefits (now the position in BC because of provisions of the current *PBSA*).

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

There may be cases where the agreement or order is silent about what is to happen in this scenario, and the limited member, or the member's estate, may argue that the *FRA* rules should continue to apply. If the application of those rules would produce a result that differs from an equal division of the benefits,

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however, it is important to note that the court retains a jurisdiction to revise pension division arrangements in any case where they would operate inappropriately in the existing circumstances. [*FLA*, s. 131]

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

8.5 Administrator consultation with parties

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

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

In any case where the administrator consults with the parties, it is to confirm the parties' intentions and to receive directions on particular issues. [*FLA*, s. 253(3)] *See* para. 14.18. In those cases, the directions would govern the issue.

In contrast, if there is some kind of discussion or conversation between the administrator and the parties, but it does not result in further directions or clarification of the pension division arrangements, then that discussion would have no significance.

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

8.6 Required beneficiary designation not made

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

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

As to the principles that govern rights in this situation: the court will protect the interests of spouse1 notwithstanding that the beneficiary designation was not made. There may be a remedy against the member's estate for breach of the pension division arrangements. [*Munro v. Munro Estate*, (1995) 4 B.C.L.R. (3d) 250 (C.A.)]

If the benefits have already been paid to a third party, spouse1 may have a claim against the third party. [*Gregory v. Gregory*, (1994) 92 B.C.L.R. (2d) 133 (S.C.); *Fraser v. Fraser*, (1995) 16 R.F.L. (4th) 112 (BCSC)]

If the administrator made the payment without any notice of the court order, however, there would be no liability on the administrator to pay the benefits twice. *See* also para. 14.15.

It is also worth noting that, under the *FRA*, it was held that pension division arrangements finalized before the member's death are enforceable even if the former spouse has not become a limited member by that date: *Martens v. Martens*, 2009 BCSC 1477. Filing the Forms to become a limited member was regarded as an administrative formality, not a necessary requirement to perfect substantive rights to the benefits. Of course, if the forms are not filed, in the meantime the administrator would be required to administer the benefits in accordance with the plan text. If the forms are not filed until after death benefits are paid out from the plan, for example, the former spouse would have to look to the recipient of those benefits, not the plan administrator, for recourse.

Since the same administrative provisions are carried forward under the *FLA*, it is expected that a court would consider the earlier precedent binding. *See* para. 13.24.

8.7 Designating
limited member
beneficiary

Is there any reason why a member who is not yet receiving a pension should designate the limited member a beneficiary of the survivor benefits? Is this necessary to provide security for the limited member receiving the proportionate share?

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Not for dividing benefits in a local plan. Once a former spouse becomes a limited member, the limited member is secure for the proportionate share and would look to the administrator to enforce that interest. The idea that a former spouse should be designated beneficiary of survivor benefits derives from the original *Rutherford* Order, where that was the only possible way of providing some measure of security to the former spouse for receiving the proportionate share. The implementation of pension division legislation in B.C. in 1995 meant that, since that date, the beneficiary designation was no longer necessary as security.

That does not mean that there may not be other reasons and situations where it would be appropriate for a member to keep a former spouse as beneficiary, just that it's not a necessary part of dividing pension benefits in local plans under Part 6.

If providing security for the former spouse's share is the only reason for the designation, the designation may well cause unexpected problems depending on how future events unfold (such as where the benefits are divided, but the beneficiary designation is left unchanged. *See* para. 2.5 and 8.3.)

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

8.8 Change in spousal status after retirement

Under our plan, if the member's pension has commenced, a 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 and the limited member, who would otherwise be entitled to the survivor benefit, no longer qualifies as a spouse. What happens when the member dies?

The limited member would still be entitled to receive the survivor benefits.

Entitlement to 60% survivor benefit

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For plans subject to the B.C. *PBSA* and the federal *PBSA*, if the member has a spouse at the date of pension commencement, the plan is required to provide the spouse with a 60% survivor benefit, unless the spouse signs a prescribed waiver allowing the member to take a different form of pension. If the waiver is not signed, the 60% survivor benefit is payable to the spouse even if at some future date there is a change in spousal status. Entitlement to this statutory benefit is determined at the date of pension commencement, meaning that a later separation, divorce or annulment would not affect the plan's obligation to pay the survivor benefit. [See para. 5.21] This is a common feature of pension standards legislation across Canada.

Waiving the 60% survivor benefit

If the member's spouse waives the statutory 60% survivor benefit, the member is permitted to choose another form of pension provided under the plan text, such as a pension payable only for the member's lifetime, or a pension that pays some other level of survivor benefit (such as a 50% survivor benefit, or a survivor benefit in the same amount as paid during the member's lifetime). There is a great deal of variety in the forms of pension that may be selected.

Some plan texts providing for survivor benefits impose a condition that the survivor benefits are payable only if the spouse continues to be the member's spouse at the date of the member's death.

In B.C., this condition has no effect. The *PBSA* expressly provides that change of spousal status after pension commencement does not affect entitlement to survivor benefits elected at pension commencement, whatever the plan text may say. [*PBSA*, s. 81(2)]

Administrators of plans that provide for a different result should give priority to amending the plan text to comply with the requirements of the governing legislation.

*8.8A Waiver signed
without full
information*

The member's spouse signed the prescribed waiver, and the member elected a 50% pension that is payable to the person who qualifies as the member's spouse at the date of the member's death. The member and spouse separated for more than 2 years before his death. Under our plan a person no longer qualifies as a spouse after 2 years' separation. The former spouse says she did not understand that the pension could end without benefits being payable to her on the member's death. She's

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challenging the waiver saying it was signed without full information. Is that a ground for challenging a waiver?

This was an issue that arose before *PBSA*, s. 81(2) came into force (*see* para. 8.8), but may still be relevant if the plan is regulated outside B.C.

A waiver is not effective unless the person signing it was provided with full information about what was being waived.

Consequently, an issue that must be considered is whether the former spouse had full knowledge of what was being received in exchange for what was being given up when the waiver was signed.

In all too many cases where a spouse signs the prescribed waiver, the information provided by the plan administrator is silent, or ambiguous, about entitlement depending upon continued spousal status and it is expected that, in those cases, the waiver would be ineffective (*see*, for example, *Deraps v. Coia* (1999), 179 D.L.R. (4th) 168 (Ont. C.A.)).

8.9 Payment to limited member's estate

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

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

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8.10 Proportionate share if limited member dies before the member's pensions commences

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

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

8.11 Agreement waives survivor benefits

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

See para 5.7, 5.20 and 11.15.

8.12 Competition between separated spouse and common law spouse

The member died (before pension commencement). The member and the former spouse (spouse1), who were married, separated 4 years ago. The member was in a marriage-like relationship with a new spouse (spouse2) at the date of his death. Who is entitled to the survivor benefits? Spouse1 has now filed a Form P1.

The administrator must pay the survivor benefits to spouse2. Although spouse1 may have rights in this situation, a court order must be obtained to advance them (or there must be an agreement between the parties recognizing spouse1's interest).

Separation is a triggering event, vesting a half interest in family property in each of the parties, and a recent case has held that proceedings can be commenced under the FLA even after the death of a party, provided no limitation period has expired (for example, if the parties are common law partners, the proceedings must be commenced within 2 years of the separation: *Howland Estate v. Sikora*, 2015 BCSC 2248. This means that it is still open to the former spouse to make a

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claim to a share of the pension benefits under the *FLA*, and can still send in a Form P1 for information about the benefits, notwithstanding the death of the plan member. *See* also para. 2.9.

That doesn't mean the plan has to wait to see what happens. The possibility of a family law claim doesn't over-ride the administrator's obligations with respect to administering the benefits, which in this case would be paying out the survivor benefits. [*FLA*, s. 142]

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

See para. 15.26B and 15.26C for information about calculating the notice period and determining when notice is deemed to be received.

8.13 *Death of member and supplemental benefits*

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

Part 6 does not automatically provide for the division of supplementary benefits on the death of the member because not all supplementary plans provide for the payment of benefits if the member dies before pension commencement. If, however, the supplemental pension plan pays a survivor benefit in these circumstances, then the former spouse is entitled to a share of the supplemental benefits determined the day before the member's death. [*FLA*, s. 124(1)(b) and (2)]

The *Division of Pensions Regulation* allows a bit of flexibility on the valuation date, however, by providing that the valuation be not earlier than the end of the month immediately preceding the death of the member. [*Reg.*, s. 23(3)(c)]

8.14 *Former spouse still qualifies as spouse under the PBSA*

The member has applied for pension commencement. Our records show that the member has a spouse. The member has provided us with an agreement under which the spouse waived any claim to the benefits. But the information provided shows that the parties have been separated for

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less than two years. Doesn't that mean that the former spouse still qualifies as a spouse under the *PBSA* rules? *PBSA*, s. 80 says that the member must elect a 60% survivor benefit unless the prescribed waiver is signed. How do we sort this out? Does the member have to elect a 60% survivor benefit for the former spouse? Does the member have to get the former spouse to sign the prescribed waiver under the *PBSA* to choose another form of pension?

The agreement overrides the *PBSA* rules, including the statutory entitlement to the 60% survivor benefit.

The *FLA* provides that the obligation on the member to choose the 60% survivor benefit no longer applies in the following circumstances: [*FLA*, s. 145. See also *PBSA*, s. 80(9)]

- pension benefits are divided,
- a former spouse becomes a limited member,
- there is an agreement adjusting for the former spouse's pension entitlement in some other way, or
- the former spouse waives any claim to pension benefits in a family law agreement.

The policy underlying s. 145 is to ensure that a former spouse does not benefit from the member's pension benefits twice (once under the *FLA*, and then secondly under the *PBSA*). To summarize:

- (a) the prescribed waiver is required only if the former spouse is entitled to survivor benefits under *PBSA*, s. 80,
- (b) a former spouse is not entitled to survivor benefits under *PBSA*, s. 80 if there is an agreement that provides that the spouse does not receive any share of the pension (because that's the effect of *FLA*, s. 145, particularly s. 145(4)), and
- (c) therefore, since there is no entitlement to the survivor benefits, there is no need for the prescribed waiver.

The agreement isn't a substitute for the prescribed waiver. Essentially, the agreement removes spousal status for pension purposes.

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8.14A Waiving the spousal benefits under *PBSA*

Does the spouse have to sign *FLA* Form P5 (“Waiver of Survivor Benefits after Pension Commencement”) to waive spousal entitlement that arises under the *PBSA*?

No, Form P5 would only be used to waive spousal entitlements in a marriage breakdown situation.

The *PBSA* provides spouses with a number of rights, including: (a) the requirement that the member’s pension pay a 60% survivor benefit for the spouse, and (b) entitlement to priority over a designated beneficiary of benefits payable on the death of the member before pension commencement.

In each case, the *PBSA* permits the spouse to waive these benefits by signing a prescribed waiver (see *PBSA Reg.*, Schedule 3, Form 2 and Form 4). These rights also cease if *FLA*, s. 145 applies (where the spouse has become a limited member of the plan or there is an agreement or order dividing the benefits).

In neither of these cases is there any need for the spouse to also sign a Form P5 to waive the benefits. (Nor would Form P5 be sufficient for this purpose, if the parties have not adhered to the requirements of the *PBSA*. A Form P5 has very limited use in special cases discussed in para. 5.20. See also para. 3.18, 8.14 and 8.15.

8.15 Former spouse still qualifies as spouse under *PBSA*

The member has died before pension commencement. The former spouse still qualifies as a spouse under the *PBSA* rules and so appears to be entitled to the survivor benefits under s. 79, because the prescribed waiver under the *PBSA* was not signed. The member’s personal representative has provided us with a copy of an agreement where the former spouse waives any claim to the pension benefits. Does that override the entitlement of a spouse to survivor benefits under *PBSA*, s. 79? Who is entitled to the survivor benefits?

The same position applies as discussed in para. 8.14. The agreement overrides the *PBSA* rules.

The *FLA* provides that once pension benefits are divided, or a former spouse becomes a limited member, or there is an agreement adjusting for the former spouse’s pension entitlement in some other way, or the former spouse waives any claim to pension benefits, the statutory priority of a spouse to survivor

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benefits under the *PBSA* no longer applies to the former spouse. [*FLA*, s. 145, *PBSA*, s. 79(5)]

The policy underlying s. 145 is to ensure that a former spouse does not benefit from the member's pension benefits twice (once under the *FLA*, and then secondly under the *PBSA*).

Essentially, if *FLA*, s. 145 applies, the former spouse no longer qualifies as a spouse for the purposes of s. 79 of the *PBSA*, even if the parties have been separated for less than 2 years. Consequently, there is no requirement for the former spouse to sign the *PBSA* prescribed form.

(The survivor benefits would be paid to the beneficiary designated by the member or, if none, to the member's estate. This is a different situation from where the member has already elected a 60% survivor benefit for the former spouse when the pension commenced. Nothing in the *PBSA* affects the vested entitlement of the spouse, and the only way the spouse can waive that vested entitlement is by signing a Form P5 "Waiver of Survivor Benefits after Pension Commencement": see para. 5.20).

**8.16 Waiving the 60%
survivor benefit
under PBSA**

This isn't a situation where the parties' relationship is ending (or, at least, we have no information about the relationship). The member wants to take a single life pension starting next month and the spouse has signed *PBSA*, Schedule 3, Form 2, waiving the 60% survivor benefit, but the form is set up to also waive other beneficiary rights and the spouse has not ticked that box. The member has elected a single life pension, and designated his sister as the beneficiary of it (there is the possibility of a residual payment if the amounts paid to member during the member's lifetime are less than the contributions made to the plan). The member also wants to designate his sister beneficiary of the benefits if he dies before pension commencement. Can we implement the member's directions?

No. The *PBSA* provides that:

- (a) a spouse can waive the 60% survivor benefit, using the prescribed form (which is Schedule 3, Form 2 of the *PBSA Reg.* See *PBSA*, s. 80(4)). This would be Waiver A.
- (b) a spouse who signs Waiver A gives up the 60% survivor benefit to allow the member to choose another form of survivor benefits is still entitled

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to receive any other survivor benefits under the plan, unless the spouse also waives those other rights by completing the Waiver B portion of the Form (*PBSA*, s. 80(5) and (6)).

- (c) even if the spouse waives the 60% survivor benefit and any other survivor benefit under the plan, this applies only to benefits payable after pension commencement. The spouse is still entitled to receive survivor benefits payable if the member dies before pension commencement (unless the spouse signs Form 4, set out in Schedule 3 of the *PBSA Reg.*: *PBSA*, s. 79 and 80(8)).

This means that the member can choose the single life pension, but the spouse is still entitled to be beneficiary of the plan unless both Waiver “A” and “B” are completed.

The member can designate his sister to be beneficiary of survivor benefits payable before pension commencement provided that the spouse waives entitlement by signing *PBSA*, Form 4. *See* also para. 3.18, 5.12, 5.20A, 8.14A, 8.16, 8.24, 11.17 and 15.43.

8.17 Former spouse designated beneficiary and member dies

The member has died before pension commencement. Benefits were divided with the former spouse some years ago, but the member designated the former spouse as beneficiary after the division was completed. For any other beneficiary, we would pay out the death benefits in a lump sum, remitting tax withholdings to CRA. Is the position different where the beneficiary is a former spouse? Can the former spouse choose to transfer the benefits to a registered plan to defer paying taxes until the funds are withdrawn from the plan?

This publication is unable to provide tax advice and this question should be directed to CRA. However, Chart 9, in T4040, the Tax Guide published for RRSPs and Other Registered Plans for Retirement advises that a lump sum amount (up to a specified maximum amount) that a taxpayer is entitled to receive from a former spouse’s registered pension plan on the former spouse’s death can be rolled over to a registered plan, such as a registered pension plan, an RRSP or a RRIF.

8.18 Former spouse designated beneficiary and

The member and the former spouse made an agreement that each would keep his or her own benefits, but that each would designate the other beneficiary of the benefits. Our plan was sent a copy of the agreement. The member has now decided to have the pension commence, designating his

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*member has a
new spouse*

current spouse as joint annuitant. Is this permitted, in light of the agreement with the former spouse?

The parties' agreement cannot override the statutory priority (under *PBSA*, s. 80(1)) enjoyed by the current spouse to be the joint annuitant. [*Hamilton v. O'Pray*, 2015 BCSC 51] Unless the agreement or order is clearly drafted on this point, however, there may be questions concerning the member's liability to the former spouse for not being able to maintain the beneficiary designation.

In *Hamilton v. O'Pray*, for example, the court interpreted the obligation as being restricted to maintaining the beneficiary designation until pension commencement. The member was not liable for the former spouse having no rights under the matured pension.

In another case, the member's obligation was viewed differently and the member's estate was liable for (1) the member failing to advise the former spouse that it was not possible to make the designation and (2) the member not making alternative arrangements to provide similar security. [*Munro v. Munro Estate*, (1995) 4 B.C.L.R. (3d) 250 (C.A.); see para. 14.15].

*8.19 Former spouse
designated
irrevocable
beneficiary and
member has new
spouse*

The *Wills, Estates and Succession Act*, S.B.C. 2009, c. 13, permits a beneficiary designation to be made on an irrevocable basis (s. 88). This means that it cannot be changed without the consent of the beneficiary. We've received a separation agreement that requires the plan member to designate the former spouse irrevocable beneficiary of the pension benefits until the former spouse receives the proportionate share of the pension benefits. The member is in a new relationship. Who gets the benefits if the member dies?

The former spouse would receive the proportionate share of the pension benefits determined the date before the member's death and the member's pension would be adjusted accordingly. The person qualifying as the member's spouse at the date of death would be entitled to the survivor benefits (determined on the adjusted pension benefits). An irrevocable beneficiary designation prevents the member from changing the designation without the consent of the beneficiary, but it does not override the statutory priority the *PBSA* provides to a member's spouse.

*8.20 Former spouse
designated*

Our plan has received a court order that gives the former spouse a share of pension benefits and requires that the member designate the former spouse beneficiary of the benefits until the former spouse receives the

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*beneficiary in
court order*

proportionate share of the benefits. Is this an irrevocable beneficiary designation?

The designation does not trigger the provisions of *WESA*, which requires the designation to specify that it is made irrevocably. However, the effect is similar: the member cannot change the designation until the former spouse receives the proportionate share of benefits, unless the former spouse consents. The beneficiary designation, however, would not override the provisions of the *PBSA* respecting entitlement to survivor benefits: *see* para. 8.18 and 8.19.

*8.21 Former spouse
designated
irrevocable
beneficiary
subject to a
contingency*

The member and the former spouse made an agreement under which the member is required to designate the former spouse irrevocable beneficiary of the pension benefits, unless the former spouse remarries, or cohabits in a marriage-like relationship for 90 days. Does this qualify as an irrevocable beneficiary designation under *WESA*?

Making an irrevocable designation that is subject to a contingency would appear to go beyond what is contemplated under *WESA*, which provides for two types of designation, one that is revocable and one that is irrevocable. But the legislation is still relatively new and its scope unexplored. It would be difficult for the plan administrator to determine whether the contingency had occurred. In this circumstance, best practice would be for the plan administrator to not accept the beneficiary designation and explain why it cannot be administered. An irrevocable beneficiary designation that recognized that the member could change the beneficiary designation in favour of a new spouse, however, would be acceptable, because that recognizes the limitations imposed by the *PBSA* respecting the entitlement of a member's spouse to survivor benefits.

*8.22 Can a former
spouse be a joint
annuitant*

The member's pension has not yet commenced. The parties want to divide the pension using the rules that apply to matured pensions. They want to divide the monthly payments equally during their joint lifetimes, and the survivor receive all of the benefits on the death of the other party. This only works if the former spouse can be the joint annuitant. The member does not have a new spouse, but the former spouse no longer qualifies as a spouse under family or pension legislation. Can the member designate his former spouse to be a joint annuitant?

Not all administrators are prepared to permit this, but it is an option that some plan administrators (such as the Pension Corporation) make available.

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**8.23 Former spouse
waived share for a
payment that was
not made**

The member and the former spouse made an agreement 20 years ago under which the former spouse waived any share of the member's pension benefits in exchange for a payment of \$4,000. The former spouse has applied to become a limited member of the plan and claims that the payment was never made. The member says he paid the lump sum, but is unable to provide us with any record of the transaction. He wants to designate his children beneficiary of the benefits in the meantime, but he is also terminating from the plan, and has applied to transfer his benefits from the plan. What are the plan's obligations in this case?

Whether or not the payment was made, the pension division arrangements do not give the former spouse an interest in the benefits, so the former spouse is not in a position to apply to become a limited member. (Filing to become a limited member requires an agreement or court order that expressly gives the former spouse an interest in the benefits [FLA, s. 134].)

The former spouse may have legal remedies against the member, such as suing the member for the payment, and may even be able to set aside the agreement and advance a claim to the pension benefits. But it is not up to the plan administrator to determine whether or not the agreement has been carried out, nor what legal remedies may be available to the former spouse.

However, the former spouse would still be able to request information from the plan concerning the benefits, by filing a Form P1. A "spouse" is entitled to request information from the plan, and a "spouse" includes a former spouse (FLA, s. 133 and s. 3(2); see para.13.8 and 13.23). If the former spouse files a Form P1, the plan is under an obligation to give advance notice about the member's directions concerning transferring his benefits from the plan. But until the former spouse files a Form P1, the administrator would not be able to provide the former spouse with that information: see para. 13.19.

Nothing in the court order prevents the member from making a beneficiary designation, and there is no basis on which the former spouse (who separated from the member years ago and therefore no longer qualifies as a spouse under the PBSA) has a claim to be beneficiary of the plan, without first obtaining an agreement or court order to that effect.

**8.24 Death of the
member after
separation**

The member has died. We have a note on file advising that the member and spouse were separated and the date given is more than 2 years ago, so the spouse may no longer qualify as a spouse under the PBSA. No Forms have

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been filed with us. What rights would the surviving former spouse have in this situation and what are the obligations placed on the plan administrator?

Basically, the whole structure of Part 6 is to ensure that plan administrators are not at risk from the issues that might arise from the breakdown of a relationship. To promote that position, the legislation provides that the administrator is not required to do anything towards dividing pension benefits until notified by one party or the other as required under Part 6.

The fact that the parties are separated, and the administrator has notice of that separation, does not trigger duties by the administrator. That is the thrust of *FLA*, s.143 (and s. 143(3) in particular). If the administrator is required to administer the benefits (here, take the necessary steps with respect to the death benefits) and there is a Form P1 on file, the administrator is required to give the former spouse notice. Or if there is an incomplete application to become a limited member, the notice obligation also applies. But if there is no notice obligation (the case here), there is no liability to the administrator for administering the benefits as required. [*FLA*, s. 143(3)]

Under the old *FRA*, Parts 5 and 6 were no longer available to a former spouse after the death of the other spouse, unless there was a triggering event and proceedings had been commenced before the death. The position is different under the *FLA*: separation is a triggering event, vesting a half interest in family property in each of the parties, and proceedings can be commenced under the *FLA* even after the death of a party, provided no limitation period has expired. See para. 8.12.

What this means is that the former spouse can still make a claim to a share of the pension benefits and can still send in a Form P1 for information about the benefits, notwithstanding the death of the plan member.

That doesn't mean the plan has to wait to see what happens. The possibility of a family law claim doesn't over-ride the administrator's obligations with respect to administering the benefits. [*FLA*, s. 142]

The former spouse won't be able to unwind steps legitimately taken in administering the benefits. If the former spouse is properly advised, he or she should commence proceedings, and apply for a restraining order so that death benefits are not paid out, and preserve the possibility of receiving a share.

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Otherwise, the former spouse's claim would be to a share of whatever form the benefits take once there is a court order or agreement respecting the spouse's entitlement.

When a member dies before pension commencement, the plan administrator is required to prepare a pre-retirement death benefits statement, which must be provided to the deceased member's surviving spouse. [*PBSA*, s. 37(2)] This obligation to notify the spouse does not arise if there is no surviving spouse, within the meaning of the *PBSA*, or the surviving spouse's interest has terminated because the required waiver was signed, or there has been a division of the benefits under the *FLA*. [*PBSA*, s. 37(2)(b) and (6), *FLA*, s. 145] If there is sufficient evidence that the parties were separated for longer than 2 years, so no longer spouses under the *PBSA*, then the former spouse would have no claim under the *PBSA* to survivor benefits.

The administrator's obligations are clear enough if there is a waiver, or satisfactory evidence that *FLA*, s. 145 applies, but determining whether the member has a surviving spouse is a bit trickier.

The first step in these circumstances would be to have the personal representative provide as much information as possible on the question of separation.

*8.25 Waiver of 60%
survivor benefit
after death of the
member*

The member has died. The member's former spouse is entitled to the unexpired guarantee period but has contacted us and wants to waive that benefit in favour of the member's current spouse. Can this be done?

No. The *PBSA* would have permitted the waiver if it had been signed before the member's death, but not after. [*PBSA*, s. 80(6)(a)(iii), *see* para. 5.12] The policy rationale is that waiver is permitted before the member's death, because at that point the former spouse has only a right to receive the benefits. After the member's death, there is no longer a right that is capable of being waived: the benefits have vested in, and now belong to, the former spouse. *See* also para. 5.20 respecting the use of Form P5.

*8.26 Waiver of
entitlement to LIF*

The member terminated employment and pension benefits were transferred to a LIF. The member's will left the LIF account to be divided between his 3 children. The benefits are substantial. However, at the date of death the member had a common law partner who is entitled to the LIF under the *PBSA*. The common law partner wants to give effect to the

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deceased's wishes and wants to waive any claim to the account. Is that permitted under the *PBSA*?

The benefits cannot be waived (see para. 8.25 for a similar situation), but the common law partner will be able to give effect to the deceased's wishes. *PBSA Reg.*, s. 125(1) permits the benefits to be paid to the surviving spouse on a non-locked in basis. The surviving spouse would be required to pay taxes on the payment, but could then transfer the net benefits to the deceased's children. (This would not have been possible under the old *PBSA*, because it provided that benefits payable on the death of the LIF owner to a surviving spouse remained locked-in).

CHAPTER 9. DISABILITY BENEFITS (FLA, s. 122)

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

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

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

9.1 Court order silent

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

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

9.2 Disability benefits: divisible family property?

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

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

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**9.3 Disability benefits
under CPP**

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

No.

Under the *FRA*, CPP disability benefits were considered to qualify as a pension and, as such, were family property by definition. [*FLA*, s. 84(2)(e). *Webb v. Webb*, (1985) 49 R.F.L. (2d) 279 (BCSC); *Coulter v. Coulter*, (1998) 60 B.C.L.R. (3d) 6 (C.A.)] It is likely that the same analysis that was applied under the *FRA* would apply under Part 5 of the *FLA*, which provides that a spouse's entitlement under a "pension plan" qualifies as family property. [*FLA*, s. 84(2)(e)] (The term "pension plan" in Part 5 is not restricted by the definitions in Part 6. The definitions in Part 6 apply in Part 6: *FLA*, s. 110.)

CPP disability benefits not divisible under the CPP Act

But even if CPP disability benefits qualify as "pensions" within the meaning of Part 5 and Part 6, the Part 6 pension division rules for benefits in local plans do not apply to CPP. The CPP Plan qualifies as an "extraprovincial plan": *see* para. 7.3. Division of CPP benefits is governed by the federal *Canada Pension Plan Act*, which provides its own rules for the division of unadjusted pensionable earnings between former spouses. The CPP rules, however, do not provide a mechanism for dividing CPP disability benefits. All that is available under the *Canada Pension Plan Act* is the ability to divide CPP unadjusted pensionable credits.

Dividing CPP too soon might prejudice the disabled spouse

If the disabled spouse was the family's main bread winner, a division of CPP will probably result in reducing the disability benefit, with no offsetting amount being payable to the member's spouse (at least until the spouse qualifies for the normal CPP benefit). For this reason, in *Coulter v. Coulter*, the B.C. Court of Appeal reapportioned the CPP disability benefit 100% to the member, and protected the spouse by awarding support. [*See also* para. 11.20]

CPP disability benefits might be taken into account in dividing other assets or awarding support

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

While there are a handful of cases where courts have divided disability benefits, or ordered that compensation be paid for them, many courts, often with little

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Disability Benefits (FLA, s. 122)

analysis, will reapportion entitlement to provide the member with most, or all, of the disability benefits. The reason most commonly cited under the *FRA* for finding that an equal division is unfair is the member's greater need for economic self-sufficiency. [See, for example, *Fuller v. Fuller*, [1998] B.C.J. No. 1738 (S.C.); *McNiven v. Feng*, [1995] B.C.J. No. 279 (S.C.); *Kossen v. Kossen*, [1999] B.C.J. No. 595 (S.C.)]

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

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

9.4 Disability benefits that are not a disability "pension"

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

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

If the disability benefit is not provided under a pension plan within the meaning of Part 6 of the *FLA*, but is nevertheless divisible family property under *FLA*, Part 5, the administrator may be prepared to assist in dividing the benefits. If not, the member could be required to divide each payment between the member and the spouse. [See *Webb v. Webb*, (1985) 49 R.F.L. (2d) 279 (BCSC); and *Coulter v. Coulter*, (1998) 60 B.C.L.R. (3d) 6 (C.A.), where the spouse's share took the form of support.] Or, the value of the disability benefits could be taken into account in adjusting the division of other family property: see para. 9.3.

9.5 Tax withholdings

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

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

**9.6 Disability benefits
and limited
member's options**

We have a member who is receiving disability benefits under the pension plan. Does this fact prevent a former spouse from applying to become a limited member? If the former spouse can become a limited member, does the payment of the disability pension restrict options in any way? For example, must the former spouse wait until the member's disability pension is converted to a regular pension (something that will not take place until the plan member reaches age 60) before receiving a proportionate share of the benefit? Or could the former spouse apply for a lump sum transfer or a separate pension at the plan member's earliest retirement age despite the plan member being in receipt of a disability pension?

Payment of disability benefits does not limit the options available to the limited member with respect to receiving a share of the pension benefits. In the case where the lump sum transfer option and the separate pension option would be available to the limited member if no disability benefits were being paid, those options continue to be available to the limited member notwithstanding the payment of the disability benefits. Courts will sometimes adjust entitlement, or defer division, if the former spouse's entitlement to receive a share of the benefits will reduce the member's disability benefits: *see Coulter v. Coulter*, (1998) 60 B.C.L.R. (3d) 6 (C.A.), para. 9.3 and the discussion at para. 11.20.

9.7 Disability benefits

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

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

CHAPTER 10. TRANSFER FROM A PLAN

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

- (a) when the division is of funds in a defined contribution account [see Chapter 3],*
- (b) when the division is of benefits determined under a benefit formula provision, the pension has not yet commenced, and the spouse chooses to take a lump sum transfer at some time after the member becomes eligible for the pension to commence [see Chapter 2],*
- (c) when the administrator requires the spouse to accept a transfer (for example, because the share is beneath a prescribed threshold, under FLA, s. 139(b)),*
- (d) when a limited member dies before the benefits are divided, under FLA, s. 124(4) (see para. 8.10), and*
- (e) 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 from the plan (to, for example a LIRA, LIF or another pension plan or be used to purchase an annuity). [Reg., s.26, PBSA, s. 88]

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

10.1 Valuing the transfer

The separation agreement gives the spouse a share of the member’s unmaturred benefits. They are determined by a benefit formula provision. The administrator has offered to make an immediate transfer of a sum of money to a LIRA to satisfy the spouse’s entitlement. How does the spouse know if it’s a fair share?

Such a transfer will be treated as a compensation payment in lieu of a proportionate share of the benefits. The spouse is not obliged to accept the trade-off. *Reg.*, s. 27 sets out some of the rules for calculating a transfer value in this situation. The valuation must make reasonable allowance for projected increases in the value of the benefits. Most plans that are prepared to make an immediate transfer, however, are structured to value the transfer on the assumption the member terminates employment immediately and does not commence receiving the pension until the normal retirement age (often 65). This usually places a smaller value on the benefits than is required under the *Division of Pensions Regulation*. A person who has doubts must either retain an actuary to verify the calculation or consult a lawyer.

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

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

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

The member's pension has not yet commenced. The benefits are determined by a benefit formula provision. Under Part 6, the spouse is entitled to have the administrator transfer a share to a LIRA, LIF, annuity or another pension plan at any time after the earliest date that the member could elect to have the member's pension commence [FLA, s. 115(2), PBSA, s. 88]. Can the spouse require a plan administrator to make a transfer before the member becomes eligible for pension commencement?

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

*10.3 Transfer to same
plan*

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

No. This is available only with the consent of the administrator. [See para. 2.39-40]

*10.4 "Locked-in"
benefits*

What are "locked-in" benefits?

"Locked-in" benefits must be used to provide lifetime retirement income for the owner. If B.C. law applies, the life income can start when the person reaches age 50, or earlier, if permitted under the plan from which the benefits were received. [PBSA Reg., Schedule 1 Addendum, s. 6]

If the member's benefits are locked-in, a transfer of a share of them to the spouse must also be on a locked-in basis (that is, they cannot be cashed out and can only be used to produce a life income, subject to exceptions specified under the PBSA, s. 69 for unlocking benefits).

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 becomes a "spouse owner" of the account. and may use the locked-in funds to produce a life income when the spouse owner reaches age 50.

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Transfer from a Plan

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

Locking-in rules are determined by the pension benefits standards legislation of the territory having jurisdiction over the plan. The rules vary, so it is important to confirm the applicable legislation (for more information, see *PBSA* s. 69, and also refer to the excellent resources on the B.C. Financial Institutions Commission website at:

www.fic.gov.bc.ca

Unlocking pension benefits

The B.C. *PBSA* permits benefits in a pension plan to be unlocked in the following cases:

- (a) *if they are beneath a prescribed amount*: a retired member receiving life income type benefits can unlock the benefits if they are less than the prescribed amount, which is 20% of the Year's Maximum Pensionable Earnings (established by the Canada Revenue Agency) for the calendar year in which the most recent determination of the commuted value of the benefits was made (s. 69(1), *PBSA Reg.*, s. 72(1)),
- (b) *for small amounts*: the surviving spouse of a deceased member can unlock the benefits if they are less than the same prescribed amount (s. 69(1), *PBSA Reg.*, s. 72(1)),
- (c) *if the member has a terminal or life-shortening illness or disability*: a plan member or other person who is currently entitled to benefits, other than a person receiving a defined benefit or target benefit pension, may unlock the benefits as a series of payments or a lump-sum if the person is suffering from an illness or disability that is terminal or likely to shorten the member's life considerably (s. 69(3(a)), and
- (d) *for non-residency*: a member or other person who: is currently entitled to benefits; has been absent from Canada for 2 or more years; provides Canada Revenue Agency confirmation of non-residency in Canada; and is eligible to transfer the commuted value of benefits from the plan can unlock those benefits (s. 69(3)(b), *PBSA Reg.*, s. 72(3)).

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Unlocking benefits in a locked-in retirement account (LIRA) or life income fund (LIF)

The B.C. *PBSA* permits benefits in a LIRA or LIF to be unlocked in the following cases:

- (a) *if they do not exceed a prescribed amount*: if the value in the *LIRA* or *LIF* is less than 20% of the Year's Maximum Pensionable Earnings (established by the CRA) for the calendar year of the application (applying the test to individual plans, and not cumulatively to all of the owner's LIRAs and LIFs). [s. 69(2), *PBSA Reg.*, ss. 107, 126] A *LIRA* or *LIF*, however, cannot be split into smaller amounts to allow for unlocking. [*PBSA Reg.*, s. 107(2)]
- (b) *if the owner is 65 or older*, and the value in the owner's LIRA or LIF is less than 40% of the Year's Maximum Pensionable Earnings (established by the CRA) for the calendar year of the application (applying the test to individual plans, and not cumulatively to all of the owner's LIRAs and LIFs, as was required under the former *PBSA*) [s. 69(2), *PBSA Reg.*, ss. 107, 126]
- (c) *for specified circumstances of financial hardship*: which includes low income, medical expenses, rent arrears or mortgage arrears for a principal residence and rental payments needed to obtain a principal residence (s. 69(4)(c), *PBSA Reg.*, ss. 110, 129, an option introduced in the new *PBSA*),
- (d) *if the member has a terminal or life-shortening illness or disability*: (s. 69(4)(a), *PBSA Reg.*, ss. 108, 127), and
- (e) *for non-residency*: if the owner has been absent from Canada for 2 or more years and provides Canada Revenue Agency confirmation of non-residency in Canada (s. 69(4)(b), *PBSA Reg.*, ss. 109, 128).

**10.5 Federal locking-in
rules**

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

The *Pension Benefits Division Act Regulation* [s. 17(1)] provides that a transfer of vested benefits is governed by the federal *PBSA* locking-in rules. Under the federal *PBSA*, the transfer to a LIF can be made at any age. The federal locking-

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in rules differ in some respects from the B.C. rules, and there are additional opportunities available to the LIF owner to unlock benefits (such as a one-time transfer of 50% of the funds, after the owner turns 55).

If the benefits are not vested, they are transferred to an RRSP or RRIF for the former spouse on a non-locked-in basis.

10.6 Unlocking – terminal illness

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

Yes. A limited member has the rights of a member. The *PBSA* provides for unlocking in these circumstances. [*PBSA*, s. 69(3)(a)] See para. 2.35B and 10.4.

10.7 Maximum transfer and treatment of the excess

When a member transfers benefits from a plan, the *Income Tax Act* specifies a maximum transfer value that can be rolled over into a LIRA or LIF, and any amount over the maximum transfer value must be paid out in cash to the member (less tax withholdings). [*ITA*, Reg. 8517, *ITA*, s. 147.3(4)(d)] Do the same rules apply to a transfer of funds from a plan to the credit of a former spouse when their relationship breaks down?

No. *ITA*, s. 147.3(4)(d) applies only if the transfer amount does not exceed a prescribed amount. [*ITA*, s. 147.3(4)(c). The prescribed amount is determined under *ITA*, Reg. 8517]. The transfer to the credit of a former spouse when a relationship ends is under *ITA*, s. 147.3(5), which does not contain a provision similar to subparagraph (d), meaning that there is no maximum limit on what may be rolled-over into registered savings or income plan for the former spouse. The *Registered Plans Directorate Technical Manual* (in Chapter 4, at para. 4.12) confirms that “transfers under subsection 147.3(5) of the Act are not subject to the prescribed amount limit in section 8517 of the Regulations.”

If the member terminates employment, applies to transfer benefits from the plan to a LIRA or LIF, and a portion of the benefits in the plan exceeds the maximum transfer amount, a limited member would be entitled to a share of the excess. A limited member is entitled to a share of “benefits” in the plan, which includes, in addition to a pension, any “other monetary amount a person is or may become entitled to receive under the plan” (other than a refund of actuarial excess or surplus). [*FLA*, s. 113; and s. 110, def’n of “benefit”]. The amount that exceeds

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the maximum transfer amount comes within this definition (it is a “monetary amount” a member becomes “entitled to receive under the plan” even though the member cannot roll it over into a registered savings or income plan). As such, the limited member is entitled to a proportionate share of it.

CHAPTER 11. AGREEMENTS

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

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

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

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

11.1 The spouse wants a compensation payment

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

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

In some other provinces (Ontario, for example, until 2012) the payment of compensation was the usual approach for adjusting pension entitlement. B.C. case law suggests, however, that B.C. courts are reluctant to order a compensation payment. Except in a few circumstances, requiring a member to use current assets to purchase pension entitlement that the member may never live to enjoy is viewed as being unfair. [See para. 2.23]

Another problem in dividing benefits using a compensation payment is arriving at a fair value. In *N.A.J. v. P.L.J.*, 2014 BCSC 948, for example, an actuary valued pension benefits assuming retirement at different ages (a factor that results in placing quite different values on the benefits). The non-pensioned spouse applied to court for an order that the member pay compensation assuming the member's pension commenced at 55 (which placed the highest value on the benefits). The court declined and ordered division under Part 6.

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

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

The member's benefits are unmaturred and determined by a benefit formula provision. The member refuses to agree that the spouse can accept a transfer of a share of the commuted value of the benefits when the member reaches retirement age. What recourse does the spouse have?

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

11.3 *Features of an
agreement*

How formal must an agreement respecting pension division be in order to trigger the operation of Part 6 of the FLA?

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

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

In family law, agreements are sometimes given different names, but they are still agreements. Some examples:

- agreements made before the parties marry (sometimes called "cohabitation agreements," if they parties are not planning on marrying any time soon, or "prenuptial agreements" if the parties have marriage plans),
- agreements made after the relationship breaks down (sometimes called "separation agreements", but there can be a series of agreements dealing

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with specific issues, so there can be Property Agreements, Pension Division Agreements, Support Agreements, and so on),

- agreements made to resolve litigation (which can take the form or “Minutes of Settlement” which are usually intended to be followed by a consent order).

The important thing is not what the agreement is called, but that it represents a final settlement of the terms for dividing the pension benefits. So Reasons for Judgment would not be enough (the reasons must be incorporated in a court order), nor would draft agreements prepared to negotiate the issues.

Technical areas that the agreement must address will usually arise from making sure the remainder of the financial affairs of the spouse and member are resolved in ways that are consistent with the pension division arrangements. This is particularly true, for example, when determining when a support obligation should end. The *FLA* provides that support is reviewable when a member starts receiving pension benefits and when a supported spouse becomes eligible to receive benefits. [*FLA*, s. 169] This is helpful, and certainly an improvement over the *FRA*, where these events often were not factors a court could consider when determining support obligations. In most cases, however, it will be better for the parties to consider and address these questions in more detail, so that there is no doubt over what is to happen if, for example, a former spouse paying support decides to take early retirement, or a supported spouse decides to defer using a share of pension benefits.

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

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

11.4 Oral agreement and beneficiary designation

When the member and spouse divorced, the member agreed to keep the former spouse as beneficiary of the benefits so that the spouse would get whatever benefits were available on the member's death. This

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arrangement was never written down, but the member kept his word and, when the member died (before pension commencement) the former spouse (“spouse1”) was still the beneficiary. However, the member had formed a marriage-like relationship in the meantime, with a person who is claiming the benefit as the member’s new spouse (“spouse2”). What rights does spouse1 have in this case?

The *PBSA* gives priority in this case to spouse2. [*PBSA*, s. 79(1)(a); *PBSA*, s. 1(3) definition of “spouse”; *Re Hodgins Estate*, (1996) 11 C.C.P.B. 109 (BCSC)]

Had the agreement to maintain the spouse as a beneficiary been proved, however (which is easier to do if it is in writing), spouse1 might have been able to enforce entitlement to benefits accruing up to the date the new relationship commenced. Section 70(3)(c) of the *PBSA* prohibits assignments of benefits, but recognizes an exception for agreements made as a result of the breakdown of a relationship. See also para. 13.15.

It is not uncommon, in these cases, to find that spouse1 and spouse2 are prepared to divide the benefit. The plan administrator can follow their joint directions if they are able to reach a settlement.

**11.5 Departures from
Part 6: Effect on
administrator’s
responsibilities**

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

Yes.

Under the old *FRA*, the share specified by an agreement could not exceed 50% of the benefits. To receive more than 50% of the benefits required a court order.

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

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11.6 Proportionate share

If the spouse and member have entered into an agreement that specifies the spouse's share using a formula that differs from the *Division of Pensions Regulation*, what is the "proportionate share?"

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

11.7 Spouse's share exceeds the share under the Regulation

The plan has received the prescribed Forms, and an agreement that gives the spouse a larger proportionate share of the benefits than set out in the *Division of Pensions Regulation*. Does the administrator have to use the agreed-upon proportionate share, or is the excess something the member must pay directly to the spouse?

The administrator must use the agreed-upon proportionate share. [*See* para. 11.5]

11.8 Compensation payment

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

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

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

11.9 Trust clauses

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

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Many lawyers think that it is a good idea to do so.

Agreements and court orders made before July 1, 1995 usually provided that the member was a trustee for the spouse as an aid to enforcing the terms for dividing the pension benefits. But Part 6 allows the limited member to enforce all of these rights directly against the plan administrator. Part 6 also provides that in various situations where the member, or another person, receives benefits belonging to a former spouse, the recipient holds those benefits as a trustee for the spouse. Similarly, a former spouse who receives more than a specified share holds the benefits in trust for the member, or other person entitled to the benefits. [*FLA*, s. 144]

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

11.10 Right to buy out spouse

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

Yes, the parties can enter into this agreement (in the original pension division arrangements and even at a later date). It is open to the spouse to waive an interest in the benefits and there is no restriction on when the waiver may be made, provided the benefits have not yet been divided. [*FLA*, s. 127] The spouse would do this by filing a Form P7 with the plan administrator. *See* also para. 13.10 and 15.40.

The plan is protected in any event by the obligation to send a Form P6 notice to the member when the limited member decides to take the share of the benefits.

11.11 Agreement divides benefits on a net basis

The agreement dividing the pension entitlement sets out the interests of the spouse and member based on the assumption that the member will pay tax on the whole amount. But the legislation requires the administrator to

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make separate withholdings for the member and the spouse, which leads to a different result. What should the administrator do?

[See para. 12.1]

11.12 *Determining the compensation payment*

The parties are considering an arrangement under which the member keeps all of the pension entitlement and pays compensation to the former spouse for the share being given up. Is the average age of retirement used for determining a compensation payment?

It doesn't have to be. An actuary would determine the value of the former spouse's benefits in accordance with accepted actuarial practice in Canada. The policy underlying the *Division of Pensions Regulation* is the expectation that actuaries will apply the Canadian Institute of Actuaries Standards of Practice that relate to the breakdown of a relationship.

Usually an actuary is asked to place a value on the benefits assuming there is no division, to guide the parties in negotiating a fair compensation payment. In this way the member has advice about the value of what is being kept in exchange for making the compensation payment and there is no need to determine the value the plan would place on the former spouse's share of the benefits: *see* para. 2.55 and 2.65 (for alternatives to using the average age of retirement).

It would be possible to ask the actuary to estimate the value of the transfer amount the spouse would receive, if the benefits are being divided under Part 6, but this is not very common.

11.13 *Beneficiary designation*

Does the agreement have to deal with beneficiary designation issues?

Not in the usual case. A former spouse's entitlement under Part 6 is secure without recourse to survivor benefits. *See* para. 2.5, 2.9, 8.2 and 8.7. For beneficiary designations by a limited member, *see* para. 8.1A.

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

11.14 *Both spouse and member have*

Both spouse and member have benefits under pension plans. Neither of their pensions has commenced. The member's benefits are worth more. Do

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*pension
entitlement and
neither has retired*

both parties' benefits have to be divided? What options are available to them?

No, it is not necessary to divide both parties' benefits. Rather than divide both parties' pension entitlement, it might make sense to take both interests into account, but divide only one party's benefits.

For example, calculating a limited member's entitlement based on average age of retirement means that in some cases setting off pension entitlement might preserve more overall pension value than dividing each party's pension entitlement separately. (For example, a party intending to retire before the former spouse reaches the average age of retirement will often be better off keeping as much of that party's pension as possible rather than exchanging it for a share of the former spouse's benefits.)

Allowing both parties to keep as much as possible of their respective benefits may also promote more flexibility for retirement planning. For example, an older spouse losing half of a pension may want to retire at a date before it is possible to use the share of the younger spouse's benefits (because the younger spouse has not yet reached an age at which a pension could commence).

Setting off entitlement, and adjusting for any difference by a compensation payment may be a better option for one (or both) spouses.

11.15 Waiving division

The parties' agreement waived division of a matured pension. The pension is a joint annuity that provides the spouse with a 60% survivor benefit. The agreement doesn't say anything about the survivor benefit. Does the waiver affect the survivor benefits, or is the spouse still entitled to them?

The spouse is still entitled to the survivor benefits. The waiver relates only to the pension payable during the member's lifetime. In this context, the survivor benefits are the spouse's separate property. [*FLA*, ss. 124(5), 126; *Tarr Estate v. Tarr*, 2014 BCCA 315] See para. 5.20.

Even if the agreement expressly specified that the survivor benefits were waived, it would be ineffective. The *FLA* provides that a waiver of survivor benefits otherwise payable after a pension commences is effective only if it is in prescribed form. [*FLA*, s. 126(2)(a), Form P5] See para. 5.7 and 8.11.

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11.16 *Deferring division until both retire*

Both parties have benefits under pension plans. Under the terms of the agreement, each party's pension entitlement is to be divided in accordance with Part 6 of the *FLA*. But neither is to be divided until both parties have elected to have their pensions commence. The member of our plan has just started receiving the pension. What happens to the spouse's share until the spouse's pension commences?

The agreement limits the methods of pension division available under Part 6. Essentially, the first pension to be divided must be divided by the rules that apply to matured pensions (that is, by a plan-administered split of the monthly payments made under the pension). [See Chapter 5]

The full amount of the member's pension will be paid to the member until the former spouse's pension commences. Under the terms of their agreement, the former spouse has no interest in the member's pension until that date.

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

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

Not all administrators are prepared to accept this arrangement, because of the challenges it raises in identifying when events outside of their control take place (such as when the working spouse decides to retire). A reasonable way of accommodating that concern is for the parties to deliver a copy of the agreement to the administrator for information purposes, but not apply to become a limited member of the plan until the date that the pension division arrangements are to be implemented.

11.17 *Waiver: prenuptial or cohabitation agreement*

Can a spouse waive rights to pension entitlement in an agreement made before the parties marry or before they commence living in a marriage-like relationship?

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The question of waiver arises in two cases:

- (a) entitlement to survivor benefits, and
- (b) division of the pension entitlement on the breakdown of a relationship.

Entitlement to survivor benefits: the *PBSA* provides that a “spouse” is entitled to survivor benefits unless the spouse signs a waiver. Prescribed Forms must be used for the waivers. [Note, however, that unmarried spouses, after they separate, and married spouses, after living separate and apart for more than 2 years, are no longer considered to be spouses under the *PBSA*: *PBSA*, s. 1(3).]

The waiver of a survivor benefit payable after pension commencement must be signed within 90 days before pension commencement. [*PBSA*, s. 80(4)(a)(iii) and (6). B.C. Reg. 71/2015, Form 2 of Schedule 3] This right could be waived at the same time as an agreement is made at the beginning of the relationship, provided the prescribed form is used, but it would be of no use unless the member's pension commences within the next 90 days. At best the agreement could provide that the spouse will waive at some future date, but there would be obvious questions about the utility and enforceability of such a provision.

The waiver of a survivor benefit payable before pension commencement can be signed at any time. [*PBSA*, s. 79. B.C. Reg. 71/2015, Form 4 of Schedule 3] This right could be waived at the same time that a prenuptial or cohabitation agreement is made, provided the prescribed form is used.

Division of the pension benefits on the breakdown of a relationship: Part 6 of the *FLA* governs pension division on the breakdown of a relationship. A spouse can waive any right to or interest in a member's pension or any benefit under it [*FLA*, s. 127], subject to the B.C. *PBSA* and the *FLA* restrictions on waiving survivor benefits: *see* para. 11.14. A spouse, therefore, can waive entitlement to have the benefits divided on the breakdown of a relationship in a prenuptial or cohabitation agreement, subject to court review under *FLA*, s. 93.

Part 6 stipulates that if a form of waiver is prescribed, it must be used, but currently no form for waiving pension division is prescribed. [*FLA*, s. 136] (There is a form--Form P7--for withdrawing pension division arrangements previously delivered to the administrator).

A separation agreement that is silent about pension entitlement functions as a waiver since it is deemed to allocate all of the benefits to the member. [*FLA*, s.

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111(2)] However, this is subject to the court's jurisdiction to review agreements (under *FLA*, s. 93).

Special rules apply to waiving CPP credit splitting. [See para. 11.18]

11.18A Waiving entitlement using Form P7

Can a Form P7 be used to waive future claims to pension benefits?

No. A Form P7 is used to withdraw a claim that has been made, and any documents filed in connection with that claim.

11.18 Waiving CPP entitlement

The spouse and member have agreed that the spouse will not claim an interest in the member's CPP benefits. What is needed to waive entitlement?

There is no prescribed form of waiver, but the waiver must:

- (a) expressly mention the *Canada Pension Plan Act*, R.S.C. 1985, c. C8, and
- (b) state that "there be no division of unadjusted pensionable earnings under s. 55, 55.1 or 55.2" of the *Canada Pension Plan Act*, R.S.C. 1985, c. C-8. [*CPP Act*, s. 55.2(3)]

Under the *CPP Act*, division can't be waived unless provincial legislation is enacted to allow it. The *FRA* provided for waiving CPP entitlement, and this policy has been carried forward in the *FLA*. [*FRA*, s. 62 and s. 80(1)(c). *FLA*, s. 127(2)]

11.19 No CPP waiver

The agreement dividing family property did not divide Canada Pension Plan entitlement. But there was also no waiver of a division of unadjusted pensionable earnings. Is the spouse still entitled to apply for credit splitting?

Yes. Division of unadjusted pensionable earnings under the Canada Pension Plan takes place unless there is an enforceable waiver. [See para. 11.18] There is no specific need for the agreement or court order to provide expressly for division if that is what the parties want (although it is obviously better practice to include such a reference). [*Verbeek v. Craig*, (1998) 37 R.F.L. (4th) 143 (BCSC)] However, an application for credit splitting must be made by one of the former spouses.

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11.20 *When to waive
a division of CPP*

Are there any guidelines for determining whether or not to divide CPP in the context of a general division of family property?

For information about whether in the specific case it is beneficial to split CPP credits, contact Services Canada (their staff are sometimes able to provide some guidance on this question), or consult an actuary or lawyer working in this area.

In some cases, equalizing CPP will reduce the entitlement of the spouse with higher contributions without benefiting the other spouse.

Example 1: The Canada Pension Plan protects a spouse who is out of the work force for a period of years to look after young children. Specified contribution periods 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 often doesn't benefit the other (if equalized entitlement is dropped out, it is not available to be used by either party).

Example 2: CPP provides for a drop-out of a percentage of the lowest earning years. If these drop-out periods correspond with the relationship period, again the equalization of CPP reduces the working spouse's entitlement without benefiting the non-working spouse.

Example 3: CPP disability benefits are determined by a formula that consists of two parts: component A, which is a fixed amount, and component B, which is an amount based on CPP unadjusted pensionable earnings accumulated by the pensioner. If the party receiving CPP disability benefits has the greater CPP contributions, equalizing CPP contributions in favour of a spouse who will not qualify for CPP for a number of years produces this result: (1) it immediately reduces the disability benefit (by reducing component B), but (2) the spouse of the disabled person receives no offsetting amount (until the spouse qualifies for the normal CPP benefit). For this reason, in *Coulter v. Coulter*, (1998) 60 B.C.L.R. (3d) 6 (C.A.) the court reapportioned the CPP disability benefit 100% to the member, and protected the spouse by awarding support.

11.21 *Compensation
payment*

***Reg.*, s. 27(1)(a) and (b) refer to a “compensation payment”, while *Reg.*, s. 27(1)(c) refers to a compensation payment or an “amount to be transferred under s. 128(2)” of the *FLA*. What is the difference between them?**

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The *Division of Pensions Regulation* sets out some rules and assumptions for valuing benefits for different purposes and in different situations.

Reg., s. 27(1)(a) and (b) are referring to compensation payments made *by a member* to a spouse under s. 97 or 127 of the *FLA*.

In contrast, *Reg.*, s. 27(1)(c) is referring to the calculation of a transfer amount *from a plan* to a spouse under s. 128(2) of the *FLA*.

11.22 Valuation assumptions

***Reg.*, s. 27 governs calculating compensation payments. It refers to a number of assumptions but only requires the “possibility” of their occurrence to be taken into account. Isn’t “possibility” too vague a word?**

The formulation is an adequate direction to an actuary to calculate the commuted value taking into account future contingencies. The actuary will not, for example, simply assume changes in contingencies will be fixed on the entitlement date or the retirement date. The calculations will be weighted to take into account possible occurrences at different times, on an actuarial basis. The policy underlying the *Division of Pensions Regulation* is the expectation that actuaries will apply the Canadian Institute of Actuaries Standards of Practice that relate to the breakdown of a relationship.

11.23 Tax

***Reg.*, s. 27 doesn’t refer to the impact of tax on valuing pension benefits. Shouldn’t tax consequences be taken into account when determining the commuted value of the future pension benefits?**

Yes. *Reg.*, s. 27 doesn’t provide a restrictive list of assumptions to take into account when determining the commuted value of future pension benefits. It directs that the prospect of some future events, such as benefit upgrades, should be taken into account to provide direction on an issue of B.C. law that was in doubt before the equivalent of the *Division of Pensions Regulation* under the *FRA* was promulgated.

Other aspects of the calculation should be carried out in accordance with accepted actuarial practice in Canada. Refer to standards published by the Canadian Institute of Actuaries. See para. 11.22.

The impact of tax, for example, should be taken into account even though not listed in *Reg.*, s. 27. [*Park v. Park*, (2000) 73 B.C.L.R. (3d) 153 (C.A.)]

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

(a) provide, having regard to specified factors, that the spouse receives an equal share of the pension benefits, or a share that is less than, or more than an equal share, [FLA, ss. 95 and 129 of the FLA]

(b) vary the dates to be used to determine the benefits that are attributable to the relationship, or

(c) allocate the former spouse's share against other property. [FLA, s. 97(2)]

Additional Directions

Where an agreement or order dividing pension benefits has been made, and questions arise concerning how to implement the division, an application can be made to the court for directions to clarify how the benefits are to be divided. [FLA, s. 130]

Modifying aspects of the pension division rules - an extraordinary power

A court is also empowered to modify aspects of pension division under Part 6 of the FLA where the default rules would produce an inappropriate result. [FLA, s. 131] But this is an extraordinary power. A court will be reluctant to depart from the methods set out under Part 6 except in extreme cases where the legislated rules will produce an unfair result. The statutory methods are designed to protect the interests of the spouse, member, plan administrator and other plan members. So a consent order obtained by the parties without notice to the plan administrator would not be an effective exercise of the jurisdiction under s. 131.

Departures from the statutory division methods may well prejudice one of these parties. There must be a specific finding that the usual rules under Part 6 are inappropriate because of some special feature of the terms of the plan. It is not a jurisdiction to depart from the legislative rules simply because the parties would prefer some other method of pension division. Section 131 was designed to ensure that the court retained a jurisdiction to deal with unexpected provisions in pension plans.

Balancing the interests of all parties concerned

The legislation provides the court with flexibility to make an appropriate order in the circumstances, but the court must be vigilant to see that the order is consistent with the policies sought to be advanced by the legislation. Before Part 6 of the FRA came into force in 1995, courts refused to make orders binding on plan administrators. Plans were regarded as innocent third parties to the dispute between the former spouses. Courts will continue to make sure that orders do not prejudice plans.

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Moreover, every departure from the rules set out in Part 6 carries with it some risk. The change might upset the basis upon which the plan is funded, for example. Or the change might make it more difficult and more expensive for the plan to administer the pension division simply because the plan will not be able to rely upon the systems put in place to give effect to Part 6 divisions.

A person requesting an order that substantially departs from the methods of division set out under Part 6 must give the plan administrator notice of the application.

**12.1 Court order
divides pension on
a net basis**

The court order sets out the interests of the spouse and member based on the assumption that the member will pay tax on the whole amount. But the legislation requires the plan administrator to make separate withholdings from the shares of the member and the spouse, which leads to a different result. What should the plan do?

The order is inconsistent with the requirements of the *ITA* and Part 6 of the *FLA*. The tax provisions in the order are based on the kinds of arrangements that were necessary before changes to the *Income Tax Act* were introduced and before CRA's policy on this issue was more completely settled. It is clear now, however, that under the *ITA* each of the parties is responsible for taxes payable on their respective shares of pension benefits paid under registered plans that are divided under provincial legislation (for the position with respect to disability benefits paid under a pension plan, see para. 9.5). Part 6 requires separate withholdings. [*FLA*, s. 141(3)]

The plan administrator should:

1. explain the problem to the member and spouse,
2. recalculate entitlement by applying the proportionate share formula to the gross pension,
3. 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
4. have them agree to the variation.

**12.2 Court order
doesn't say Part 6
applies**

We have received a court order dividing the pension benefits, but it does not refer to Part 6 of the *FLA*. Is the order binding on the administrator anyway?

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Court Orders

Yes. Part 6 of the *FLA* applies in any case in which the spouse is entitled under Part 5 of the *FLA* to a share of pension benefits (unless the parties expressly agree, or the court expressly orders, that Part 6 does not apply). [*FLA*, s. 111(1)] Provided the agreement or court order indicates that the benefits are to be divided, there is no need for an express reference to Part 6 for the agreement or order to be binding on the administrator (although it is obviously better practice to include such a reference). [*See* para. 1.5, 1.7 and 11.3]

12.3 Court order gives all to spouse

We have received a court order that gives the spouse 100% of the member's benefits. Is that a valid order under the legislation?

Yes. The spouse's proportionate share, whether specified by agreement or court order, can be any amount. [*FLA*, ss. 95, 127 and 129]

As a matter of policy, a court should be reluctant to make such an order if opposed by the member. It is important to protect the nature of the pension entitlement, which is to provide retirement income for both spouse and member. One situation where the order would be appropriate, and consistent with the policy of protecting retirement income for the spouse and member, is where the member has two pensions. Allocating all of one pension to the former spouse might be a very sensible way of apportioning entitlement in such a case.

12.4 Pre-relationship pension accruals

When should a court order the division of pre-relationship accruals?

[*See* para. 2.23 and 2.25]

12.5 Insufficient information to divide

Our plan uses a benefit formula provision. We have received a Form with an order attached that provides that the benefits are to be divided under Part 6, that the value of the pension is \$36,000 and that the spouse is entitled to 1/3 of that. This makes no sense in terms of the requirements of Part 6. How do we administer the division of these benefits?

Send the spouse and member a notice under *Reg.*, s. 7(2) explaining why it is not possible to act on the materials that were filed and what must be provided to divide the benefits. Explain the problem. The notice must be sent within 30 days of receiving the Form P2. [*See* para. 12.6 on revising the obligations under a court order]

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See para. 15.26B and 15.26C for information about calculating the notice period and determining when notice is deemed to be received.

12.6 Further directions The administrator sent the member and spouse a notice under Reg., s. 7(2) explaining that the materials filed do not provide enough information to divide the benefits. The spouse and member are in agreement about how the order should be revised. Do they have to apply for a new order before the administrator can act on their agreement?

No. An administrator can act on their agreement without a new order. Parties can vary the terms of a court order by agreement to the extent that it applies to them and not third parties. All the plan administrator would require in this case would be written instructions signed by both the spouse and member. It might be easiest for the administrator to set out the new instructions and request the spouse and member to sign a copy and return it. It is usually a good idea to require the signatures to be witnessed.

However, if further directions are required, and the parties cannot agree, the *FLA* permits a court application to be brought by either of them to clarify how the benefits are to be divided. [*FLA*, s. 130] This is a legislative version of the common clause found in agreements and court orders dividing benefits that provides that the parties continue to have liberty to apply for an order to facilitate or enforce the division of the benefits in accordance with the specified pension division arrangements.

12.7 Invalid court order We administer a plan in which benefits are determined by a benefit formula provision. We have received a Form P2 and a court order providing for an immediate transfer of the spouse's share from the plan, but the member is not yet eligible for pension commencement (and this option is not available under Part 6 until the member becomes eligible for pension commencement). What are our obligations?

You are correct that, under Part 6, a transfer of the commuted value of the spouse's share of benefits determined by a benefit formula provision is not available until after the member becomes eligible for pension commencement. [*FLA*, s. 115(3)] Technically, a court can make an order departing from the Part 6 rules, but the jurisdiction to do so depends upon a finding that some aspect of the plan's terms makes the default rules inapplicable, which is not the case on these facts. [See Chapter 12, Introduction]

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Consequently, you should advise the parties, using Form P6, that the order is ineffective because it does not comply with the Act.

12.8 Entered order required

The member's pension has commenced and the parties have provided us with an excerpt from the judge's "Reasons for Judgment" which sets out some pretty vague guidelines about determining the spouse's share. It's not clear if this is meant to be a direction to apply the Part 6 rules, or a variation of them. What should we do?

The plan administrator's obligation to assist in dividing the benefits arises when it receives from the parties either (a) a written agreement dividing the pension benefits, or (b) an entered court order. [*FLA*, s. 134] The Reasons for Judgment are not the same thing as an entered order.

After a judge hands down a decision, the parties must then take the steps necessary to have the decision recorded in the form of an order. That order must be entered in the registry. Only then is it binding on third parties, such as the plan administrator.

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

Once the entered order is delivered to the plan (with Form P2 and the administrative fee, if required), payments can be made directly to the spouse.

12.9 Limitation periods and court orders

We have a client who wants to claim a share of a former spouse's pension benefits under the *FLA*. The parties divorced 4 years ago, and there is no order or agreement dividing the pension benefits. What options are available to our client for pursuing this claim?

Your client's claim may no longer be available because of the expiration of a limitation period. Under the *FLA*, there is a time limit for bringing any claim to family property under Part 5 (2 years from divorce or, for spouses in a marriage-like relationship, 2 years from the date of separation). [*FLA*, s. 198(2)] Under the *FRA*, the time limit was built into the definition of spouse. [*FRA*, s. 1, definition of "spouse"] An application had to be made within two years of an order of divorce, nullity or judicial separation. The B.C. Court of Appeal, in *Suckau v. Suckau*, 2002 BCCA 300, interpreted this as meaning that rights vested under Part 6 were lost when a person ceased to qualify as a spouse.

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See para. 13.22-13.23.

There may be alternative means of advancing claims under the *FLA*. If the parties made an agreement about their property, the agreement may be reviewable by the court if the benefits were not disclosed, or on other specified grounds. [*FLA*, s. 93((3)(a)] The limitation period for an application to set aside or replace an agreement about family property is two years from the date the spouse discovered, or ought reasonably to have discovered, the grounds for making the application.

Although it does not sound like it would help in this case, it is also open to the parties to agree to have benefits divided under Part 6 (effectively waiving the application of the limitation period).

CHAPTER 13. USING THE FORMS AND NOTICES

Part 6 of the FLA requires Forms to be used for dividing pension benefits. The forms are set out in the Division of Pensions Regulation [See Appendix B of the Q&A for the Forms]

Form P1, “Claim and Request for Information and Notice” notifies the plan administrator that the spouse has a potential interest in the member’s benefits. Once the administrator receives the notice, the administrator is under an obligation (a) to notify the member, (b) to provide the spouse with requested information about the benefits, [Reg., s. 10] and (c) to give the spouse advance notice before it acts in connection with the benefits (as a result of a direction received from the member, for example, or because of an event, such as the death of the member). [Reg., s. 9]

Form P2, “Request for Designation as Limited Member” is used after the spouse’s interest in the benefits has been recognized by agreement or court order. The Form directs the plan administrator to register the spouse as a limited member. It is used in one of the following cases, (a) the pension has commenced, or the member is receiving an annuity, (b) the benefits are determined by a benefit formula provision and the pension has not yet commenced, (c) the benefits are in a supplemental pension plan or a plan for specified individuals, (d) the spouse is entitled to a share of disability benefits paid under the pension plan, or (e) the benefits are in a defined contribution account and the administrator consents to administer the spouse’s share in the plan. Form P2 is used basically in any case where the former spouse must wait to receive a share, or the share will be paid to the former spouse by the administrator over a period of time. [See Chapter 2]

Form P3, “Request for Transfer from Defined Contribution Account” is used if the member still has benefits in a defined contribution account. After the spouse’s interest in the benefits has been recognized by an agreement or court order, the Form is used to direct the plan administrator to transfer the spouse’s share (to, for example, a LIRA or LIF, or another pension plan, or used to purchase an annuity: PBSA, s. 88). (If the administrator consents to administer the spouse’s share in the plan, then a Form P2 would be required for the spouse to become a limited member of the plan.) [See Chapter 3]

Form P4, “Request by Limited Member for Transfer or Separate Pension” is used for dividing benefits determined by a benefit formula provision before pension commencement. After the former spouse is registered as a limited member, this Form is used by the spouse to select how the share will be received. A limited member may choose either a lump sum transfer, or a separate pension. These options are available at any time after the member reaches an age at which the member could elect to have the pension commence.

Form P5, “Waiver of Survivor Benefits after Pension Commencement” allows a spouse, who is entitled to survivor benefits, to waive that interest in favour of another

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party. This doesn't permit the other party to become the beneficiary of the survivor benefits, however. It would require the spouse to hold the benefits in trust and pay them to the other party (see para. 5.7 and 8.11).

Form P6, "Administrator/Annuity Issuer Response" is used by the administrator of the benefits to give notice to the member and former spouse as required under the Act.

Form P7, "Withdrawal of Notice/Waiver of Claim" is used by a former spouse to advise the administrator that the former spouse is no longer claiming an interest in the benefits, and to withdraw documents already filed.

Form P8, "Change of Information" can be used by a former spouse to keep the administrator advised of any changes in personal information (although if this information is provided by some other means, such as a letter or a change of address card, that is equally effective).

Form P9, "Agreement to Have Benefits Divided Under Part 6". If the former spouse and member are in agreement about dividing the benefits and the dates to be used for that purpose, they can use Form P9 to record that agreement.

13.1 Incomplete or invalid Forms

What should an administrator do when the Form received is incomplete?

An administrator must act within 30 days of receiving a Form. [Reg., s. 7] If the Form is incomplete, the administrator must promptly advise the party who submitted it so that any oversights can be corrected.

If the administrator does not act in 30 days, the spouse and member are at liberty to bring court proceedings to compel the administrator to act (although in most cases they will contact the administrator first). [Reg., s. 8] If the administrator failed to act because the Form was defective, but didn't advise the parties of the reason, a court might be inclined to award costs against the administrator for causing unnecessary proceedings to be brought.

13.2 Invalid Forms

What should the plan do if the Form isn't valid? *For example*, what happens if:

- the plan administrator receives a Form without an agreement or order?
- the plan administrator receives an agreement or order without a Form?

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Using the Forms and Notices

- the Form is incorrectly filled out?
- the plan administrator is sent the wrong Forms?

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. [*Reg.*, s. 7(2)] In most cases, the problem can probably be rectified by e-mail or a quick telephone call. (If a former spouse provides the administrator with an e-mail address on the Forms, the administrator may communicate with the former spouse using that e-mail address: *Reg.*, s.2(2)).

E-mail and faxes are deemed to be received on the day they are sent. Mail is deemed to be received 5 days after mailing: *Reg.*, s.2(3)]. See further para. 15.26C and 15.39.

But, if not rectified, the legislation clearly requires the administrator to notify the parties about the defects (using Form P6) in the time required (within 30 days of receipt).

13.3 Missing information

Is a Form invalid if it does not contain all of the indicated personal information? We have received a Form P1 that does not include any contact information for the member.

No, those omissions do not invalidate the form. *Reg.*, s. 4(2) expressly provides that a notice or other document is not defective or ineffective if it does not contain the member's address, fax number, e-mail address, telephone number or spousal status. These items are protected personal information that will not always be available to a former spouse. There may be situations where this information, or other information, will be required to identify the member. But that does not make the Form invalid.

13.4 Court costs

If the parties provide the plan administrator with an agreement dividing the pension benefits, and file the required Forms, what is the position if the administrator does not take the required steps for dealing with the benefits? Can a court award costs against a plan that forces a spouse to get an order compelling the administrator to act?

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Yes. It can do that under the general power of a court to award costs when legal proceedings take place.

13.5 Who gets the Forms?

Should all of the prescribed Forms be flowing through the plan administrator or can the holder of the pension funds deal directly with the member or limited member in obtaining appropriate Forms?

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 Authorizing a personal representative

The former spouse has filed a Form P1 with our plan. We have also received a letter from the former spouse's lawyer requesting information about the plan. Can we provide that information?

Information cannot be sent to the former spouse's lawyer without a written authorization from the former spouse. The administrator has statutory and fiduciary obligations not to disclose information about the member or the member's benefits to third parties. The *FLA*, however, expressly provides that the administrator must provide specified information to a former spouse who files a Form P1 with the plan.

The former spouse can designate a representative to assist in pursuing a claim to pension benefits. [*Reg.*, s. 12] Considering how complicated plans can be, the former spouse will often want the assistance of a professional advisor.

Once the administrator has a written authorization from the former spouse, information can be released to the former spouse's representative. *Reg.*, s. 12(1) provides that the information must be copied to both the representative and to the former spouse. But if a substantial amount of photocopying is involved, the administrator should check to see if the parties want to insist on this, or receive a single copy and save costs.

Form P1 contains an area that the former spouse can use to authorize a representative.

13.7 Time a Form takes Effect

When a plan gets a Form, does the Form have immediate legal effect? *Reg.*, s. 7(2) says a plan must notify the spouse and member within 30 days if it cannot act on the Form. Does that postpone the effective date of the Form?

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The Form is effective from the date of receipt. If, for example, the pension has commenced, and the former spouse has filed all of the documents required to become a limited member, the former spouse is entitled to a share of the payment made 30 days after the date of receipt. [*Reg.*, s. 15(a)] The time given the administrator to advise parties that Forms are incomplete (also 30 days, *see* para. 13.2) is a limitation period. If the administrator doesn't act within that time, either the spouse or the member can get a court order compelling the administrator to act. But the 30 day period does not act as a postponement of the effective date for the Form if it is complete.

13.8 Proving spouse is entitled

Form P1 says the spouse is claiming an interest based on *FLA*, s. 81. What steps does the administrator have to take to confirm that the person filing the form is a "spouse", that the parties have separated and that the former spouse has a potential claim under s. 81?

The Form P1 is sufficient in itself. Provided that the information confirms that the parties were married, or that they have been cohabiting for at least 2 years in a marriage-like relationship, and are, therefore "spouses" within the meaning of the *FLA*, there is no other obligation on the plan administrator to make further inquiries about the status of the parties' relationship. *See also* para. 12.9, 13.22 and 13.23.

The member is protected from invalid claims by the obligation on the plan administrator to give the member notice that Form P1 was received. [*Reg.*, s. 7(1)] The administrator can require a person to provide evidence about a claim. [*FLA*, s. 135(3)] In most cases, the administrator will have information on file confirming whether the member has a spouse and the identity of the spouse. If a request is made by someone else, then it would be reasonable for the administrator to take additional steps to confirm the facts.

Nothing prevents the administrator from adopting procedures to verify spousal status. Under the *FRA*, many administrators required a party requesting information to provide a copy of the marriage certificate. For unmarried spouses, it may be reasonable to request confirmation of the parties' relationship in the form of a sworn affidavit. However, in practice, an affidavit is unlikely to provide any more assurance than a signed and witnessed statement (which is required under Form P1 in the first place).

See para. 13.17.

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13.9 Computers

Can the Forms be placed in a computer?

Yes. The Forms are valid so long as any deviations from the Forms as set out in the *Division of Pensions Regulation* are not calculated to deceive. [*Interpretation Act*, s. 28(1)] See para. 13.17 and 13.27.

**13.10 Agreement not
to divide/Form P7**

If the former spouse and member agree not to divide the benefits, should they send a copy of the agreement (or court order) to the plan? Do they also need to send the plan a Form P7?

This would certainly confirm the position, but it will usually not be necessary to go that far. If a Form P1 has been filed, then all that is required to withdraw it (or any other documents relating to the spouse's claim to a share of benefits filed with the administrator) is for the former spouse to send the administrator a Form P7 "Withdrawal of Notice/Waiver of Claim." If the former spouse declines to do so, however, then it is certainly open to the member to establish that the former spouse no longer has a claim by alternative means, such as providing a copy of the agreement or court order. It is not mandatory to send in a Form P7. The form is provided for administrative convenience (it will usually be the simplest way to give the administrator directions, rather than having to draft a joint letter or formal agreement setting out that the parties have decided not to proceed with pension division arrangements). But the agreement or order will be effective even if a Form P7 is not signed.

See also para. 11.10 and 15.40.

**13.11 Providing
general
information to
third parties**

We sometimes receive phone calls from lawyers asking for information about our plan. These are relationship breakdown files. What are we supposed to do if the former spouse hasn't filed a Form P1 yet?

The administrator cannot provide information about the member or the member's benefits to anyone without proper authorization: see para. 13.6.

However, there is no prohibition about providing general information about the plan itself to a third party and this will often be helpful to member and former spouse. Many lawyers advise administrators that their front line staff should not give out any information until they have the Form P1 on file to avoid the risk that, in providing general information, the plan may end up disclosing protected personal information.

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Obviously, this is a judgment call. But answering general questions will often help move things forward and save the parties from incurring unnecessary additional legal costs. Questions like: are the benefits determined by benefit formula provision or a defined contribution provision? how are survivor benefits determined? where are you registered? or what is the plan's correct name? are unlikely to pose any risk to the plan administrator.

Even better would be to have this type of general information available on-line so that callers can be directed to the plan's website.

13.12 Pension division agreements

What are the minimum requirements for an agreement dividing pension benefits? Is it enough for the parties to draw up and sign their own agreement, or does it need to be certified or notarized?

The *FLA* does not set out the minimum requirements that must be met for an agreement to be effective.

For the purposes of Part 6, not a great deal of formality is called for. The parties are free to draw up and sign their own agreement dividing the benefits, or to use Form P9. However, because pension benefits are often the most valuable asset owned by the parties, they would be well advised to seek professional advice before finalizing the terms for dividing the benefits.

Even so, there is certainly no need for the agreement to be certified or notarized. [See para. 1.3 and 11.3] It is the administrator's judgment call whether the administrator will accept a photocopy of an agreement. Most administrators have no difficulty with accepting photocopies, faxes or scanned versions of the agreement.

13.13 Entitlements to benefits in two different plans

My spouse has entitlement to benefits in two different plans. Are there special rules for dividing pension benefits in this case?

Each plan must be treated separately. Each plan administrator must receive separate Forms and each is entitled to charge an administrative fee for dividing the benefits.

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**13.14 Late filing of
Forms**

What happens if the Forms are not submitted in a timely fashion?

There is no time limit under the legislation for submitting the Forms. Problems may arise if a required Form is delivered after something has happened (for example, the member has died, the limited member has died, the member is eligible for pension commencement, or the member's pension has commenced). A former spouse may find that payments due the former spouse have been made to the member or another party.

The parties' substantive rights are determined by the agreement or court order dividing the benefits. Delivering Forms P2, P3 or P4 with an agreement or court order dividing the benefits is an administrative requirement that does not subtract from the parties' substantive rights, but are a formality for involving the administrator in the pension division arrangements (*see, for example, Martens v. Martens*, 2009 BCSC 1477). *See* para. 13.24.

If payments of a spouse's share are made to a third party because of late filing, the spouse will have a claim against the recipient of the payments, but not against the plan administrator. The administrator's obligations arise when it receives the required documents. [*FLA*, s. 137] (Although an administrator that receives notice of an order or agreement without the correct Forms will sometimes be placed in a position where notice to the former spouse will be required: *see* para. 13.15.)

**13.15 If an agreed
beneficiary
designation is not
made**

The member and the spouse agreed, orally, that spouse1 would be beneficiary of the pension benefits. But the member died before pension commencement without making that beneficiary designation. When the member died, the member was in a marriage-like relationship with spouse2.

So far as the plan is concerned, the dispute does not concern it. If spouse2 qualifies as a spouse, the 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 (although notice obligations may arise if there is an incomplete application: *see* para. 13.19).

Spouse1 may have rights against spouse2, and may be able to assert priority over spouse2, but in the example cited above, that would require spouse1 obtaining a court order to do so. *See* para. 11.4.

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If there is an order or agreement dividing the benefits, this should be delivered to the administrator promptly. In the absence of a restraining order, a Form P1, or delivery of an order or agreement dividing the benefits made before the member's death, the administrator has no obligation to take any steps to protect the interests of the former spouse. [*Chaisson v. Chaisson* (1997), 33 R.F.L. (4th) 205 (Ont. Gen. Div.)]

13.16 *Orders made before FLA comes into force*

What should an administrator do if it receives an order dividing the benefits that was made before Part 6 of the *FLA* came into force?

[See Chapter 14]

13.17 *Revising the Forms*

It would help us to add another box to Form P6 that deals with advising a former spouse when the member changes a beneficiary designation. The Form currently lists two options: "you have ceased to be the beneficiary" and "you have become the beneficiary". There will be cases where the spouse is not the beneficiary and the changed designation means that "another person has become the beneficiary". Can we add that box to the Form?

Changes like this would be acceptable. Deviations from prescribed Forms that are not deceptive do not invalidate a form: *see* para. 13.9 and 13.27. It would be prudent, however, to indicate on the Form any changes that are made. [See Chapter 14]

13.18 *Order not served on plan until after member retired*

The relationship of the member and spouse1 ended 5 years ago. Spouse1 obtained a court order for a share of the benefits, but never delivered it to the administrator. The member's pension commenced 2 years ago and the member took a joint annuity with spouse2. What is spouse1 entitled to?

Spouse1 is entitled to a proportionate share of the periodic payments made under the member's pension during the member's lifetime. There is no obligation on the administrator to commute spouse1's interest to establish separate pension entitlement now, or when the member dies. [See para. 5.7]

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**13.19 Form P1
requested but not
filed**

The former spouse requested a Form P1, which we sent out. It was never returned to us. The employee has now quit and directed that pension entitlement be transferred from the plan. What are the plan administrator's obligations? Are we required to alert the former spouse?

The *PBSA* requires the permission of the member's spouse in many circumstances, including when benefits are transferred from a plan.

If the plan administrator is satisfied that the member is not in a relationship with someone who qualifies as a spouse under the *PBSA*, this scenario does not raise issues that place any obligations on the plan administrator under the *FLA*.

In the absence of statutory authorization, the administrator is under a fiduciary obligation to the member not to disclose personal information to third parties, including the member's spouse. Part 6 of the *FLA* changes that, but only once you have the Form P1. The only other circumstance in which an administrator is required to give a spouse notice is where there has been an incomplete application (such as where a former spouse files with the plan administrator the agreement or court order, even if no Forms are filed at all, or the filed Forms are defective.) [*FLA*, s. 143(1)]

**13.20 Disclosing
information about
benefits
transferred from
the plan**

The employee quit and directed that pension entitlement be transferred from the plan, which was done. This took place a year ago. The former spouse has now filed a Form P1. Are we under an obligation to disclose what was transferred and to where?

Yes. The administrator's obligation to provide requested information includes information about benefits that were transferred from the plan after the Form P1 is filed with the plan, or within 2 years before it is filed. [*Reg.*, s. 10(1)(h)] See para. 15.20.

**13.21 Form P1 and old
orders and
agreements**

The member's former spouse has an order dividing the pension benefits that was made in 1992. The spouse has now sent in a Form P1 and requested information about the pension benefits. Are we obligated to provide that information?

Yes, the former spouse still qualifies as a "spouse" (under the *FLA*, "spouse" includes a "former spouse": *FLA*, s. 3(2)).

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A spouse claiming an interest in benefits is entitled to this information after sending in a Form P1. [*FLA*, s. 133(1), *Reg.*, s. 10] *FLA*, s. 133(1) refers to a spouse claiming an interest in general, which would include an interest arising under an order made before Part 6 came into force.

(Form P1 refers to a claim under *FLA*, s. 81, but that was included on the Form to remind spouses that there had to be some legal basis to the claim, not to restrict the right to receive information that is conferred under s. 133.)

13.22 Limitation period – spouse in marriage-like relationship requests info

We have received a Form P1 from the member's common law spouse together with a request for information. The dates on the form show that the parties separated more than 2 years ago. Can we provide the information?

Yes, if the information on the Form P1 states that the parties have been cohabiting in a marriage-like relationship for at least two years (which is the requirement under the *FLA* for non-married parties to qualify as “spouses” entitled to a share of family property when a relationship ends). [*FLA*, s. 1, definition of “spouse”, and s. 3]

An unmarried spouse has 2 years from the date the parties separated to bring a claim under the *FLA*. [*FLA*, s. 198(2)(b)] After 2 years, the unmarried spouse ceases to be a “spouse” within the meaning of the *FLA* for the purposes of claiming entitlement under that Act. There are provisions that suspend the running of time where the parties are engaged in “family dispute resolution” with a “family dispute resolution professional”. [*FLA*, s. 198(5)] It's possible that an application to vary an order can be made even after the two year limitation period. Time starts to run after the spouse first discovered, or reasonably ought to have discovered, the grounds for making the application. [*FLA*, s. 198(3)]

“Spouse” includes a “former spouse”. [*FLA*, s. 3(2)] It is not the administrator's responsibility to determine in advance whether or not the spouse's claim under the *FLA* will be successful. Even if an unmarried spouse has been separated from the member for more than 2 years, the unmarried spouse is entitled to file a Form P1 and receive requested information. If the *FLA* is closed to the former spouse, the former spouse may still be able to establish entitlement to a share of the pension benefits through a claim based on unjust enrichment. See para. 12.9.

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If the member is opposed to the former spouse receiving information about the benefits, the member would be required to obtain a court order prohibiting its release. The administrator's obligation to provide the member with notice (using Form P6) means that the member can take appropriate steps where the application is made by someone who has no entitlement to information. *See*, however, para. 13.26.

13.23 *Limitation
period - Divorced
spouse requests
info*

We have received a Form P1 from the member's former spouse. The member says they divorced a few years ago. Can we still provide the former spouse with information?

Yes. A spouse claiming an interest in benefits is entitled to this information after sending in a Form P1. [*FLA*, s. 133(1), *Reg.*, s. 10]

A married spouse has 2 years from the date of an order for divorce or nullity to bring a claim under the *FLA*. [*FLA*, s. 198(2)(a); *see* para. 12.9]

However, under the *FLA*, "spouse" includes a "former spouse". [*FLA*, s. 3(2)] So, even if the parties have been divorced for more than 2 years, the former spouse is entitled to file a Form P1 and receive requested information. (If the *FLA* is closed to the former spouse, the former spouse may still be able to establish entitlement to a share of the pension benefits through a claim based on unjust enrichment.)

13.24 *Order/
agreement silent
about the pension*

We have a file where the spouse sent in a Form P2 with a Divorce Order attached to it, but nothing that deals with the pension benefits.

On another file, the former spouse of a member has claimed an interest in the member's pension benefits and sent in a Form P2. Their relationship ended years ago, and the agreement dividing their property did not mention the pension benefits.

Are either of these spouses entitled to become limited members and request pension division?

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No. A plan cannot register a spouse or former spouse as a limited member unless there is an agreement or court order dividing the benefits. [*FLA*, s. 134]

An agreement or court order that is silent on that point is deemed to allocate the entire pension to the member. [*FLA*, s. 111(2); *Webster v. Webster*, 2014 BCSC 730, para. 18-30] See para. 1.5, 6.15, 9.1, 11.17, and 14.14 for the general rule.

Even if *FLA*, s. 111(2) applies, that doesn't mean that the former spouse is foreclosed from establishing entitlement to a share of the benefits, but that is not a concern of the administrator. *FLA*, s. 111(2) means that, for the administrator's purposes, an agreement or order that is silent about pension division is not sufficient to require the administrator to take any action with respect to dividing the pension benefits.

It is quite possible that the spouse has rights, or may be able to establish rights, to the pension benefits, and provide the administrator with the required information and documents.

For example, rights in the benefits may have previously vested in the former spouse that are not affected by the later agreement or court order (as in *Mann v. Mann*, 2009 BCCA 181).

Also, the *FLA* expressly provides that this deeming rule does not affect the court's jurisdiction under Part 5 to review an agreement or court order. [*FLA*, s. 111(3)] A similar position applies with respect to disability benefits. [*FLA*, s. 122(5)]

An agreement may be reviewed and replaced with an order under the *FLA* where, for example:

- (a) it is significantly unfair [*FLA*, s. 93(5)],
- (b) a spouse failed to disclose significant property or debts, or other information relevant to the negotiation of the agreement, [*FLA*, s. 93(3)(a)]
- (c) a spouse took improper advantage of the other spouse's vulnerability, including the other spouse's ignorance, need or distress, [*FLA*, s. 93(3)(b)]
- (d) a spouse did not understand the nature or consequences of the agreement, [*FLA*, s. 93(3)(c)] or

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(e) other circumstances exist that would, under the common law, cause all or part of a contract to be voidable. [FLA, s. 93(3)(d)]

Based on cases under the *FRA*, the most important factor for court intervention is if the pension benefits were not disclosed when the family property arrangements were finalized, or if misleading information was provided about their value. [FLA, s. 93(3)(a)] In *B.R.A. v. R.W.A.*, 2015 BCSC 1173, para. 71-73, for example, pension benefits were not included in a list of assets set out in a stationer's standard form separation agreement used by the parties. The omission was identified as one factor in the court finding that the agreement was unfair (under s. 65 of the *FRA*) and revising the division of property.

The main point, however, is that it is not the administrator's responsibility to determine whether the agreement or court order would be changed by a court. From the administrator's perspective, the only concern is that until there is an order or agreement providing for the division of the benefits, the benefits cannot be divided.

(For the rules that apply to dividing CPP, *see* para. 11.18-20).

13.25 Agreement not served on plan until after spouse died

The member and spouse's relationship ended last year, and they entered into a separation agreement dividing unmatured benefits determined by a benefit formula provision. The spouse died before filing the Forms to become a limited member. Can the spouse's personal representative file the Forms on behalf of the deceased and have the spouse's share transferred to the estate?

Yes. The agreement is sufficient to vest an interest in the benefits in the spouse. Processing the Forms is a procedural requirement, not a substantive one. The chief concern about delay in filing Forms is that (a) payments may be made to a third party before the administrator receives notice of the spouse's interest, and (b) the spouse may have difficulty recovering the spouse's share from the recipient. [See also para. 2.9, 8.6, 8.12, 13.14, 15.6 and 15.12]

13.26 Stranger requests info

We have received a Form P1 from a person claiming to be the member's former spouse. We sent the member notice in Form P6 and the member tells us that he has never cohabited with the person who has filed the form?

The administrator is not under any obligation to determine a spouse's entitlement in advance in order to provide information about pension benefits. But where the member takes the position that there was no relationship (as

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opposed to arguing that parties who have cohabited for several years do not qualify as unmarried spouses under the *FLA*), clearly this raises special considerations.

If the member verifies the member's position in writing, advise the spouse and give the spouse an opportunity to respond. Depending on the information provided, it may be necessary to adopt the position that no steps can be taken without a court order. If either party has caused unnecessary legal proceedings to be pursued, this can be addressed through an order for costs.

13.27 Correcting typos on Forms

It looks like there are typos in Form P9 as published in the *Division of Pensions Regulation*. The paragraph numbering is not in sequence. Can we correct that on the Forms we are providing the parties?

Yes, you can correct the paragraph numbering. Section 28 of the *Interpretation Act* says that deviations from a form that do not affect its substance, or that are not calculated to deceive, do not invalidate the form used. *See* para. 13.9 and 13.17. Apparently, even an agreement can constitute a prescribed waiver if it is sufficiently close to the prescribed waiver. [*Smith v. Casco*, 2011 ONCA 306]

13.28 Using Form P9

Form P9 contains the advice: “Don’t file this form if you already have a written agreement, or an order, dividing the benefits.” There are cases where it might be convenient for the parties to use Form P9 when they have an order or agreement made before pension division legislation was enacted in B.C. on July 1, 1995. Would they be able to use Form P9?

Yes. The caution in Form P9 is to make sure that it is not used by parties who already have an agreement or order that is enforceable under Part 6 of the *FLA* (to prevent the plan administrator from being faced with two inconsistent pension division agreements, for example). But where the parties have an old order or agreement that cannot be brought within the operation of Part 6 of the *FLA* without a further agreement, there is no reason why they could not use Form P9 for this purpose.

13.29 Information request about former spouse and privacy rights

A member has asked us about what elections the former spouse made with her share of the benefits. Do we have to disclose that information?

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Not only are you not required to disclose that information, the former spouse's rights of privacy mean that you must not provide personal information to the member without the former spouse's consent.

The member would be entitled to confirmation about how you calculated the former spouse's share. But after that, no third party, including the member whose benefits were divided, is entitled to information about whether the former spouse took a separate pension, or transferred the benefits from the plan and, if transferred, to where. Personal information is protected. [*Personal Information Protection Act*, S.B.C. 2003, c. 63]

Neither Part 6, nor the *Division of Pensions Regulation*, addresses privacy issues dealing with the former spouse's separate entitlement. (There are rules about protecting the member's privacy with respect to personal information set out in *FLA*, s. 133, and *Reg.*, ss. 10 and 13. This is because Part 6 gives to a former spouse extraordinary rights of disclosure, so the balance between disclosure and the protection of personal information has to be carefully demarcated).

Outside family law disputes, an administrator cannot disclose any private information about a member to a third person, including other plan members, under privacy laws and also fiduciary obligations imposed on a plan administrator. There was no need for family property legislation to address privacy issues affecting the former spouse in pension division matters because once the former spouse's share is carved off from the member's pension (by a lump transfer, or a separate pension), the former spouse is in the same position as any other person about whom the plan has private information.

There are tools available under the *Supreme Court Family Rules*, (see Part 5, Financial Disclosure) to compel disclosure, if there is pending litigation. If the former spouse is making a claim for support, for example, the plan member should be entitled to information about the former spouse's assets that are available to produce income. But there is a formal procedure for obtaining disclosure in those circumstances.

Providing information about how the former spouse's share was calculated, on the other hand, would not be considered personal information and it is information to which the member is entitled (to determine whether the pension division was carried out correctly). If the member requests this information, the administrator would be required to advise concerning the proportionate share allocated to the former spouse, and how this was calculated.

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With respect to privacy issues under the *FLA*, see also para.13.19, 15.21, 15.44 and 15.45

CHAPTER 14. TRANSITION ISSUES - AGREEMENTS AND ORDERS MADE BEFORE MARCH 18TH, 2013

The FLA applies to any pension division arrangements completed after it came into force (on March 18th, 2013).

There will be various issues about the interplay between the FRA and the FLA for agreements and orders made before the FLA came into force, and where initial steps have been taken under the FRA. The FLA provides transition rules addressing these questions. [FLA, s. 252-3] See Table 4 at the end of this Chapter.

B.C. first enacted pension division legislation on July 1st, 1995.

Any agreement (or order) made after that date addressing the division of pension benefits is automatically subject to B.C.'s pension division legislation, unless the pension division arrangements expressly exclude its operation. It is not necessary for the agreement or order to provide that Part 6 applies. [FRA, s. 71(1), FLA, s. 111(1)]

Agreements (or orders) made before July 1st, 1995 can be brought under the pension division legislation (discussed further below).

How the FLA applies to agreements or orders made under the FRA

If the pension division arrangements spell out all aspects of the pension division, and they don't conflict with the requirements of B.C. legislation, then the agreement or order would be sufficient for determining each party's entitlement.

However, if events take place that are not addressed in the pension division arrangements, then B.C.'s pension division legislation fills in the gaps. The legislation is sometimes referred to as providing "default rules" because its provisions apply in the absence of express directions in the agreement or court order.

The FLA provides that it applies to pension division arrangements completed under the FRA (s. 253(2)). This means that:

- any additional options for pension division provided under the FLA apply to pension division orders or agreements made under the FRA (for example, under the FRA, a supplemental pension was divided by a benefit split while under the FLA the former spouse is entitled to receive the share by a separate pension when the member's pension commences - See Chapter 6. The transition rules mean that a spouse entitled to a share of a supplemental pension under the FRA can choose to receive the share by a separate pension as provided for under the FLA), and*
- if the order or agreement made under the FRA does not address an issue that has arisen, the FLA default rules would apply to resolve what is to happen.*

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For the most part, the FLA rules are the same as the FRA rules, but there are three important exceptions:

- (a) the FLA rules differ from the FRA for determining the commuted value of benefits determined by a benefit formula provision, and the separate pension payable to a limited member. [See Chapter 2] (In this case, the FRA rules applied if an application was made by the limited member for the share under the FRA either before the FLA came into force or, if the administrator provided a written notice about the limited member's options, within the period specified in the notice for making the election. If no period was specified, it was 60 days from the date of the notice, [Reg., s. 29(2) and (3)])*
- (b) the FLA rules differ from the FRA for determining a limited member's entitlement if the member dies before pension commencement, [See Chapter 8] and*
- (c) the FLA rules differ from the FRA concerning the division of a matured pension after the death of the member, where the limited member is not the joint annuitant [see para. 5.4 and 5.5]*

Forms were filed under the FRA but things remain to be done when the FLA came into force

If Forms have been filed taking various steps towards dividing pension benefits under the FRA, but things still remain to be done (such as registering the former spouse as a limited member or transferring the former spouse's share from the plan), the steps already taken are still valid and the former spouse does not need to file new FLA Forms to replace the FRA Forms. [FLA, s. 253(1)]

Proceedings to challenge or review pension division agreements

If proceedings have been commenced under the FRA that involve a claim to pension benefits, the FRA continues to apply to those proceedings, unless the parties otherwise agree to continue under the FLA. [FLA, s. 252(2)(b)]

Any challenge to an agreement made under the FRA (to set it aside, or for reapportionment) would be brought under the FRA. [FLA, s. (2)(a)] If the agreement is made after the FLA comes into force, then it would be subject to review under the FLA rules.

Consultation

An important exception to the FLA rules applying to arrangements finalized under the FRA is where there has been consultation with the parties and the plan administrator. See para. 8.4 and 14.10.

How the FLA applies to agreements or orders made before July 1st, 1995

If an order or agreement was made before July 1st, 1995 and it was brought under the umbrella of the FRA (by agreement of the parties, or the provisions of the FRA) the FLA will apply to that order or agreement in the same way as if it had been made after July 1st, 1995 (as discussed above).

Agreements and orders that were made before the FLA comes into force, and to which Part 6 of the FRA did not apply, can be brought under the FLA:

- (a) if the order or agreement provides that, after pension commencement, the member will pay a share of each monthly pension payment to the former spouse (sometimes in B.C. called a “benefit split” or a “Rutherford Order”) the former spouse can require the administrator to make the payments directly to the former spouse by delivering a Form P2 with the order or agreement, [FLA, s. 112(3)(b)]*
- (b) the parties can also agree to have Part 6 of the FLA apply to the order or agreement, [FLA, s. 112(3)(a)] and*
- (c) in some situations, the parties are deemed to have agreed to have Part 6 of the FLA apply (where the agreement or court order requires the former spouse's share to be severed from the member's benefits, as explained more fully in this Chapter: see para. 14.1). [FLA, s. 112(5)]*

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**14.1 Old order or
agreement: opting
in**

The former spouse has a court order dividing the member's pension benefits. It provides that, when the pension commences, the member will pay a specified share of each monthly payment to the former spouse. The order was made before July 1, 1995. Does the former spouse have rights under the *FLA*?

The *FLA* allows opting in for pension division agreements and orders made before it comes into force. Agreements or court orders made after July 1st, 1995 (when the *FRA* came into force) were automatically subject to Part 6 of the *FRA*, and so also automatically subject to Part 6 of the *FLA*.

For agreements or orders made before Part 6 of the *FRA* was in force, the following is a discussion of the options that are available.

After the member's pension commences

After the member's pension commences, the spouse can require the plan administrator to administer the benefit split. [*FLA*, s. 112(3)(b)] The spouse would file Form P2 to become a limited member of the plan. The spouse's share, and other matters, will be determined by the court order or agreement. In all other respects, this situation is no different than had the agreement or court order been concluded after the *FLA* came into force.

Form P2 can be filed at any time. It is not necessary to wait until the member's pension commences. If the former spouse chooses to file the Form P2 before the member's pension commences, the administrator would register the spouse as a limited member of the plan, entitled to information and a division of the benefits by a plan-administered benefit split under *FLA*, s. 117. (In this case, though, the limited member is not entitled to the pension division options otherwise available before pension commencement, under *FLA*, s. 114, 115 or 116.)

Before the member's pension commences

Before the member's pension commences, the spouse and member can agree to opt into Part 6. [*FLA*, s. 112(3)(a)] They can do this by filing the appropriate form (a Form P2 for benefits determined by a benefit formula provision or a Form P3 for those in a defined contribution account) and related material. The administrator will also want directions signed by the spouse and member that

say they agree to opt in under *FLA*, s. 112(3). (This would be required unless *FLA*, s. 112(5) applies, discussed below under “Deemed to opt-in”.) Form P9 “*Agreement to Have Benefits Divided under Part 6*” could also be used. See para. 13.28

To the extent that the court order or agreement is relevant to the mechanisms for division under the legislation, it applies. Some parts of it will be irrelevant, such as a requirement saying the spouse is entitled to survivor benefits after receiving either a transfer of entitlement or a separate pension. [See also para. 14.12] After either of these events, the spouse should no longer be entitled (unless specifically designated by the member) to any share in the member’s remainder of the pension benefits. [Reg., s. 25]

Typically, the well-drafted agreement or court order will indicate which parts become inoperative when the spouse receives a separate share.

Part 6 provides a template for bringing the original pension division arrangement within Part 6. [Reg., s. 25]

Deemed to opt-in

Part 6 also provides that if the original order or agreement places an obligation on the member to sever the spouse’s share from the member’s pension benefits (a very common term), that term is conclusively deemed to be an agreement to opt into Part 6 of the *FLA*. [FLA, s. 112(5)] The member’s agreement to have Part 6 apply to an order or agreement made before the *FLA* comes into force, consequently, is not necessary if the agreement places an obligation on the member to sever the spouse’s share of the benefits whenever that becomes possible.

There are sometimes problems in cases where the formula determining the spouse’s share is ambiguous. This is often the situation when the benefits being divided are in a defined contribution account and a *Rutherford* formula has been used. The *Division of Pensions Regulation* addresses these issues. [See para. 14.2] But if there is any situation where, after applying the *Regulation*, an ambiguity remains, the administrator should simply advise that the joint direction of the member and spouse (or a court order) is required concerning how to calculate the proportionate share.

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**14.2 Opting-in for DC
Accounts**

The member has benefits in a defined contribution account. The parties have an agreement made before July 1, 1995 dividing the benefits. It requires the member to sever the spouse's share when that becomes possible, so the parties are deemed to opt in under s. 112 (5). The agreement, however, says that the benefits must be divided by a *Rutherford* Order. How does that work?

The reference to a *Rutherford* Order incorporates a formula for determining the spouse's share which is very similar to the formula used under Part 6. The general formula is $1/2 \times A/B$ where A is pensionable service during the relationship and B is all pensionable service up to the date that the former spouse's share is determined, which is essentially the same formula used under the *Division of Pensions Regulation* for determining entitlement to a matured pension or unmatured benefits determined by a benefit formula provision. See para. 2.17. [*Reg.*, s. 17]

Unfortunately, this formula does not work very well when applied to a defined contribution account. In these cases, the *Division of Pensions Regulation* requires the former spouse's share to be calculated using the *FLA* rules in *Reg.*, s. 20 for determining a proportionate share of a defined contribution account. See para. 3.4. The dates specified in the agreement or order defining the portion subject to division would be used for the commencement date and entitlement date. [*Reg.*, s. 25(2)]

In some cases, the pension division arrangements will provide enough information to determine the dates. For example, if made at a time when the *FRA* was in force, the pension division arrangements may specify that the former spouse's share is from the date of marriage to the entitlement date. Both of these can be determined objectively. The marriage date can be verified by a party providing a marriage certificate. If not specified, the entitlement date under the *FRA* would be the "triggering event", which is the first of the following events to occur: the date the parties made a separation agreement, the date of an *FRA*, s. 57 declaration of irreconcilability, and the date of an order of divorce, nullity or judicial separation.

If no dates are specified, or cannot be determined, the parties must provide directions about the dates to be used.

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*14.3 The spouses
separated before
July 1, 1995*

Does B.C. pension division legislation apply if the spouses separated before July 1, 1995 (the date pension division legislation was first implemented in B.C.)?

The date of separation is not determinative. The determinative factor is the date of the order or agreement dividing the pension benefits. If the order or agreement dividing the pension is made after July 1, 1995, then B.C. pension division legislation applies.

If the order or agreement is made before July 1st, 1995, B.C. pension division rules apply only if the spouse and member agree to opt in (or are deemed to opt in: *see* para. 14.1).

(But *see* para. 4.4, with respect to administering a benefit split under an agreement or court order made before July 1, 1995.)

*14.4 If the member
won't opt in*

The member and spouse made an agreement in 1993 dividing the pension by a *Rutherford* benefit split. The member's pension has not yet commenced, but the member does not want to opt into Part 6. What rights does the spouse have?

The spouse has the right to be designated a limited member of the plan and receive from the administrator a share of the monthly payments made when the member's pension commences, by delivering a Form P2 to the administrator with the agreement. [*FLA*, s. 112(3)(b). *See* para. 14.1]

If the agreement provides that the spouse's share of the benefits is to be 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 Member's best
interests to opt in*

Why would the member want to agree to opt in?

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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 member's share of the pension benefits that fit the member's personal situation. For example, the *PBSA* requires a member to receive a pension with a survivorship option for the member's current spouse (spouse2), but spouse1's rights complicate this and make uncertain the extent to which spouse2 is protected. Opting in means that once spouse1 has received a share of the benefits, the member can take a survivorship option on spouse2 that would be free of any claim by spouse1. If the member declines to opt in, and it is not possible to provide security for spouse1's share, it is very common to find that the member is under an obligation to provide alternative security (in the form of life insurance, for example) which can be much more costly than simply dividing the pension benefits under Part 6. A common provision is a requirement for the plan member to take the pension benefits in the form of a pension that pays a 100% survivor benefit to the former spouse, to provide the former spouse with security after the death of the member. Opting in makes this requirement unnecessary, because the former spouse then has separate pension entitlement.

(See para. 14.10, 14.12 and 14.15 for examples of provisions in pension division arrangements that can be replaced to the member's benefit if the parties opt-in.)

14.6 Obligation to sever in agreement or order

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?

No. The agreement places an obligation on the administrator as well as on the member. The administrator must advise the member in writing that it can't act on the retirement election until (a) the spouse's share has been severed (by opting into Part 6), or (b) the spouse waives the application of that part of the agreement.

14.7 Proportionate Share

Our plan has received a Form P2 and a separation agreement made before July 1, 1995 is attached to it. The member's pension has commenced. What share does the spouse get: the proportionate share set out in the *Division of Pensions Regulation*? or the share stipulated in the separation agreement?

The share stipulated in the separation agreement.

S. 112(3)(b) allows a spouse to have the administrator administer the benefit split in accordance with s. 117. S. 117 provides that a spouse is entitled to a proportionate share of benefits paid under the pension. The formula for determining the proportionate share under Part 6 is overridden by an agreement or court order. [See *FLA*, s. 110, definition of “proportionate share.” *Reg.*, ss. 17(2), 20(2).] See also para. 11.6.

(See, however, para 14.2 if benefits are still in a defined contribution account, and there is an obligation on the member to sever the former spouse's share. In that case, *Reg.*, s. 25(2) would apply.)

14.8 Arrears

The member has not made all payments to the spouse required under the court order. Can a spouse who files a Form P2 with a plan recover the arrears from the plan administrator?

No. [See, for example, *Swan v. Canada*, (1998) 47 R.F.L. (4th) 282 (F.C.A.)]

The spouse is entitled to receive from the plan administrator the proportionate share of those benefits starting with payments made 30 days after the spouse has filed the necessary materials with the administrator (Form P2, the agreement or court order dividing the benefits and any required administrative fee). [*FLA*, ss. 117(2), 137, *Reg.*, s.15] The administrator has no obligation to account to the spouse for a share of benefits paid before that date.

For a share of payments made before that date, the spouse must look to the member (or, if the member has died, claim against the member's estate). [See *FLA*, s. 97(2)(c)) and s. 141(2) which makes the member a trustee for the former spouse; *Hart v. Hart*, 2012 BCSC 334; *Mangat v. Mangat*, 2009 BCCA 143; *Vestrup v. Vestrup*, [1999] B.C.J. No. 1057 (S.C.); *Leppard v. Leppard*, [1991] B.C.J. No. 1053 (S.C.)] Or the arrears may be taken into consideration when determining a compensation payment for the spouse for waiving a share of the benefits. [*Penner v. Penner* (1984), 42 R.F.L. (2d) 402 (BCCA)]

Under the *FRA*, courts reserved to themselves a jurisdiction (under *FRA*, s. 65 and 66) to:

- (a) decline to award compensation for arrears if that would be unfair in the circumstances (for example, because the retired member did not have the

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financial ability to repay the amount that had accumulated, or because the funds were used to enhance other family property that was being divided), or

(b) provide for their repayment in instalments.

It is likely that the courts will adopt the same approach under the *FLA*.

Even if arrears are recoverable from the member, they may not be recoverable for a period during which the retired member was paying support. [*W.(R.S.) v. W.(A.T.)*, [1997] B.C.J. No. 3065 (BCSC)]

*14.9 Form P2 and
calculating the
spouse's share*

The parties have been dividing the matured pension for several years now according to a *Rutherford*-type court order made before July 1, 1995. The spouse has sent the plan administrator a Form P2 requesting it to administer the benefit split. The member seems to have made a mistake – in the member's favour – calculating the spouse's share. We have advised the member of this and the member has threatened to sue us. What is our obligation?

Once the former spouse becomes a limited member of the plan, the administrator's obligation is to administer the benefit split and pay the spouse the correct amount. *See* para. 11.11, 12.1 and 14.9. The spouse probably has a claim for compensation against the member.

*14.10 Deemed
retirement*

The parties' pre-1995 agreement has a "deemed retirement" provision and requires the member to sever the spouse's share. The spouse has relied on *FLA*, s. 112(5) and has become a limited member of the plan. Is the "deemed retirement" provision still in effect?

No. [For information on "deemed retirement" arrangements, *see* para. 2.48]

Severing the benefits results in ending the deemed retirement arrangements (because the former spouse can directly access the share of the benefits, notwithstanding the member's decision to postpone retirement). *See*, for example, *Muzzillo v. Muzzillo*, 2000 BCSC 363 *aff'd* 2001 BCCA 44.

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14.11 Changes to the old order or agreement **The member and spouse want to opt in to Part 6, but they want to change one part of the order. Can the parties do that? (The order requires the member to postpone pension commencement until age 60, but the member wants to retire earlier than that. The spouse consents because bringing the arrangements under Part 6 means that the spouse has separate rights to the pension benefits.)**

This is an example of a term that would be needed where the parties are administering the division of the benefits between themselves, but 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.

As to providing directions that differ from the terms of a court order, *see* para. 12.6.

14.12 Changing the proportionate share **The member and spouse want to opt in to Part 6, but they have agreed to reduce the spouse's proportionate share set out in the order. Can the administrator give effect to that agreement?**

Yes. S. 112 (3)(a) allows the spouse and member to agree to divide the benefits "in accordance with this Part" meaning Part 6. Part 6 permits the parties to agree, (under *FLA*, s. 127(1)), on the spouse's proportionate share, including using a different proportionate share than the one set out in the pre-existing court order or agreement. *See* para. 12.6.

14.13 Order doesn't refer to the pension **We have received from a former spouse of a member a Form P2 and a court order. The court order does not refer to the pension benefits. The member's pension has commenced. Is the former spouse entitled to a share of the pension?**

Maybe, but the spouse will have to produce something more. The legislation, for the purposes of Part 6, deems an order or agreement that deals with family property, but is silent about the pension entitlement, to allocate the entire pension entitlement to the member. [*FLA*, s. 111(2). *See* para. 1.5, 6.15 and 11.17 for the general rule, and para. 13.24 for what the court can do if the agreement is silent about the pension entitlement.]

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14.14 *Old orders and agreements are still binding*

To what extent is a plan bound by the terms of an order or agreement made before July 1, 1995?

It is quite common for agreements and orders to require the member to obtain the spouse's consent before having the pension commence (or to give notice of an intention to have the pension commence, or to obtain consent to the form of election made on retirement). Another common contractual provision is to specify the form of pension the member must choose. For example, the member may be required to choose to take the pension in the form of a joint annuity with the former spouse (a joint annuity will provide continued benefits to the joint annuitant on the death of the member).

These types of contractual provisions are often unwisely ignored by both member and plan administrator.

The purpose of provisions of this nature is to ensure that the choice the member makes protects the spouse's interests in the benefits. [*Walker v. Walker*, (1993) 142 A.R. 374 (Alta. Q.B.)] If the member chooses a single life pension, for example, a spouse who is entitled to a share of the income stream under the pension will be prejudiced because the pension will end when the member dies.

These kinds of concerns do not arise if division is under Part 6, and the spouse receives a share either in the form of a separate pension, or a transfer of the commuted value of the benefits. But where the agreement provides for a *Rutherford*-type division, the form of the pension is a very important part of ensuring the division operates fairly between the parties.

Where the obligation is ignored, the spouse would have remedies against the member for breach of contract (*see*, for example, *Woodrow v. Woodrow*, [1997] O.J. No. 2014 (Ont. Gen. Div.) and, if the contract places trust obligations on the member, for breach of trust. If the administrator had notice of the agreement, the administrator may be liable as well.

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 joint annuity, or 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?

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This was the situation that arose in *Munro v. Munro Estate*, (1995) 4 B.C.L.R. (3d) 250 (C.A.) .. The Court of Appeal held that, even though it was not possible for the member to make the specified 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, when the administrator is aware that the agreement or order places a positive duty on the member to sever the spouse's interest in the benefits if it becomes possible to do so, the administrator may be liable if it accepts the member's pension commencement election without severing the spouse's share. [See para. 14.6]

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

14.15 Agreement made under the FRA

The *FLA* is now in force. We administer a plan that uses a benefit formula provision and have received from the former spouse an agreement dividing the member's unmatured benefits. The former spouse filed a Form 1 under the *FRA* with us in 2012. The agreement refers to the benefits being divided under Part 6 of the *FRA*. How do we deal with this?

FLA, s. 253(1) provides for the continued application of the former Act to ensure that no rights were lost by the introduction of the *FLA*. The rules under the *FRA* that determined whether or not the former spouse was entitled to a share of benefits continue to apply.

However, unless the pension division arrangements are completed and the spouse has received a share of the benefits before the *FLA* comes into effect, the *FLA* rules apply to the division of the benefits. See the introduction to this Chapter.

Even if the former spouse became a limited member under the *FRA*, the *FLA* rules apply. [*FLA*, s. 253(2)]

Any application for a share of the benefits, or to become a limited member, made after the *FLA* comes into force, would be governed by the *FLA*.

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*14.16 Application for
separate pension*

The former spouse became a limited member in 2010, under the *FRA*. The limited member has applied for a separate pension. The member is eligible for pension commencement, but has not yet made that application. Under the *FRA*, the former spouse had to wait until the member's pension commenced to receive a separate pension. Are we required to pay the limited member the separate pension?

Yes. Entitlement to benefits is determined under the *FLA*, even where the former spouse registered as a limited member under the *FRA*. [*FLA*, s. 253(2)] This means that the former spouse can make the choice provided under the *FLA*, to receive the proportionate share as a separate pension at any date after the member becomes eligible for pension commencement.

*14.17 Administrator
consulted with
parties*

S. 253(3) of the *FLA* says that, where the pension division arrangements were formalized under the *FRA*, entitlement to benefits is determined under the *FLA*, unless the administrator “consulted” with the member and spouse about a particular issue. What does this mean?

The reference to consulting doesn't mean that, if the administrator and the parties had general discussions about the Forms or the parties' pension division arrangements, the *FLA* somehow no longer applies.

The *FLA* rules apply if there are insufficient directions in the agreement or court order.

The reference to consulting refers to where the plan administrator has requested directions from the parties about particular issues, which were provided. If so, the consultation on those issues has the same status as an express direction in the agreement or court order. *See* para. 8.5.

Alternatively, the plan administrator may have advised the parties how the pension division arrangements would be interpreted unless the parties advised to the contrary. This too would constitute consulting, or be the equivalent of directions that would determine how the benefits were to be divided, meaning that there would be no need for the *FLA* default rules to be applied on that question.

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Providing general information about the plan, or a summary of the *FRA* pension division rules, however, would not constitute “consulting”. See para. 14.20 and 14.28.

14.18 Limited
member’s share if
member has died

The former spouse became a limited member under our plan in 2010, under the *FRA*. The *FLA* is now in force, the limited member has not yet received the share of benefits and the member has just died. The member's pension had not commenced. How do we determine the limited member's entitlement? The pension division arrangements are silent about what happens in this situation.

This is one of the reasons that the *FLA* rules apply to pension division arrangements formalized under the *FRA*. Under the *FRA*, the limited member was entitled to a share of the survivor benefits, but this sometimes led to unequal division that prejudiced either the limited member (where the survivor benefits were inadequate) or the member's estate (where the survivor benefits equaled the share of the benefits before the member's death). See Chapter 8, and para 8.4 in particular.

The *FLA* provides that the limited member receives the share of the benefits determined the day before the member's death: see para. 8.2. This over-rides the *FRA* rules that apply in the absence of specific direction on the point (or consultation on this issue by the administrator). [*FLA*, s. 253(2)]

14.19 Is providing
general
information
consulting?

We often provided members and former spouses with general information about how a Part 6 division operates, including information about how shares are determined if the member died before pension commencement and the parties' agreement did not deal with how benefits were to be divided. Does this constitute “consulting” and mean that the *FLA* rules will not apply on that question?

No. The policy is to ensure that formal discussions with the administrator about specific issues respecting the operation of the parties' pension division arrangements are recognized and protected, not that general information about the *FRA* will mean that the *FLA* rules cannot apply in any case.

14.20 Using an *FRA*
Form 2 under the
FLA

We received an *FRA* Form 1 from the former spouse in 2010. The *FLA* is in force and we have just received a court order dividing the benefits,

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together with a Form 2 under the *FRA*. Can we accept that to register the former spouse as a limited member?

The administrator has discretion about accepting the *FRA* Forms. [*FLA*, s. 253(4)]. But the administrator can also require the parties to use the *FLA* Forms.

This discretion was intended to bridge administrative questions that might arise during the transition period after the *FLA* coming into force. At the time this edition of the Q&A is being prepared (in 2016), it is difficult to conceive of a situation where the *FLA* Forms should not be required.

14.21 Administrator discretion and applicable law

Does the administrator's discretion about using the *FRA* or the *FLA* Forms mean that the administrator gets to decide which Act applies to dividing the benefits?

No. The administrator's discretion extends only to determining which Forms to use. Technically, once the *FLA* is in force, all aspects of the *FLA* pension division procedures apply, including the use of the *FLA* Forms. But processing the Forms is a procedural requirement, not a substantive one, and there will be many cases where pension division arrangements are in process where nothing is gained by insisting that the parties refile using the *FLA* Forms.

*14.22 Using an *FRA* Form 2 under the *FLA**

This is a situation where all communications with the parties have taken place after the *FLA* came into force. For some reason, the former spouse has used a Form 2 instead of a Form P2 in the application to become a limited member. Can we accept it?

Yes. Technically, all aspects of the *FLA* apply in this case, including the use of the *FLA* Forms. But processing the Forms is a procedural requirement, not a substantive one and the *FLA* gives the administrator a discretion to accept the *FRA* Forms or require the parties to use the *FLA* Forms. [*FLA*, s. 253(4)] This discretion is intended to simplify the administrative issues that may arise in the transition to the *FLA*, so that applications that have been in the works are not rejected on non-substantive grounds.

*14.23 *FRA* or *FLA*?*

The former spouse became a limited member of our plan in 2010, under the *FRA*. The member is now eligible for pension commencement. The *FLA* is now in force and the former spouse has applied to receive the share by a lump sum transfer. Under the *FRA* rules, the former spouse's share was determined assuming the member's pension commenced at the date

elected for the transfer. Under the *FLA*, however, the former spouse's share is determined assuming pension commencement at the later of the member's actual age and the average age of retirement for the plan. Which Act governs in this case?

The *FLA*. [*FLA*, s. 253(2)] If a spouse became a limited member under the *FRA*, but benefits have not been divided as of the date Part 6 of the *FLA* comes into force, Part 6 of the *FLA* applies to the division of the benefits.

The *FRA* applies if the application for the transfer was made before the date the *FLA* comes into force, even if not completed until after that date. [*Reg.*, s. 29(2)] There is a window where the *FRA* rules are preserved for a limited time, if the administrator provided the limited member with a statement of options for receiving the benefits. The limited member may receive the benefits in accordance with the statement (and the *FRA* rules) if the election is made within the date specified in the statement or, if no date is specified, within 60 days after the date of the notice. [*Reg.*, s. 29(3)] The election would be made in accordance with the statement and by filing a Form P4.

Some plan administrators advise they intend to provide limited members with notice about the changed rules and specify a more extended window than required under the *FLA*, to ensure that no one is taken by surprise by the new rules.

(See para. 2.55 with respect to using the average age of retirement and 2.65 concerning alternatives to using the average age of retirement.)

14.24 Dates not
specified

The *FLA* is now in force and we have received a separation agreement that was drafted under the *FRA*. There are no entitlement dates indicated but we have the date of marriage on file and can apply the default provisions under the former *FRA* to ascertain the end date of the entitlement period. Should we apply the *FRA* default provisions for the start and end dates, or request the parties to clarify the dates under the *FLA*?

The *FRA* rules would apply. Although the *FLA* does apply to fill in gaps in an order or agreement, this is one case where the *FLA* does not have a rule so entitlement would be determined by the law that applied at the date the agreement or order was finalized. If the agreement or court order was made when Part 6 of the *FRA* was in force, and no dates are specified for determining the portion of the benefits that are subject to division, the period subject to division is from the

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date of marriage to the triggering event. *See* para. 2.26. If the agreement or court order is made under the *FLA*, and no dates are specified, the parties must provide joint directions concerning the dates to be used.

14.25 *FRA* or *FLA*?

We represent a plan member. The former spouse is claiming a share of the pension benefits. Proceedings were commenced under the *FRA*. There has been no triggering event. What date will determine the end of the period subject to division: a triggering event under the *FRA*, or the date of separation under the *FLA*?

The triggering event under the *FRA* (at least as a starting point). Proceedings started under the *FRA* continue under the *FRA* (*FLA*, s. 252(2), although, the parties can agree to have the *FLA* apply).

But courts under the *FRA* have not blindly applied the triggering event as the end date. There are numerous cases where the date of separation was used. In other cases, a midpoint between the date of separation and the triggering event was selected. The principle under the *FRA* for determining the appropriate end date for dividing the benefits has sometimes been characterized as selecting the date when any prejudice caused by the marriage or its breakdown has been compensated -- sometimes this is when support started being paid, or when the other spouse returned to employment and began independently accruing pension entitlement: *Green v. Green*, 2000 BCCA 310.

**14.26 *FRA* Forms filed
but judge not told**

We've received a court order providing that the benefits are divided under Part 6 of the *FLA*. The reasons for judgment were also provided to our plan and the judge says that he concluded that the *FLA* applies because there was no evidence that *FRA* Forms were filed. In fact, we have *FRA* Forms that were filed with us in 2012, which would mean that the *FRA* should continue to apply to the pension division issues. How do we deal with this?

This does not present a problem for plan administrators. You would implement the order in the same way as you would deal with any other order dividing the benefits.

Determining which Act applies is important to determine which rules govern how the benefits are divided and the main question in that respect is: what period is used to determine the former spouse's share. In the absence of agreement or court order, the *FRA* would divide the benefits that accrued from the date of marriage to the triggering event (*see* para 2.17 and 2.23), while the *FLA* provides for dividing the benefits from the date the parties' relationship began to the date of separation (*see* para 2.17).

The *FLA* provides that the *FRA* still applies for determining this (and other questions) if Forms under the *FRA* were filed before the *FLA* came into force. But both Acts give the court discretion to depart from the default rules, so essentially what has happened here is that the court has held that, based on the evidence before it, the benefits are to be divided under the *FLA*.

Courts have adopted an approach under which, if there is no evidence that Forms were filed under the *FRA*, it will apply the *FLA* rules: *Stonehouse v. Stonehouse*, 2014 BCSC 1057, para. 25. It is hard to identify any other reasonable approach for a court to adopt on this question.

In the circumstances, the plan administrator has more information than the court concerning the background facts. But there are many situations, such as here, where that is the case but the additional information does not invalidate the order.

It is true that there are circumstances where courts will reconsider a decision on the basis of new evidence, and it is open to either party to apply to court for such a reconsideration. But, until such a reconsideration takes place, the order is valid and the plan administrator is not only entitled, but required, to rely upon it.

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Table 4 – Transition Rules – *FRA* – *FLA* & Pension Division

Issue	<i>Which Act applies?</i>
<p>1. <i>FLA</i> in force, but application for pension division in process under <i>FRA</i>.</p>	<p><i>FRA</i>: <i>FRA</i> administrative rules continue to apply to steps already taken (<i>FLA</i>, s. 253(1)). (The policy is to not invalidate interim steps that have been taken in finalizing pension division arrangements).</p> <p><i>FRA</i> Forms already filed with plan administrator are still valid.</p> <p><i>FLA</i> Forms should be used to complete the pension division arrangements, but administrator has discretion to accept <i>FRA</i> Forms (<i>FLA</i>, s. 253(4)).</p>
<p>2. Former spouse becomes limited member under <i>FRA</i>.</p>	<p><i>FLA</i>: Agreement or court order governs the division of the benefits. Additional rights available under the <i>FLA</i> are available to the limited member. If agreement or court order does not provide sufficient directions on particular issues, <i>FLA</i> rules apply.</p>
<p>3. Agreement or order made while <i>FRA</i> in force, but former spouse becomes limited member under <i>FLA</i>.</p>	<p><i>FLA</i>: Same as in 2.</p>
<p>4. Agreement made before <i>FLA</i> comes into force dealing with pension benefits, and a party wants to enforce or vary it after the <i>FLA</i></p>	<p><i>FRA</i>: Questions about whether the agreement is enforceable at all, or whether the agreement should be varied because it is substantially unfair, are subject to the <i>FRA</i> (<i>FLA</i>, s. 252(2)(a)). This is the general rule that applies in all cases, not just pension division situations. The parties can agree, however, to have these issues decided under the <i>FLA</i>. (This is different from questions</p>

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Transition Issues - Agreements and Orders Made before March 18th, 2013

Issue	<i>Which Act applies?</i>
comes into force.	about how the pension division arrangements are to operate: <i>see 5.</i>)
5. Agreement made before <i>FLA</i> comes into force dealing with pension benefits, but there are questions about how to deal with a particular circumstance.	<i>FLA</i> : Questions about how pension division arrangements are to operate are determined under the <i>FLA</i> . (<i>FLA</i> , s. 253(2)) If the pension division arrangements do not specify what is to happen in a particular situation, the <i>FLA</i> default rules would be consulted. Or the court can review pension division arrangements under <i>FLA</i> , ss. 130 (<i>clarifying division of benefits</i>) or 131 (<i>changing division of benefits in unusual circumstances</i>).
6. Agreement made before <i>FLA</i> comes into force dealing with pension benefits, but silent about dates to be used.	<i>FRA</i> : questions about determining the former spouse's proportionate share would be determined under Parts 5 and 6 of the <i>FRA</i> (from date of marriage to date triggering event).
7. Proceedings under <i>FRA</i> respecting pension division not concluded when <i>FLA</i> in force.	<i>FRA</i> : <i>FRA</i> continues to apply to the proceedings (<i>FLA</i> , s. 252(2)(b)), unless the parties otherwise agree.

CHAPTER 15. MISCELLANEOUS ADMINISTRATIVE ISSUES

15.1 *Waiving the admin. fee?*

The legislation sets out maximum amounts that may be charged by a plan to offset costs of dividing a pension: \$750 for registering a former spouse as a limited member of the plan; and \$175 for transferring benefits from a defined contribution account. If the benefits are in a hybrid plan, and the administrator is required to do both, the fee would be \$925. Does the plan have to charge the administrative fee?

No. It is not mandatory to charge a fee. The *FLA* sets out the maximum that can be charged if the administrator decides to charge a fee. [*FLA*, s. 140(1)(a), *Reg.*, s. 28] Some administrators see this as a service that should be made available to members.

Clearly, not all members will benefit from this service equally (since not all members are in a relationship and not everyone's relationship breaks up). But plans provide other kinds of services and benefits even though not all members will take advantage of them.

Under the *FRA*, some administrators did not charge an administrative fee, and some administrators recognized situations where the fee, or part of it, would be waived. It is expected that similar policies will apply under the *FLA*.

15.2 *When to waive fees*

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

Examples of situations under the *FRA* where administrators often waived the fee:

1. where the application for division is late in the life of the pension (*for example*, the member took a single life pension and, at the time the Forms are received, the guarantee period has expired).
2. where the member acquired benefits under two or more related plans that are being divided. In these cases, many administrators would charge just one administrative fee.

The examples are not exhaustive.

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Table 5 – Time limits for discharging administrative obligations

	<i>Administrator's Obligation</i>	<i>Time for completing</i>
1	Member gives administrator direction with respect to benefits. If Form P1 on file, or former spouse is limited member, administrator must notify former spouse. [Reg., s. 9(1)]	Former spouse must receive 30 days advance notice before administrator acts on the direction.
2	Administrator advised of member's death. If Form P1 on file, or former spouse is limited member, administrator must notify former spouse. [Reg., s. 9(1)]	Former spouse must receive 30 days advance notice before administrator acts on the direction.
3	Administrator receives documents and prescribed Forms from former spouse. Administrator must notify member using Form P6 [Reg., s. 7(1)]	30 days of receiving document from former spouse.
4	Administrator cannot act on document received from former spouse. Administrator must notify former spouse and member using Form P6 explaining why and what is required [Reg., s. 7(2)]	30 days of receiving document from former spouse.
5	Implement division of benefits under a matured pension, annuity or disability benefits. [Reg., s. 15]	Begins with benefits payable on or after the 30 th day after receiving all required documents.
6	Register a limited member and confirm registration to former spouse and member [Reg., s. 16(a)]	Within 60 days of receiving all required documents.
7	Transfer funds from defined contribution account [Reg., s. 16(b)]	Within 60 days of receiving all required documents.
8	Start payment of separate pension [Reg., s. 16(c)]	Within 60 days of receiving all required documents.
9	Transfer funds from plan that uses a benefit formula provision [Reg., s. 16(d)]	Within 60 days of receiving all required documents.

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15.3 Charging the fee: when information is requested? **The administrator has just received a request for information from a former spouse who wants to be able to value the pension benefits. Can the administrator demand payment of administrative fees before the information is provided.**

No. The administrator is required to provide requested information to a spouse upon receipt of a valid Form P1, which tells the plan that the spouse is claiming an interest in the member's benefits. Administrative fees should not be charged until the administrator is asked to take a positive step in dividing the pension benefits. The fee could not be charged on receiving Form P1 because the benefits may end up being divided in other ways that do not involve the plan.

15.4 When to charge the fee **If the administrator intends to charge an administrative fee, when should it be charged?**

The correct time to charge the fee is:

1. when a Form P2 is received to register a former spouse as a limited member, and
2. when a Form P3 is received to transfer a proportionate share from a defined contribution account.

Even in these cases, however, it may be appropriate to defer matters. The *FLA*, for example, permits an administrator to deduct the administrative fee from the payment of benefits, which may not take place until some later date: *see* para. 15.8.

15.4A Parties are willing to pay the admin. fee in advance **We are prepared to provide the parties with a valuation of the benefits, but we need to charge the administrative fee to cover our costs of the valuation. Can we accept the administrative fee from the parties before they file a Form P2 or P3 if they are prepared to pay that in advance?**

There is nothing in Part 6 that prohibits the parties from voluntarily paying the administrative fee in advance. However, an administrator should be reluctant to arrange for an actuarial valuation before the benefits are actually going to be divided. It often takes the parties a very long time to finalize pension division arrangements and, even if the valuation is useful at the time it is made, valuing pension benefits is often a moving target. The valuation may be out of date by the time that the benefits are to be divided, meaning that a second valuation must be arranged, and the costs of that valuation incurred again.

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

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Each party is responsible for half of the fee. [FLA, s. 140(1)(b)] It is not the administrator's responsibility to collect the fee from the parties. If an administrative fee is not paid with the application, the administrator may deduct the fee from the payment of benefits. Adopting the deduction approach as the plan's usual policy may be the most efficient approach for dealing with this issue. [FLA, s. 140(3)] See para. 15.8.

15.6 Parties refuse to pay the administrative fee

Can the administrator refuse to register the spouse as a limited member until paid the administrative fee?

Yes. [FLA, s. 137(2), Reg., s. 16(a)] The administrator is required to register the former spouse as a limited member within 60 days of receiving the required materials (Form P2, the administrative fee (if required), the agreement or court order dividing the benefits, and other documents reasonably required by the administrator with respect to the registration). But see para. 15.12 concerning the differences between procedural requirements and substantive rights.

15.7 Paying the administrative fee to the plan

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

The legislation does not require an administrative fee to be paid, and there is no prohibition on an administrator requiring that the administrative fee be paid to a third party, such as the plan sponsor.

15.8 Paying by installments or deducted from benefits

Can the administrator permit the administrative fee to be paid by instalments or by deductions from pension benefits?

Yes, to both options.

Just as it is up to the administrator concerning whether to charge an administrative fee at all, the administrator can decide how it wishes to be paid. Full payment can be required before acting on a direction to divide the benefits, for example, or the administrator can accept another arrangement for satisfying the fee.

The FLA expressly permits an administrator to deduct administrative fees from benefits. [FLA, s. 140(3)]

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If the pension has commenced, the administrative fee can be deducted from the monthly payments to each of the parties.

In this case, it is important to note that the benefits are subject to tax in the hands of the member and former spouse. If \$375 is deducted from each party's share, each will end up having to pay taxes on the \$375, so they end up paying more than \$375. The administrative fee is not a tax deductible expense: *see* para. 15.10. If the administrator allows the parties to select this option, the parties should also be advised about the tax position. They may prefer to make the payment from some other source.

Similarly, if the former spouse decides to have benefits transferred from the plan, s. 140(3) permits the administrator to agree to deduct the administrative fee from those benefits. Again, however, there would be tax payable on the deregistered benefits.

15.9 GST

Are the administrative fees subject to the GST?

When pension division legislation was first enacted in B.C. in 1995, this question was raised with the federal government, which provided a non-binding interpretation that GST was not chargeable. Inquiries are being made on the current position.

15.10 Income tax

Is the administrative fee tax deductible?

CRA took the position that the administrative fee was not tax deductible under the *FRA* and it is expected that the same position will apply under the *FLA*.

15.11 Income Tax Act and the admin. fee

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

No. The payment cannot be characterized as a “contribution” to the plan and cannot be used as a deductible expense from the payer’s income tax. The Registered Plans Division of the Canada Revenue Agency, however, indicated that under the *FRA* it was acceptable as a payment to offset administrative costs, provided the payments were not made through the plan itself, and it is expected that the same position will apply under the *FLA*.

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**15.12 Administrative
fee not paid
before spouse's
death**

The spouse sent in Forms P1 and P2 with an agreement dividing the pension benefits. Form P2 was returned because the spouse couldn't afford to send in \$750 to pay the administrative fee. The spouse has now died. What are the rights of the spouse's estate?

In this case, there is a valid agreement. Part 6 sets out administrative rules to protect the plan administrator, but failure to pay the administrative fee does not affect the property right itself: *see Martens v. Martens*, 2009 BCSC 1477, which dealt with a similar administrative issue arising after the death of the member, and para. 8.6 and 13.14. The plan should transfer the spouse's share to the spouse's estate on payment by the personal representative of the necessary administrative fee, or deduct it from the benefits. *See* para. 15.6 and 13.24.

**15.13 Administrative
expenses
exceeding the fee**

In addition to the maximum administrative fee that can be charged to a spouse and a member, can additional expenses required to administer the routines surrounding "limited membership" be charged to the pension fund (provided the pension plan allows for this)?

The administrative fee referred to in the legislation and the *Division of Pensions Regulation* represents the maximum amount that can be collected from the former spouse and the member.

Additional costs incurred in dividing the benefits—such as actuarial fees—could not be charged to the spouse or member nor deducted from the member's benefits. Similarly, the plan could not require member and spouse to carry out at their own expense duties that the legislation places on the administrator.

But the legislation in no way restricts arrangements made between sponsor and plan concerning how general administrative costs are borne by the whole of the pension fund.

**15.14 Phased
retirement**

***Reg.*, s. 19 deals with recalculating a limited member's proportionate share after a period of phased retirement. What kinds of issues is this addressing?**

The old rule used to be that, once a member's pension commenced, no more benefits could be accrued by that member.

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Under a phased retirement option, the member may be allowed to continue working, and accrue pensionable service, while being paid a phased retirement benefit.

Or the member may have fully retired and started receiving a pension, and then be allowed to return to work. In that case, the pension is suspended, and a phased retirement benefit is paid to the member who is allowed to continue to accrue pensionable service.

Reg. 19 provides guidance on how to determine the limited member's share in circumstances where the member takes part in a phased retirement arrangement. The limited member's share may be affected in two cases:

- (a) where the limited member hasn't yet taken the share of the benefits, and
- (b) where the limited member is receiving a share of the member's retirement pension and the pension is suspended during the phased retirement period.

*15.15 Filing a Form P1
without an
agreement or
court order*

I filed a Form P1 with the plan, but the administrator has refused to accept the Form and provide any information about the benefits until I produce the court order or agreement that provides for pension division. Are these necessary?

No.

As a practical matter, no agreement or court order will be available until the parties have sufficient information to value the pension benefits. The plan administrator should be advised that if a court application is necessary to compel the plan to accept the Form P1 and provide information, the court will likely award costs against the administrator.

Reg., s. 10 requires the plan administrator to provide the spouse with requested information once a Form P1 is filed. (Under the law predating B.C. enacting pension division legislation, a plan administrator could not provide the spouse with information without the member's consent.)

*15.16 Valuing the
member's pension*

I filed Form P1 and asked the plan administrator to value the member's pension benefits, but the administrator declined to do so.

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Part 6 does not require the administrator to value the benefits. The only obligation on the plan administrator is to provide a spouse with the information specified in *Reg.*, s. 10. This information would allow the spouse to arrange for the member's pension benefits to be valued. However, when it comes time to transfer the spouse's share, the administrator will have to do its own valuation.

**15.17 Termination
value**

The spouse has asked us (the plan) to place a value on the pension benefits. We are not in a position to value the benefits assuming the member's continued employment, but we are able to place a value on it assuming the member leaves employment as of the valuation date. Can we provide the spouse with that information?

Nothing in the legislation prevents a plan administrator from providing any form of information (other than personal information about the member as specified in *Reg.*, s.13).

If the administrator is able to provide a termination value, this may be of some use to spouse and member, but in many cases is probably likely to cause more harm than good (in terms of misleading the parties and their professional advisors about each party's entitlement, because Part 6 does not use a termination value for dividing the benefits).

If you decide to provide such information, it is important to take steps to ensure that the parties are not misled. Consider adding caveats, such as:

1. the value is based on the assumption that the member leaves employment as of the valuation date,
2. the value differs from the value that would be placed on the benefits under *Reg.*, s. 23 or 24, and
3. if greater accuracy is needed by the parties, they would have to have an actuary value the benefits.

**15.18 Obligation to
provide
information**

Who is entitled to receive information from the plan administrator (and when) in connection with a member's pension benefits?

A spouse who files a Form P1 but who is not yet a limited member is entitled to information on request. (So is a spouse in the absence of a Form P1, where the agreement or court order authorizes the release of information to the spouse.)

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In contrast, an administrator is required to send specified information annually to a spouse who is registered as a limited member, whether or not a request is made. [*FLA, Reg.*, ss. 10 and 11]

FLA, Reg., s. 11(1)(a) refers to sending the limited member any information or notice available to members of the plan, which seems very broad, but this has been interpreted in practice as not extending to copies of information or notices that have nothing to do with the benefits that are being divided. Obviously, there may be some close judgment calls. A limited member would be entitled to copies of information or notices given to the member that would directly or indirectly affect the limited member's entitlement (such as, for example, opportunities to acquire additional entitlement, information about proposed plan conversions, and so on).

A limited member who is in receipt of a separate pension, or is a limited member with a separate defined contribution account, is only entitled to information about the separate pension or the limited member's defined contribution account. [*FLA, Reg.* s. 11(2)]

If a spouse files a Form P1 and requests information about the benefits, the administrator must provide the information within 60 days after receiving the written request. [*Reg.*, s. 10(1)]

15.19 Repeated requests for information

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

The administrator is required to provide information only once in each calendar year. [*FLA, Reg.*, s.10(3)] However, the former spouse can request an update on the information, but again only once in the calendar year. [*FLA*, s. 10(2)]

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

For example, the spouse and member 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 benefits. The spouse received information from the plan 6 months before and would like an update to make sure the compensation payment is accurate.

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The plan gains nothing from adhering to its right to provide information only once a calendar year. The *Division of Pensions Regulation* should not be used to destroy sensible negotiations. If an administrator declines to provide information, it is still open to the court to order that information be provided more than once in a year. [FLA, s. 133(2)]

Similarly, a follow-up request by a former spouse to explain information that the plan provided, or to request information that has not already been provided, would not be subject to the one-request-per-year limitation. It is perfectly acceptable for the spouse to request, for example, a copy of the plan member's most recent annual statement and then, at some later date, request a plan summary or other pertinent information not already provided by the administrator.

15.20 Kinds of information

We have just received a Form P1 with a letter from the spouse's lawyer saying "we look forward to receiving information from you." The letter does not indicate what information is required. What information does the administrator have to give?

Division of Pensions Regulation, s. 10(1) lists the required information.

The administrator must provide the spouse with a copy of the most recent annual statement about the member's pension benefits.

If a copy of the annual statement is not available, the administrator must prepare a current statement showing contributions to date and earned service.

If not included in the annual statement, the following information is also required:

- any additional information necessary to value the benefits or finalize the division of the benefits (if the plan is using the average age of retirement for pension division purposes, then information about the average age of retirement would also be required),
- whether the spouse is the beneficiary of the member's benefits,
- if the pension has commenced, information about survivor benefits payable under the pension, whether they are payable to the spouse, and whether a change of spousal status affects entitlement (although, in B.C.

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a change in spousal status would not affect entitlement since *PBSA*, s. 81(2) came into force. *See* para. 8.8.),

- if benefits are based on the member's income for a particular period, information about the member's income for that period,
- any information or notice provided to the member after the Form P1 was filed with the administrator,
- information about benefits transferred to the plan, or from the plan, on behalf of the member after the Form P1 was filed, or within 2 years before it was filed, and
- information on options and elections available to the member, or a limited member, with respect to the benefits.

Including a copy of the most recent explanation or summary of the plan will often be very useful for the parties, and reduce the amount of follow up requests for information.

Reg., s. 10(1) is helpful, but this is not a new issue. Pensions have been divisible in B.C. since 1979. Administrators have close to 4 decades of experience with this kind of issue. Also, in many cases, the spouse will retain an actuary, who will deal directly with the plan administrator and will indicate precisely what information is required.

Reg., s. 10 provides minimum standards for what must be disclosed. There will be circumstances where the plan will be aware that members and limited members will benefit by being alerted to special features of the plan.

For example, it may be the case that the value placed on the limited member's share of benefits will increase if the limited member postpones applying for the share for a short period (to avoid, for example, an early retirement reduction). There would be no statutory penalty for a plan failing to provide this advice. But the law is developing where there is a duty of good faith that an administrator owes plan members with respect to retirement counseling, which would apply equally to a limited member, and there have been cases where the plan has been found liable for failing to discharge those duties. Consequently, if the plan is aware of information that would be valuable to the limited member, it should be communicated to the limited member if possible. *See* para. 2.56A and 2.63.

For example, if the plan has a target benefit provision, disclosure of the targeted nature of benefits is part of the annual statements to members, so that

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information would be provided to a spouse requesting information. But if a new valuation report is being prepared for filing, this would not be part of the annual statement to members (although it would be part of a termination statement given to the member under *PBSA Reg.*, 33(4)). However, since this information is relevant to estimating the value of the spouse's potential share, it should be part of the information provided to the spouse.

**15.21 Information
purely personal to
the member**

Does a plan administrator have to disclose purely personal information about the member such as, for example, whether additional pension entitlement has been purchased after the breakdown of a relationship, or whether the member has appointed a new beneficiary? Is an administrator even allowed to disclose this information?

There is a distinction between (a) information about the member's benefits (which would have to be disclosed if relevant to determining or valuing the former spouse's share) and (b) the member's personal information.

Information about purchased entitlement would likely be relevant for determining the former spouse's proportionate share of the overall benefits.

But when providing information, the administrator must not, unless the member consents in writing, disclose the member's address, fax number, e-mail address, telephone number, spousal status, or the identity of any beneficiary nominated by the member (other than the former spouse). [*Reg.*, s.13(1)] For the beneficiary designation, the administrator would confirm whether or not the former spouse is the beneficiary. [*Reg.*, ss.10(1)(c), 13(1)(b)]

If documents required to be disclosed contain any of the specified personal information, the administrator must edit the document to remove it. [*Reg.*, s. 13(2)]

Information disclosed to a former spouse claiming an interest is subject to conditions of confidentiality in the hands of the spouse and can only be used or disclosed for the purpose of dividing the benefits. [*Reg.*, s. 13(4)] See para. 15.45.

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15.22 *When to provide the information* **Must an administrator send information sufficient to value the interest in the member's pension immediately on receiving Form P1?**

No.

A spouse, by delivering to a plan a Form P1, becomes entitled to request the information, but the spouse may not need the information immediately, or at all.

Some administrators may find it convenient to automate the process as much as possible and may choose to set up systems under which the necessary information is sent immediately upon receiving the Form P1. Technically, however, there is no obligation on the administrator to deliver the information until the spouse makes a formal request for it. [*FLA, Reg.*, s. 10(1)] Once a formal written request is made, however, the administrator must provide the information within 60 days of receiving the request. [*Reg.*, s. 10(1)]

15.23 *Obligation to advise about options* **The benefits are determined by a benefit formula provision. Should the plan administrator send out the Form P4 (which the spouse uses to select between the options under s. 115) with the initial package of information? This might avoid diarizing problems.**

The problem with sending the Form P4 to the limited member before the member reaches an age at which the pension could commence is that the limited member may return the Form too soon, perhaps years before the benefits can actually be received. This might be confusing to the limited member (who might think that benefits are available right away). It might also lead to decisions being made prematurely, and settling on options that may not be in the limited member's best interest at the date the benefits can be accessed.

While the limited member could withdraw the Form P4 before it is acted on, another problem is that, unless the limited member provides more direction, the Form P4 functions as a direction to divide the benefits immediately (or as soon as it becomes possible to divide them). *FLA, Reg.*, s. 16 (d) requires the directions set out in Form P4 to be implemented within 60 days (provided all other required documents have been submitted).

On the other hand, there have been a surprising number of cases where the limited member cannot be located when the member elects to have the pension commence. Without directions from the limited member, the administrator may be concerned about whether (a) the benefits should be segregated and retained

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for the limited member, or the limited member becomes entitled to a share of the monthly income stream paid to the member (*see* para. 15.49 and 15.50). Having a signed Form P4 on hand, even one provided years before, would provide at least a partial solution to this dilemma and therefore a prudent course for the limited member to adopt.

But not all plan administrators are prepared to accept a Form P4 submitted unless it can be implemented within a matter of months (relying on the requirements of *FLA*, Reg., s. 16(d))

15.24 *Obligation to inform about separate entitlement*

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

No. Nothing in the *FLA* or the *Division of Pensions Regulation* requires the administrator to show the separate interests of the member and the spouse before the benefits are actually divided.

An administrator that does not show the separate interests of the member and the spouse on the information sent out would be wise to add to the information statement a warning or caution that:

- the information provided relates to the benefits in their undivided form, and
- the member and the spouse will each receive a part of the benefits, as set out in the agreement or court order they filed with the plan.

A warning containing this information will make sure that the spouse and member are not misled concerning the dimensions of their pension entitlement.

15.25 *Obligation to notify: advance notice to limited member*

The member has terminated employment and requested a transfer of the benefits to another plan. The member's former spouse is registered as a limited member with our plan. What are our duties to the limited member in this case?

The limited member must be given 30 days' advance notice of the transfer. [*FLA*, Reg., s. 9] If the member is eligible to have the pension commence, the limited member can choose between receiving the benefits by a lump sum transfer or a separate pension. [*FLA*, s. 115] If the member is not eligible to have the pension

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commence, the limited member is entitled to a proportionate share of the commuted value being transferred. [*FLA*, s. 115(6)] See also para. 2.10 and 15.26.

15.26 *Obligation to
notify: advanced
notice to spouse*

The spouse sent in a Form P1, but is not yet a limited member of the plan. The employee has now quit and directed that pension entitlement be transferred from the plan. What are the plan's obligations?

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. [*Reg.*, s. 9]

15.26B *Obligation to
notify: Calculating
30 days advance
notice*

How is the 30 day advance notice calculated?

Be careful about how you calculate the 30 days. Under s. 25(4) of the *B.C. Interpretation Act*, the first and last days are excluded. Also, if the last day occurs on a non-business day, it is extended to the next business day.

15.26C *Obligation to
notify: When is
advance notice
received?*

When is advance notice deemed to be received?

Reg., s. 3 sets out when notice is deemed to be received. If sent by ordinary mail notice is deemed to be received 5 days after the date of mailing. If by e-mail or fax, notice is deemed to be received on the day it was sent.

15.27 *Obligation to
notify: advance
notice to member*

The member and spouse have an agreement dividing the pension benefits that was made before July 1, 1995. It provides that the member must sever the spouse's interest when that becomes possible. The spouse has exercised rights under *FLA*, s. 112(5) to opt in to Part 6 by delivering a Form P2 to the plan, together with the agreement. Is the plan under an obligation to notify the member?

Yes. The member should be sent a Form P6 advising that the plan has received a Form P2 from the spouse (although, if s. 112(5) applies, the member has no right to prevent the severance). If there are special circumstances (although it's difficult to imagine what they could be), the only way to prevent severance would be for the member to obtain a court order.

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*15.28 Retaining the
limited member's
share*

What if the member terminates employment and requests a transfer of the commuted value of the pension benefits, but the limited member doesn't provide the plan with directions for transferring the limited member's share?

The administrator protects itself by sending the limited member advance notice of the member's request. If the limited member does not communicate with the plan, the limited member's share would be retained until the directions are received. *See* para. 2.10-2.12.

*15.29 Investment
directions*

In our plan the member can make certain decisions respecting how the member's benefits are invested. How does filing a Form P1 affect that right?

The administrator must give the spouse notice of an investment direction and wait 30 days before acting on the direction. The 30 day notice requirement applies for any direction given to the plan administrator by a member. [*FLA, Reg.*, s. 9(c)]

Obviously, in some cases it will be important to be able to respond to the investment direction more promptly than that. It would be open to the member to ask for the spouse to waive notice in these cases. The spouse might be prepared to give the administrator a general waiver concerning notice for all investment directions. It might simplify things for the administrator to develop a form for this purpose, or for the parties to address the issue in the pension division arrangements.

*15.30 Adjusting the
member's benefits
(1)*

If the spouse takes a transfer of the commuted value of the benefits before the member's pension commences, will the member pay the price by having too much deducted when adjusting the member's share?

No. The legislation sets out rules for adjusting the member's share which the administrator must follow. [*Reg.*, s. 21]

*15.31 Adjusting the
member's benefits
(2)*

How are the member's remaining benefits adjusted after there has been a division?

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The adjustment is made by reducing pensionable service. The administrator is required to reduce the member's service "by the amount of pensionable service reflected in the limited member's proportionate share of the benefits". In the usual case, the reduction will be half the pensionable service acquired in the period between the dates used to specify the portion of the benefits that are subject to division. [Reg., s. 21(3) and (4)] See, however, para. 15.31A and 15.32.

15.31A *Adjusting the member's benefits* (3)

How are the member's remaining benefits adjusted after there has been a division if the benefit rates are not the same for all years?

If benefit rates are not the same for all years, things are a little more complicated and to carry out the requirements of the *Division of Pensions Regulation*, the reduction would be to the member's overall pensionable service. For example, if benefit rates are different over the years, and the member has 20 years of service, and the entitlement period is 10 years, meaning that the former spouse will receive 1/4 of the benefits, the reduction will result in each of the 20 years being reduced by one quarter.

15.32 *Adjusting member's benefits in other cases*

How are the member's benefits adjusted if the division is of a matured pension or a transfer from a defined contribution account?

The member keeps the balance of the monthly payment, or of the defined contribution account, as the case may be. There is no other adjustment required, and no rule for this is set out under Part 6 or the *Division of Pensions Regulation*.

15.33 *Adjustment when more than one division*

How are the member's pension benefits adjusted when there is more than one breakdown of a relationship and more than one division? (If service is adjusted immediately, then wouldn't the order in which the pension benefits are divided affect the value of a spouse's share?)

The *Division of Pensions Regulation* does not provide a rule for adjusting the member's benefits when there is more than one division of them. However, the approach that appears to work best, if there is no overlap in the periods being divided, is to calculate each spouse's share assuming that there has been no prior division (by notionally retaining the value and service allocated in the earlier division).

15.34 *Effect on the plan*

Will the adjustment be neutral to the plan?

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In principle, the adjustment is neutral, but any approach to achieving neutrality depends upon the date as of which neutrality is assessed, and on what basis.

In some jurisdictions, the test for neutrality is that the cost to the plan must be the same, before or after division, and so the overall cost to the plan is determined by the choices made by the member. In these jurisdictions, frequently the result is to place a low value on the former spouse's share and then, when determining the member's share at pension commencement, allocating any increase that would otherwise have formed part of the former spouse's share to the member.

Under B.C. legislation, neutrality is achieved by giving each party a share of service, and ensuring that the total of service after division equals the service before division. But because the member and the former spouse are allowed to use that service as each considers best, the overall financial cost to the plan may differ depending on the choices made. However, this is consistent with how the plan is designed in the first place. Putting pension division issues aside, the member in question may decide to take early retirement, which, if subsidized, possibly increases the overall cost of the benefits to the plan. Or the member may postpone pension commencement long past the normal retirement age, which tends to decrease the overall costs to the plan. The plan is funded to permit a member to make these kinds of choices. B.C.'s pension division legislation is structured to allow a former spouse similar personal choice with respect to the benefits. This means that the overall costs of the divided benefits will be within the plan's funding expectations with respect to the benefits, but it is not possible, and would be completely unfair, to cap the former spouse's entitlement by reference to the member's sole discretion about how the benefits are to be used.

A possible conflict arises if B.C. pension division legislation applies (which requires adjusting on service) but the plan is regulated under legislation outside B.C. that tests neutrality by the cost to the plan of the member's benefits had they not been divided. But this conflict is typically resolved by determining which jurisdiction's laws apply. For example, the federal PBSA, sets out a financial test for neutrality, so there is, at a quick glance, an apparent conflict. But the federal PBSA, s. 25(3) exempts a plan from the federal Act's benefit requirements if provincial law applies, which means that B.C.'s approach would govern.

Financial differences may arise from the adjustments required to achieve gender neutrality for the plan as well. [See para. 2.49A]

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15.34A Pension
division may end
up leaving an
excess amount

The *Division of Pensions Regulation* provides for adjusting the member's remaining benefits by deducting service allocated to the former spouse's share. We have a final average earnings plan, and if the member takes the pension share some years later (and final average earnings have increased) the total of the share allocated to the former spouse, plus the value of the member's remaining benefits, will be less than the total value if the benefits had not been divided (because, if there had been no division, the former spouse's share would have been valued based on the higher final average earnings).

For example:

DB Plan Formula: 2% Final Average Earnings Plan
Early Retirement Eligibility Age: 55
Limited Member elects a separate
pension when the member is: 55
Member retires at age: 65

Pensionable service during entitlement period = 5 years
Total pensionable service when the member is 55 = 10 years
Total pensionable service when the member is 65 = 20 years
Member's final average earnings at 55 = \$50,000
Member's final average earnings at 65 = \$60,000

Member's total annual accrued pension at 55 = $2\% \times \$50,000 \times 10$
= \$10,000

Limited Member's Proportionate Share when the member is 55
= $.5 \times 5/10 = .25$

Limited Member's PS based on \$10,000 pension
= $.25 \times \$10,000 = \2500

Adjusting the member's pension when member's pension commences at 65:

Member's total annual accrued pension at 65 before division =
 $2\% \times \$60,000 \times 20 = \$24,000$

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Adjusting based on value

Member's total annual accrued pension - value of LM's share
 $(2\% \times \$60,000 \times 20) - \$2,500 = \$24,000 - \$2,500 = \$21,500$

Adjusting based on service

**Member's total annual accrued pension -
service allocated to LM of 2.5 years =**
 $2\% \times \$60,000 \times (20 - 2.5) = \$21,000$

The Division of Pensions Regulation requires the adjustment to be made on service, which gives the member \$500 per month less than if the adjustment were made based on the monthly value allocated to the limited member. This doesn't strike us as being neutral to the plan. Should we be allocating the difference to the member's share?

The question of financial neutrality to the plan depends on the date used for establishing neutrality. In the example you provide, there is an excess. It would be possible to come up with examples where the overall value may be more than had the benefits been divided (where the member postpones pension commencement for many years). Just as there should be no clawback where there is a shortfall to the plan, nor does the B.C. legislation require the plan to increase the member's share to adjust for any supposed excess. Under the B.C. pension division legislation, neutrality is determined at the date of division by adjusting service. After that date, each party is entitled to use their share of service as they wish, and its value will be affected by the separate elections they make. *See* para. 15.34.

This does not mean that other legislation might not impose additional obligations on the plan if, for example, it is regulated by legislation outside B.C. or if, for example, federal legislation (such as the *Income Tax Act*) requires neutrality to the plan to be determined as of a different date (such legislation would not limit the application of B.C. pension division legislation, but may require different results which are not in conflict with B.C. pension division legislation: *see* para. 1.11 discussing principles of paramountcy.

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15.35 Retroactive Arrangements

The member filed the Forms with our plan to have the pension commence next month. The member has now requested that the commencement date be put on hold to give the member and former spouse time to finalize pension division arrangements. Once finalized, they want the pension division arrangements completed as of the preserved pension commencement date. They have now provided us with an agreement spelling this out. What are our obligations?

The parties are permitted to preserve a pension commencement date so that the pension division arrangements can be carried out retroactively to that date. [*FLA*, s. 132; see also *BCLI Report*, recommendation 12]

This allows the parties to preserve pension division options (because the rules would change once a pension commences) and also protects the parties against the possibility that delay in finalizing pension division arrangements will result in the loss of any pension income.

15.36 Changing average age of retirement

We relied upon s. 23(5) of the *Division of Pensions Regulation* to specify an average age of retirement. Our actuaries have reconsidered matters and suggest that it would make more sense for our plan to select a different age for this purpose.

The policy adopted under the *FLA* is to ensure that the average age of retirement is selected carefully, and not changed without good reason. The concern is that if the issue is decided from file to file, an unconscious bias may creep in.

An administrator may choose an average age of retirement that differs from the age required under the *Reg.* (or if the plan has no average age of retirement), but cannot change that election at a later date without the permission of the Superintendent. This applies equally to plans that are subject to B.C. law, but not registered in B.C. [*FLA, Reg.*, s. 23(5)]

15.37 Gender neutral

Can the plan take the spouse or the member's sex into account when valuing and adjusting pension entitlement?

No. The *PBSA* requires that these calculations be carried out on a gender neutral basis. [*PBSA*, s. 10] See, however, para. 2.49A with respect to how gender neutrality is achieved.

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*15.38 Member objects
to method adopted
by plan*

The plan received Form P2 and the court order and the benefits were divided in accordance with them. After receiving Form P6, the member has written disagreeing with the approach to division. What are our obligations?

If the calculations are checked and are accurate, the administrator must continue to pay the member and limited member their shares. The member will require a court order directing a different result. *See* para. 14.9.

It would make sense, however, to make sure:

- (a) the member's objection is understood, and
- (b) the parties understand how the shares were determined.

If the member and spouse are in agreement on the point, then the administrator can rely on their joint direction. If the member and spouse cannot reach agreement, and court proceedings are commenced, the administrator should consider making such payments as are called for (or, at least, the amount in dispute) into court. *See* para. 8.6. This protects the plan from having to pay the same benefits out twice.

*15.39 Do notices have
to be sent by mail?*

If the administrator is required to send a notice to a spouse, limited member or member, does it have to be by mail?

The *Division of Pensions Regulation* recognizes that notices can be given in a variety of ways. Notices may, for example, be sent by ordinary mail. If the intended recipient provided the administrator with an e-mail address or fax number for the purpose of delivery (by including it on a form filed with the plan, for example) then the administrator can deliver the notice by e-mail or fax, as the case may be: *Reg.*, s. 2(2). E-mail and faxes are deemed to be received on the day they are sent. Mail is deemed to be received 5 days after mailing: *Reg.*, s. 2(3). *See* para. 3.2, 13.2 and 15.26C.

Although e-mail and fax will often be convenient, there will be circumstances where the administrator will want to ensure there is confirmation that notice was given, which generally would mean using registered mail, or a courier service.

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15.40 Parties have decided not to divide the benefits

We have on file an order dividing the benefits between the parties, and the former spouse became a limited member of our plan. The parties have now decided not to divide the pension benefits (the member is going to pay a lump sum to the former spouse in compensation). Can they withdraw the order and the limited member filing? If so, how should they do that?

The parties can agree to waive a division of benefits at any time, provided the pension division arrangements have not yet been implemented. [FLA, s. 126(1)] Form P7, "Withdrawal of Notice/Waiver of Claim" would be used. This needs to be signed by the former spouse (or, if the former spouse is deceased, by the former spouse's personal representative). See also para. 11.10 and 13.10.

15.40A Does the admin. fee have to be refunded?

We have a former spouse registered as a limited member with our plan and have just received a Form P7 "Withdrawal of Notice/Waiver of Claim" requesting the pension division arrangements not be implemented. Do we have to refund the administrative fee that was paid when the former spouse was registered as a limited member?

No. The parties can agree to waive a division of benefits at any time before they are implemented, but the administrative fee was paid to offset costs incurred by the plan in implementing the pension division arrangements. Even if the parties have decided not to go through with the pension division, they have caused the plan expense (in providing information, for example, and in the administrative requirements involved in registering a former spouse as a limited member). The plan may keep the administrative fee.

15.41 Withdrawing Form P1

The member has advised us that all outstanding issues have been resolved with the former spouse and the former spouse has waived any claim to the member's pension benefits. We have on file a Form P1 which requires us to give the former spouse advance notice. Can we ignore that now?

The obligation to provide advance notice to a former spouse continues until the administrator receives either (a) a Form P7 signed by the former spouse withdrawing the Form P1, or (b) a copy of the agreement, or court order, confirming that the spouse no longer has any claim to the member's benefits. See para. 5.7, 11.10 and 13.10.

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15.42 *Updating
contact
information*

The limited member has sent us a fax with updated contact information (a new mailing address and telephone number). Do we have to require the limited member to send us a Form P8, “Change of Information”?

No. In most cases, there is no substitute for using a prescribed form. But Form P8 is included as a convenient way for parties to update personal information. It is recognized, however, that people can provide updated information in other reasonable ways. Using Form P8 is permissive, not mandatory. [*Reg.*, s. 6]

15.43 *Form P7 and
Waiver of Survivor
Benefits*

We have on file a Form P5, “Waiver of Survivor Benefits After Pension Commencement” signed by the member’s former spouse. We have now received a Form P7 signed by the former spouse, to withdraw the Form P5. Is this acceptable?

No. It is expected that few well-advised former spouses will use Form P5 to waive survivor benefits: *see* para. 5.7. But in those rare circumstances where a Form P5 has been signed by a former spouse, the former spouse cannot withdraw it using a Form P7, “Withdrawal of Notice/Waiver of Claim”.

The Form P7 is used by a former spouse to waive any claim to entitlement that would otherwise belong *to the former spouse*. A former spouse who signed a Form P5 agreed to hold that entitlement for a specified third party. Only the specified third party would be able to waive a claim to it.

The *PBSA* requires the use of prescribed forms to waive pension survivor benefits. Technical rules apply depending on whether the waiver is signed before or after pension commencement, and what benefits are being waived. The *PBSA* does not permit the joint annuity to be waived after pension commencement, although it may be possible to waive other benefits (such as the guarantee period): *see* para. 3.18, 5.12, 5.20A, 8.14, 8.16, 8.24, and 11.17.

15.44 *Accidentally
disclosed personal
information*

The former spouse filed a Form P1 with our plan. In responding to the former spouse’s request for information, we seem to have included Forms with some of the member’s personal information. What is our liability?

Protecting personal information is a serious obligation. [*Reg.*, s. 13(1)] However, there is no liability for accidental disclosure if the administrator was acting in good faith. [*Reg.*, s. 13(3)]

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15.45 Confidentiality of information provided by plan **We provided information about pension benefits to a former spouse who had filed a Form P1. We are concerned, however, that the information is being improperly used. The member says that it has been posted on the former spouse's Facebook page.**

Anyone receiving information under the *Division of Pensions Regulation* is under an obligation to keep the information confidential. [Reg., s. 13(4)] It may be used solely for the purpose of dividing the benefits (which means that it can be disclosed to professional advisors), or introduced in evidence in legal proceedings involving the benefits.

The member would be entitled to various remedies against the former spouse and should seek legal advice.

A plan administrator might consider adding a warning to information provided pursuant to a Form P1 that the information is confidential and there are legal consequences to a person who discloses the information other than for the purposes of dividing the benefits.

15.46 Pension div. arrangements do not make sense **We have received an agreement dividing the benefits under our plan, but it is so garbled, we can't figure out what the parties really intend for us to do. What are our obligations?**

Notify the parties, explain the problem and request directions. [Reg., s. 7(2)] If they cannot agree, either party can apply to court for directions. [FLA, s. 130, 131]

15.47 Form P1 and application for pension commencement **We have a Form P1 on file. The member has applied for pension commencement. The lawyer for the former spouse says we can't do anything until they finalize the pension division arrangements. Is that correct?**

No. The P1 places a notice obligation on the administrator and entitles the former spouse to request information about the benefits. But once the administrator gives the former spouse 30 days' advance notice about the member's application for pension commencement, the administrator is required to start paying the pension. [FLA, s. 142(1)] This rule applies even if the administrator has received a copy of an agreement or court order dividing the benefits, but the former spouse has not yet applied to become a limited member. [FLA, s. 142(2)] If the former spouse needs more time to finalize the pension division arrangements, the parties can agree on preserving the pension

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commencement date. *See* para. 15.35. Otherwise, the former spouse will need to obtain a restraining order to preserve pension division options. *See* para. 15.48.

15.48 No Forms filed

We have received an agreement dividing the benefits under our plan, but no Forms have been filed. The member has applied for pension commencement. What are our obligations?

In any situation where there has been an incomplete application by a former spouse with respect to perfecting a claim to pension benefits (including sending in a court order or agreement alone), the administrator is protected from any liability by giving the spouse the same notice that would have been given if the spouse had filed a Form P1, or become a limited member. [*FLA*, s. 143]

*15.49 Can't locate the
limited member*

We have a situation where the former spouse is a limited member who has not yet received a share of the benefits. The member has now decided to have the pension commence. We have given the limited member 30 days' notice before implementing the member's decision, but the limited member has not given us directions concerning the limited member's share, even though we have made numerous follow ups. We have another file with similar facts, except the problem is that we cannot locate the limited member to give notice. What happens to the limited member's pension entitlement? What are the plan's obligations when the limited member cannot be located?

The onus is on the limited member to keep contact information up to date and take reasonable steps to protect legal rights. By not providing accurate contact information, or not providing directions before pension commencement, it is the limited member who is responsible for the fact that the options available after pension commencement are no longer as secure, not the plan administrator.

If the plan administrator gives notice to the limited member, there is no liability on the plan administrator for administering the pension benefits in accordance with the plan text: *FLA*, s. 143; Reg., s. 2. The *Division of Pensions Regulation* provides for mailing, faxing or e-mailing to the most recent address provided by the limited member and when the notice is deemed to have been received (*see* para. 15.26C).

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Part 6 is silent concerning how to handle benefits if Form P4 is not received from the limited member with directions for dividing them. If there were no pension division arrangements in place, the administrator would commence payment of all of the pension to the member. In the absence of directions for dividing the benefits, the administrator is still under an obligation to commence payment of the pension.

However, the Form P2 filed by the former spouse to become a limited member also functions as directions for pension division. It is the form used to request payment of the limited member's share of the income stream once the pension has commenced. [*FLA*, s. 117(2); *Reg.* s. 4(1)(b)]. As explained on Form P2: "for a pension...that is being paid, this form will also act as a request for the administrator/annuity issuer to pay the limited member his or her proportionate share of those payments."

In the case where the limited member cannot be located, the limited member's share of the benefits would be retained by the plan until the limited member can be contacted. Otherwise, the administrator would direct the fund holder to mail the limited member's proportionate share of the pension to the address provided.

To limit exposure to risk, some plan administrators take extra steps to try to find a missing limited member before the pension commences (even going so far as to involve a service to locate the limited member). Taking extra efforts to locate the limited member is a sensible precaution. The costs involved in making sure that the limited member knows what is going on are often significantly less than the value of the benefits involved (and the potential exposure to risk of the plan administrator).

The expectation is that this scenario will occur infrequently (most limited members, advised of the importance of making a decision before pension commencement, will act promptly in giving directions. Or, because the separate pension option is now available before pension commencement, there will be few circumstances where a former spouse decides to wait to receive the share).

For an alternative approach, see para. 15.50.

For discussion concerning the plan administrator's obligations in similar situations see para. 8.24, 13.19 and 15.51 (and *FLA*, s. 143):

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- (a) where the plan administrator is aware that the member has separated from a spouse, but no Form P1 or agreement or court order has been submitted,
- (b) where the plan administrator has received a Form P1 from the former spouse, who does not respond to notice that the member has chosen to have the pension commence, and
- (c) where the plan administrator has received a defective application from a former spouse to become a limited member.

15.50 Can the administrator segregate the limited member's share of the benefits in the absence of directions?

The member has applied for pension commencement. The limited member has not yet taken her share of the benefits. We've tried notifying the limited member. We sent the limited member the Form P6 advising about the member's decision, along with a Form P4 with a request that the form be completed and returned to us indicating the limited member's choice of method for receiving her proportionate share of pension. The form has not been returned, even after numerous follow ups by the administrator. Our preference would be to recognize the limited member's property rights in the benefits and segregate that share until we receive directions from the limited member, preserving the pension division options available before pension commencement. Is that approach available to us?

Part 6 does not prohibit this approach. It is open to a plan administrator to proceed in this way, and many plan administrators do.

While this approach recognizes that the limited member has a vested property interest in the pension benefits, there are some administrative issues which, because this approach is not contemplated by the *FLA*, are not addressed in the Act or Regulations. A reasonable approach is the method adopted by the B.C. Pension Corporation: Once the limited member provides directions, the limited member receives a proportionate share of the whole of the pension benefits (assuming no division) calculated as of the date the limited member's share will be transferred to the limited member, or the separate pension will commence. Basically, no adjustment is made for payments that would have been made if the limited member had contacted the plan administrator at the same time as the member's pension commenced.

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(The plans administered by the Pension Corporation base pension benefits on highest average earnings, and the pension benefits are indexed. To adjust for any indexing that has occurred between the member's pension commencement and the limited member receiving the share, the Pension Corporation applies indexing to the highest average earnings before calculating the limited member's entitlement.)

15.51 No liability if there is no notice obligation under Part 6 of the FLA

The member has given directions to have the pension commence. We have a note on file that the member separated from his spouse. The note is from 3 years ago. No Form P1 has been filed with us. What are our obligations?

Under the *PBSA*, a member who has a spouse is required to choose a pension that pays a 60% survivor benefit.

If the plan administrator is satisfied that the member is not in a relationship with someone who qualifies as a spouse under the *PBSA*, this scenario does not raise issues that place any obligations on the plan administrator under the *FLA*.

There are notice obligations if: the former spouse has become a limited member; or filed a Form P1; or made an incomplete application to become a limited member. [*FLA*, s. 143]

If there is a notice obligation, then provided the administrator gives that notice, no legal proceeding for damages or other relief may be brought against the administrator for administering the benefits in good faith. [*FLA*, s. 143(3) and (4)]

If notice is not required under *FLA*, s. 143, no legal proceeding for damages or other relief may be brought against the administrator for administering the benefits in good faith. [*FLA*, s. 143(3) and (4)]

APPENDIX A

Selected Portions of the FAMILY LAW ACT S.B.C. 2011, Chapter 25

[Source: http://www.bclaws.ca/civix/document/id/complete/statreg/11025_01; accessed Dec 23, 2016]

Spouses and relationships between spouses

- 3** (1) A person is a spouse for the purposes of this Act if the person
- (a) is married to another person, or
 - (b) has lived with another person in a marriage-like relationship, and
 - (i) has done so for a continuous period of at least 2 years, or
 - (ii) except in Parts 5 [*Property Division*] and 6 [*Pension Division*], has a child with the other person.
- (2) A spouse includes a former spouse.
- (3) A relationship between spouses begins on the earlier of the following:
- (a) the date on which they began to live together in a marriage-like relationship;
 - (b) the date of their marriage.
- (4) For the purposes of this Act,
- (a) spouses may be separated despite continuing to live in the same residence, and
 - (b) the court may consider, as evidence of separation,
 - (i) communication, by one spouse to the other spouse, of an intention to separate permanently, and
 - (ii) an action, taken by a spouse, that demonstrates the spouse's intention to separate permanently.

Part 6 — Pension Division

Division 1 — General Matters

Definitions

110 In this Part and the regulations made under section 246 [*regulations respecting pension division*]:

"administrator" means a person responsible for administering a plan

- (a) under the terms of the plan,
- (b) as required by the *Pension Benefits Standards Act* or equivalent legislation in another jurisdiction, or
- (c) as required by the *Pooled Registered Pension Plans Act* or equivalent legislation in another jurisdiction,

and includes the administrator of a supplemental plan and the issuer of an annuity;

"beneficiary" means a person entitled to receive benefits on the death of a member;

"benefit", in relation to a plan, means a pension or other monetary amount a person is or may become entitled to receive under the plan, but does not include a refund of actuarial excess or surplus;

"benefit formula provision" means

- (a) a defined benefit provision,
- (b) a target benefit provision, or

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(c) any provision of the plan text document of a plan that is prescribed under the *Pension Benefits Standards Act* to be a benefit formula provision;

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

"defined benefit provision" means a provision of the plan text document of a plan that establishes a formula by which the amount of the pension that is to be paid to a member is determined, but does not include a target benefit provision or a provision that is prescribed under the *Pension Benefits Standards Act* to be a benefit formula provision;

"defined contribution account" means the account referred to in paragraph (a) of the definition of "defined contribution provision";

"defined contribution provision" means a provision of the plan text document of a plan that

(a) contemplates that an actual or notional account will be maintained to record

(i) the contributions, other than additional voluntary contributions within the meaning of the *Pension Benefits Standards Act* , made by or on behalf of a member,

(ii) the interest, within the meaning of the *Pension Benefits Standards Act* , allocated to the account, and

(iii) administration expenses and other money deducted by payment, transfer or withdrawal from the money referred to in subparagraphs (i) and (ii), and

(b) provides that the benefits to which the member is entitled under the provision are determined solely by reference to the amount of that account;

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"extraprovincial plan", subject to the regulations, means a plan that is not a local plan, and includes a supplemental plan to an extraprovincial plan;

"former Act" means the *Family Relations Act*, R.S.B.C. 1996, c. 128;

"hybrid plan", subject to the regulations, means any of the following:

(a) a plan if some of the benefits under the plan are determined under a defined contribution provision and other benefits under the plan are determined under a benefit formula provision;

(b) a plan if one of the following applies:

(i) a member may choose whether benefits are determined under either or both of a defined contribution provision and a benefit formula provision;

(ii) the plan text document contains rules that provide whether benefits are determined under either or both of a defined contribution provision and a benefit formula provision;

(c) a prescribed plan;

"joint and survivor pension" means a pension payable during the lives of the member and another person and, after the death of one of them, to the survivor for life;

"limited member" means a person designated under section 113 [*designation of limited members*] as a limited member of a local plan;

"local plan", subject to the regulations, means any of the following:

(a) a plan that is established by the government;

(b) a plan that

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- (i) is registered under the *Pension Benefits Standards Act*, the *Pooled Registered Pension Plans Act* or legislation equivalent to either in another jurisdiction, and
 - (ii) has members who accrue, or have accrued, entitlement to benefits under the plan from employment, or in the case of a pooled registered pension plan, self-employment, in British Columbia;
- (c) a plan that is subject to this Part
- (i) by the terms of the plan,
 - (ii) by the operation of legislation, in British Columbia or another jurisdiction, that regulates the plan,
 - (iii) by reason of the requirements of the *Pension Benefits Standards Act* and a reciprocal agreement between governments; or
 - (iv) by reason of the requirements of a reciprocal agreement between governments in respect of the *Pooled Registered Pension Plans Act* and equivalent legislation of the jurisdictions of the other governments;
- (d) a prescribed plan,
- (e) a plan for specified individuals that
- (i) is registered under the *Pension Benefits Standards Act*, or
 - (ii) has members who accrue, or have accrued, entitlement to benefits under the plan from employment in British Columbia;

"member", in relation to a plan, means a person, other than a limited member, who

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(a) has made contributions to the plan or on whose behalf an employer is or was required by the plan to make contributions, and who has not terminated membership or begun receiving a pension,

(b) retains a present or future entitlement to receive a benefit under the plan, or

(c) has begun

(i) receiving a pension, or

(ii) if the member is or was entitled to receive benefits under a defined contribution provision, making withdrawals from the member's defined contribution account;

"pension" means a series of periodic payments that, under the terms of the plan text document of a plan, is payable,

(a) in the case of payments under a benefit formula provision, for the life of a member, whether or not the pension is continued to another person,

(b) in the case of an annuity purchased by an administrator for a member, for the life of the member, whether or not the pension is continued to another person,

(c) in the case of payments under a defined contribution provision, until the earlier of

(i) the date on which the member dies, and

(ii) the date on which the balance in the member's defined contribution account is zero, or

(d) in the case of a supplemental plan, for the life of a member or for a shorter period, whether or not the payments are continued to another person;

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"phased retirement benefit", in relation to a member of a plan who is at least 60 years of age, or is at least 55 years of age and entitled under the plan to receive a pension without reduction, means payments out of the plan of an amount that is payable periodically to the member for a period other than for the life of the member;

"phased retirement period" means the period during which phased retirement benefits are to be paid to a person who is eligible to receive them;

"plan" means a plan, a scheme or an arrangement, other than a pre-scribed plan, scheme or arrangement, organized and administered to provide pensions for members;

"plan text document", in relation to a plan, means the record that sets out the rights, obligations and entitlements under the plan;

"proportionate share" means a fraction calculated in accordance with the regulations, an agreement or an order;

"separate pension" means the share of a member's benefits, determined in accordance with the regulations, that is

(a) payable to a limited member until the earlier of the death of the limited member and the termination of benefits under the plan, and

(b) separate from the benefits payable to the member;

"specified individuals" has the same meaning as in section 8515 (4) of the Income Tax Regulations under the *Income Tax Act* (Canada);

"supplemental plan", subject to the regulations, means a plan

(a) under which initial and continuing membership is subject to first having membership in another plan, and

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(b) under which benefits are provided that supplement those provided under the other plan;

"survivor benefits" means lump-sum or periodic benefits paid under a plan to a beneficiary when a member dies;

"target benefit provision" means a provision of the plan text document of a plan that

(a) establishes a formula by which the amount of the pension that is intended to be payable to a member is to be determined, and

(b) provides that the actual benefit under the plan may be reduced below the intended benefit;

"transfer" means a transfer made in accordance with the regulations.

Benefits to be determined in accordance with this Part

111 (1) If a spouse is entitled under Part 5 [*Property Division*] to an interest in benefits, the spouse's share of the benefits and the manner in which the spouse's entitlement to benefits is to be satisfied must be determined in accordance with this Part, unless an agreement or order provides otherwise.

(2) For the purposes of this Part, all of a member's benefits are deemed to be allocated to the member if an agreement between that member and that member's spouse, or if an order,

(a) is silent on entitlement to benefits, and

(b) represents a final settlement and separation of the financial affairs of the member and the spouse in recognition of the end of the relationship between the spouses.

(3) Nothing in subsection (2) affects a court's jurisdiction under Part 5 in relation to an agreement or order.

- (4) Without limiting subsection (1) but subject to subsection (2), if
- (a) a spouse of a member of a plan is entitled under Part 5 *[Property Division]* to an interest in benefits payable to the member, and
 - (b) before the spouse receives his or her share of those benefits, the member becomes entitled to receive additional amounts under the plan, including, without limitation, a refund of actuarial excess or surplus within the meaning of the *Pension Benefits Standards Act*,
- the spouse is entitled to an interest in those additional amounts.

Original agreements and orders

- 112** (1) In this section, "**original agreement or order**" means an agreement or order, made at any time, that provides for the division of benefits, under a local plan, other than in accordance with this Part.
- (2) If an original agreement or order provides that benefits are not divisible, provides for a method of division other than in accordance with this Part, or is silent on entitlement to benefits, a member and a spouse may agree to have benefits divided under this Part at any time before the earliest of the following:
- (a) benefits are divided under the original agreement or order;
 - (b) the member or spouse dies;
 - (c) benefits are terminated under the plan.
- (3) If the original agreement or order provides that the member must pay the spouse a proportionate share of benefits under a plan when the member's pension commences,
- (a) if the member's pension has not commenced,

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(i) the member and spouse may agree, by the spouse giving notice under Division 2 [*Division of Benefits in Local Plans*] of this Part, to divide benefits in accordance with this Part, and

(ii) unless the member and spouse agree otherwise, the original agreement or order must be administered in accordance with the regulations, or

(b) regardless of whether the member's pension has commenced, the spouse may choose to have benefits divided in accordance with section 117 [*local plans after pension commencement*].

(4) Subsection (3) (b) does not apply if the original agreement or order expressly prohibits the division of benefits under Part 6 of the former Act or under this Part.

(5) Unless an agreement or order provides otherwise, a term in the agreement or order that requires a member to sever, or to assist a spouse in severing, the spouse's share from the member's benefits under a plan as soon as it becomes possible to do so is conclusively deemed to be an agreement referred to in subsection (3) (a) (i) of this section, made as of the date the administrator receives notice that the spouse is to be designated as a limited member or is entitled to benefits under section 114 [*Benefits determined under defined contribution provision*].

Designation of limited members

113 (1) This section applies if benefits

(a) are under a local plan or under a supplemental plan to a local plan, and

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(b) are to be divided in any manner other than by way of an immediate transfer from a defined contribution account under section 114 (2) (a).

(2) A spouse may be designated as a limited member of the local plan or of a supplemental plan to the local plan by either the member or the spouse giving notice in accordance with section 136 [*notice or waiver*].

(3) A limited member has the following rights:

(a) to receive from the administrator benefits as determined under section 115 [*Benefits determined under defined benefit formula provision*] or 117 [*local plans after pension commencement*], as applicable;

(b) to enforce rights under the plan and recover damages for losses suffered as a result of a breach of a duty owed by the administrator to the limited member;

(c) except as modified by this Part and the regulations made under it, all of the rights that a member, within the meaning of this Act, has under the *Pension Benefits Standards Act* or *Pooled Registered Pension Plans Act*, as applicable;

(d) the additional rights that are set out in this Part.

(4) A spouse ceases to be a limited member if the commuted value of the spouse's proportionate share of benefits is transferred under this Part to the credit of the spouse.

Division 2 — Division of Benefits under Local Plans

Benefits determined under defined contribution provision

114 (1) This section applies if the benefits to be divided

(a) are under a local plan, and

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(b) are in a defined contribution account.

(2) A spouse is entitled, by giving notice in accordance with section 136 [*notice or waiver*],

(a) to have the spouse's proportionate share of the member's defined contribution account transferred from the plan to the credit of the spouse, or

(b) if the administrator consents, to have the spouse's proportionate share administered under the plan subject to the same terms and conditions that apply to members.

Benefits determined under defined benefit formula provision

115 (1) This section applies if

(a) the benefits to be divided are under a local plan and are determined under a benefit formula provision, and

(b) the pension has not commenced.

(2) Subject to subsection (3), a limited member is entitled, on giving notice in accordance with section 136 [*notice or waiver*],

(a) to receive the limited member's proportionate share of the benefits by a separate pension, or

(b) to have the limited member's proportionate share of the commuted value of the benefits transferred from the plan to the credit of the limited member.

(3) A separate pension under subsection (2) (a) may commence, or a transfer under subsection (2) (b) may be made, no earlier than the earliest date that the member could elect to have the member's pension commence.

(4) A limited member who chooses to receive a separate pension under subsection (2) (a) may choose, in the notice referred to in subsection (2), to receive benefits by any method the member could receive benefits.

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(5) A limited member is entitled, before his or her separate pension commences and during any applicable phased retirement period, to receive a proportionate share of the phased retirement benefit paid to the member under the *Pension Benefits Standards Act*.

(6) If the member terminates membership in the plan and chooses to have his or her share of the benefits transferred from the plan, the limited member's proportionate share must be transferred from the plan to the credit of the limited member unless

- (a) the administrator consents to continue administering, under the plan, the limited member's proportionate share, or
- (b) the limited member has commenced receiving a separate pension before the member terminates membership in the plan.

Local hybrid plans

116 (1) This section applies if

- (a) the benefits to be divided are under a local plan that is a hybrid plan, and
- (b) the pension under the benefit formula provision has not commenced.

(2) A spouse is entitled, by giving notice in accordance with section 136 [*notice or waiver*], to a division of benefits as follows:

- (a) if the member may choose to receive benefits under either or both of the defined contribution provision and the benefit formula provision, that choice is available to the spouse also;
- (b) if the administrator consents, the spouse may choose to receive benefits as if all of the benefits were under
 - (i) the defined contribution provision, or
 - (ii) the benefit formula provision;

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- (c) if benefits are determined under either or both of the defined contribution provision and the benefit formula provision,
 - (i) to the extent that benefits are determined under a defined contribution provision, section 114 [*benefits determined under defined contribution provision*] applies, and
 - (ii) to the extent that benefits are determined under a benefit formula provision, section 115 [*benefits determined under defined benefit formula provision*] applies.

Local plans after pension commencement

117 (1) This section applies if

- (a) the benefits to be divided
 - (i) are under a local plan, and
 - (ii) are not in a defined contribution account, and
 - (b) the pension has commenced.
- (2) A spouse is entitled, by giving notice in accordance with section 136 [*notice or waiver*], to receive a proportionate share of benefits payable under the plan during the member's lifetime until the earlier of
- (a) the death of the spouse, and
 - (b) the termination of benefits under the plan.
- (3) The references in subsection (2) to "benefits" do not include a member's phased retirement benefit under the *Pension Benefits Standards Act*.
- (4) If the member dies before the limited member and the limited member is entitled to survivor benefits under the plan, the limited member's entitlement is to be determined in accordance with section 124 (5) [*death of member or limited member*].

Division 3 — Division of Other Benefits

Annuities

118 Unless an agreement or order provides otherwise, if a member receives benefits under an annuity that is purchased by the member rather than by an administrator on behalf of the member, the provisions under this Part that apply to the division of benefits after pension commencement apply to the division of the annuity.

Supplemental plans

119 (1) This section applies if a member has or may acquire benefits under a supplemental plan to a local plan.

(2) A spouse who is entitled to a proportionate share of a member's benefits under a local plan is entitled, by giving notice in accordance with section 136 [*notice or waiver*],

(a) to be designated as a limited member of the supplemental plan, and

(b) to receive a proportionate share of benefits under the supplemental plan.

(3) The division of benefits under a supplemental plan is as follows:

(a) if the benefits to be divided are under the supplemental plan and not in a defined contribution account and if the pension has commenced, section 117 [*local plans after pension commencement*] applies;

(b) if the administrator consents, a limited member is entitled to receive the proportionate share of benefits by any other method that would apply to these benefits if they were provided under a local plan;

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(c) in any other case, a limited member is entitled to receive a proportionate share of benefits by a separate pension when the member elects to have the member's pension commence.

(4) Despite any other provision, payment of a spouse's proportionate share of benefits under a supplemental plan

(a) is subject to the same terms and conditions that apply to the payment of benefits to members of the supplemental plan, and

(b) is adjusted, is suspended or ends if the member's benefits are adjusted, are suspended or end because the member violated a condition of the supplemental plan.

Compensation for lost supplemental benefits

120 (1) If an act or omission by a member of a supplemental plan causes a loss to a spouse respecting the spouse's proportionate share of benefits under the supplemental plan, the Supreme Court, on application by that spouse, may order the member to pay compensation to that spouse.

(2) In determining whether to make an order under subsection (1) and the amount of compensation to award if an order is made, the court must consider

(a) whether the member acted unreasonably or in bad faith,

(b) whether the member obtained an advantage as a result of the act or omission, and

(c) the financial arrangements and division of property respecting the member and the spouse when the relationship between the spouses ended.

Benefits for specified individuals

121 (1) This section applies

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(a) in respect of a local plan whose only members are specified individuals, and

(b) if the pension has not commenced.

(2) A spouse is entitled, by giving notice in accordance with section 136 [*notice or waiver*],

(a) to be designated as a limited member of the plan, and

(b) to a proportionate share of benefits under the plan.

(3) A spouse who, as a limited member, is entitled under subsection (2) to receive a proportionate share of benefits may receive that proportionate share

(a) by a separate pension when the member elects to have the member's pension commence,

(b) in accordance with section 114 [*benefits determined under defined contribution provision*], if the benefits are in a defined contribution account, when the member makes withdrawals from that account, or

(c) if the administrator consents, by a method referred to in section 114 [*benefits determined under defined contribution provision*], 115 [*benefits determined under defined benefit formula provision*] or 116 [*local hybrid plans*].

Disability benefits

122 (1) This section applies if benefits are paid to a member under a plan as a consequence of the member's disability.

(2) If a spouse is entitled under an agreement or order to receive a proportionate share of disability benefits paid under the plan,

(a) the disability benefits are to be divided by giving notice in accordance with section 136 [*notice or waiver*],

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(b) the disability benefits are to be divided in accordance with section 117 [*local plans after pension commencement*], and

(c) the division of the disability benefits continues until the earlier of

(i) the death of the spouse, and

(ii) the termination of disability benefits under the plan.

(3) If an agreement or order dividing benefits is silent on entitlement to disability benefits, all of a member's disability benefits are deemed to be allocated to the member.

(4) A member's entitlement to disability benefits does not affect how other benefits under a plan are divided between the member and the member's spouse.

(5) Nothing in subsection (3) affects a court's jurisdiction under Part 5 [*Property Division*] in relation to an agreement or order.

Extraprovincial plans

123 (1) This section applies if the benefits to be divided are under an extraprovincial plan.

(2) A spouse is entitled to a division of benefits under an extraprovincial plan as follows:

(a) subject to subsection (3), if the plan, or the legislation of any jurisdiction establishing or regulating the plan, provides a method of satisfying the interest of the spouse in the benefits, by that method;

(b) in any other case, to receive from the administrator during the member's lifetime a proportionate share of benefits paid under the plan until the earlier of

(i) the death of the spouse, and

(ii) the termination of benefits under the plan.

(3) If, having regard to the rules respecting the division of benefits under this Part, the method under subsection (2) (a) would operate unfairly, the Supreme Court may order that the spouse's proportionate share of the benefits be satisfied in accordance with subsection (2) (b) instead.

(4) If subsection (2) (b) applies,

(a) the member must designate the spouse as the beneficiary under the plan to the extent of the spouse's interest in the benefits, unless the designation is not possible,

(b) if the member's pension is in the form of a joint and survivor pension with a spouse, the spouse is the owner of the survivor benefits, and

(c) subject to the entitlement, if any, of another spouse, a spouse who is a beneficiary of survivor benefits is entitled to all of the survivor benefits.

Division 4 — Death of Member or Limited Member

Death of member or limited member

124 (1) This section applies if a limited member is entitled to a proportionate share of benefits under

(a) a plan in which benefits are determined under a benefit formula provision, or

(b) a supplemental plan

(i) to a local plan, and

(ii) under which survivor benefits are payable.

(2) If a member dies before

(a) the member's pension commences, and

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(b) the limited member receives the limited member's proportionate share of the benefits,

the limited member is entitled to receive that proportionate share of benefits to which the limited member would have been entitled had the member not died, which proportionate share is to equal the commuted value of the limited member's proportionate share as calculated on the day before the death of the member.

(3) If a member dies after the limited member receives all of the limited member's proportionate share of benefits under sections 115 [*benefits determined under defined benefit formula provision*] and 119 [*supplemental plans*], the limited member is entitled to no further share of the member's benefits except to the extent that the member has designated the limited member as a beneficiary of the benefits.

(4) If a limited member dies before the member, before the member's pension commences and before receiving the limited member's proportionate share of benefits under sections 115 [*benefits determined under defined benefit formula provision*] and 119 [*supplemental plans*], the administrator must transfer to the credit of the limited member's estate the proportionate share of the commuted value of the benefits.

(5) Despite the division of benefits under this Part,

(a) if a member's pension is in the form of a joint and survivor pension with a spouse, the spouse is the owner of the survivor benefits, and

(b) a limited member who is a beneficiary of survivor benefits is entitled to all of the survivor benefits, subject to the entitlement, if any, of another limited member.

Entitlement to survivor benefits

125 If benefits are divided under this Part, entitlement to the member's share of the survivor benefits is to be determined in accordance with the law that governs the designation of beneficiaries, or the law that governs if there is no beneficiary designation, as applicable.

Waiving pension or survivor benefits

126 (1) Before an administrator implements the division of benefits under a plan, a limited member or the personal representative of his or her estate may waive the division of benefits by giving notice in accordance with section 136 [*notice or waiver*].

(2) If a member of a plan dies after pension commencement and his or her spouse is entitled to receive, or is receiving, survivor benefits, a waiver or an order does not affect that entitlement unless

(a) the spouse waives his or her entitlement by giving notice in accordance with section 136, or

(b) the Supreme Court, in allocating all or part of the survivor benefits to a person other than the spouse, refers expressly to this subsection in the order making the allocation.

(3) If a waiver or an order is made in accordance with subsection (2),

(a) the administrator may consent to pay survivor benefits to a person other than the spouse, but is not required to do so, and

(b) if a person becomes entitled to survivor benefits as a result of the waiver or order and receives an overpayment of the survivor benefits, the person is liable to the administrator to repay the overpayment.

Division 5 — Other Matters Respecting Pension Division

Agreements respecting division

127 (1) Despite any provision of this Part but subject to section 93 [*setting aside agreements respecting property division*], spouses may make a written agreement respecting the division of benefits under a plan, including a written agreement doing one or more the following:

- (a) determining the spouse's proportionate share of benefits in a manner that would leave the member with less than half, or none, of the member's benefits;
- (b) providing for the satisfaction of all or part of the spouse's interest in the benefits by the member providing compensation to the spouse.

(2) An agreement may provide that, despite the Canada Pension Plan, unadjusted pensionable earnings under that Act will not be divided between the spouses.

Determining compensation

128 (1) If, by an agreement or order, a member must provide compensation to a spouse in satisfaction of all or part of the spouse's interest in benefits under a plan, the compensation must be determined in accordance with the regulations unless the agreement or order provides otherwise.

(2) If an administrator and a spouse enter into an agreement under which the spouse accepts from the administrator compensation or a transfer of a share of benefits, in satisfaction of the spouse's interest in any circumstance not specifically dealt with under this Part, the compensation or transfer must be calculated in accordance with the regulations unless the Supreme Court orders otherwise.

Reapportioning benefits

129 The Supreme Court may reapportion to a spouse entitlement to all or part of a member's benefits under a plan for the purpose of providing the spouse with an independent source of income if

- (a) it is necessary, appropriate or convenient in the circumstances, and
- (b) the financial and property arrangements between the member and spouse to address the spouse's need to become or remain economically independent and self-sufficient would otherwise require an order
 - (i) respecting spousal support, or
 - (ii) requiring the member, after pension commencement, to pay the spouse a share of the benefits under the plan, or under another plan, as they are received.

Clarifying division of benefits

130 Despite section 215 (2) [*changing, suspending or terminating orders generally*], on application by a member or spouse, the Supreme Court may at any time give directions or make orders to facilitate or enforce the division of benefits in accordance with an agreement or order.

Changing division of benefits in unusual circumstances

131 (1) This section applies if the method of dividing benefits under this Part will operate in a manner that is inappropriate given

- (a) the terms of the plan, or
- (b) any change to the terms of the plan after the date an agreement or order is made to divide the benefits.

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(2) Despite section 215 (2) [*changing, suspending or terminating orders generally*], on application by a member or spouse, the Supreme Court may direct by order an appropriate method of dividing benefits, and the order is binding on the administrator.

(3) An application under this section

(a) may be made at any time before benefits are divided, and

(b) must be served on the administrator at least 30 days before the date set for the hearing of the application.

(4) The administrator may attend and make representations respecting the effect on the plan of any proposed division of benefits under this section.

Retroactive division of benefits

132 (1) In this section, "**pension commencement date**" means the date chosen by a member, in accordance with the requirements of a plan, to have the member's pension commence.

(2) If commencement of a member's pension is delayed beyond the pension commencement date because the member and the member's spouse, or either of them, are seeking an agreement or order respecting the division of benefits, both the member and the spouse are entitled to receive their respective shares of benefits retroactive to the pension commencement date if all of the following conditions are met:

(a) before the pension commencement date, the member or spouse gives to the administrator a copy of an agreement or order that prohibits the member from dealing with benefits under the plan or with family property generally;

(b) on or before December 1 of the year following the year in which the pension commencement date falls, the member or spouse gives to the administrator a copy of an agreement or order

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(i) setting out the final terms of the division of benefits,
and

(ii) lifting the prohibition referred to in paragraph (a);

(c) if approval from the Canada Revenue Agency is required to divide the benefits as of the pension commencement date, the administrator, before dividing the benefits, obtains that approval.

(3) For the purposes of subsection (2), the rules respecting the division of benefits before pension commencement, as set out in sections 114 *[benefits determined under defined contribution provision]*, 115 *[benefits determined under defined benefit formula provision]* and 116 *[local hybrid plans]*, apply.

(4) Nothing in this section limits the discretion of an administrator to consent to, or the jurisdiction of a court to order, the retroactive division of benefits in circumstances other than those set out in subsection (2).

Division 6 — Administrative Matters

Information from plan

133 (1) A spouse who claims to be entitled to benefits and who has given notice under section 136 *[notice or waiver]* has a right to request and receive, from the administrator, prescribed information respecting the plan

(a) after the notice is given, and

(b) annually afterwards.

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

(3) An administrator must not disclose prescribed information respecting a member without the member's written consent.

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(4) If there is a conflict between this section and a provision of the *Freedom of Information and Protection of Privacy Act* or the *Personal Information Protection Act*, this section prevails.

Agreement or order required for division of benefits

134 An administrator may administer the division of a member's benefits under this Part only if the administrator has first received a copy of an agreement or order respecting the division of benefits between the member and the member's spouse.

Information required by plan

135 (1) An administrator is not required to take any action under this Part until the administrator has sufficient information to identify the plan.

(2) If the plan is not identified by name in an agreement or order, information respecting the employment under which a member accrued the benefits is sufficient information to identify the plan.

(3) A person claiming to be entitled to receive a benefit under a plan must prove to the satisfaction of the administrator that the person is entitled to the benefit and, for this purpose, the administrator may require that person to provide evidence to establish the claim.

Notice or waiver

136 If a person is required to give notice or a waiver under this Part, the notice or waiver must be given to the administrator in the prescribed form and manner, if any.

Implementing division of benefits

137 (1) This section applies if an administrator must divide benefits under a local plan.

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(2) Subject to section 132 [*retroactive division of benefits*] and subsection (3) of this section, an administrator is required to divide only those benefits that become payable within the prescribed period after the administrator receives all of the following:

- (a) the documents required under section 134 [*agreement or order required for division of benefits*];
- (b) the notice required under Division 2 [*Division of Benefits in Local Plans*] of this Part;
- (c) the information required, if any, under section 135 [*information required by plan*];
- (d) any documents required under any other enactment, or reasonably required by the administrator, to implement the division.

(3) An administrator may delay the division of benefits

- (a) if delay is necessary until net investment returns affecting the spouse's share are allocated,
- (b) if delay may avoid or reduce transaction costs associated with dividing benefits, or
- (c) for any other reason that is reasonably likely to be advantageous to the spouse.

(4) Nothing in this section relieves the administrator from an obligation to pay benefits, or compensation for benefits, that were not paid through the fault of the administrator.

(5) Nothing in this section limits a member's duty to compensate a spouse under Part 5 [*Property Division*] for the spouse's share of benefits paid to the member before the date the administrator implements the division of benefits.

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Adjustment of member's pension

138 If, under this Act, a spouse or the spouse's estate receives a share of a member's benefits directly from the administrator, the administrator must adjust, in accordance with the regulations,

- (a) the member's interest in the benefits, or
- (b) the interest of any person claiming an interest through the member.

Transfer of commuted value of separate pension or share

139 If a limited member is entitled to a separate pension or a proportionate share of benefits paid under the plan,

(a) the limited member may apply for a transfer of the commuted value of the separate pension or of the proportionate share, as applicable, in the same circumstances that a member may do so under the *Pension Benefits Standards Act*, in the case of a plan to which that Act applies, or the *Pooled Registered Pension Plans Act*, in the case of a plan to which that Act applies, and

(b) an administrator may require the limited member to accept a transfer of the commuted value of the separate pension or of the proportionate share, as applicable, in the same circumstances that an administrator may require a member to do so under the *Pension Benefits Standards Act*, in the case of a plan to which that Act applies, or the *Pooled Registered Pension Plans Act*, in the case of a plan to which that Act applies.

Administrative costs

140 (1) If the administrator requires a fee to be paid to offset administrative costs incurred in dividing benefits under this Part,

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- (a) the fee may be no more than the prescribed amount, and
- (b) a member and spouse are each responsible for paying the fee.

(2) Unless the parties agree otherwise, a member or spouse who pays more than a half share of a fee under subsection (1) may recover from the other the additional amount paid.

(3) An administrator may deduct a fee under subsection (1) from the payment of benefits.

Income tax

141 (1) A member and spouse are each responsible for paying income tax on his or her own share of divided benefits.

(2) If, under the *Income Tax Act* (Canada), a member or spouse is required to pay income tax on the other person's share of divided benefits, the person who is required to pay the income tax on the other person's share must be reimbursed by the other person for the amount paid.

(3) An administrator who pays benefits to a spouse under this Part must make, with respect to a deduction required under the *Income Tax Act* (Canada), separate source deductions for each of the spouse's and member's shares of the benefits.

(4) An agreement or order may require a member to compensate a spouse for the spouse's property interest in benefits paid before the division of benefits is implemented by an administrator on a basis different from that required under subsection (1), if the different basis otherwise complies with applicable law.

Claim does not relieve duty to administer benefits

142 (1) An administrator is not relieved of the duty to administer benefits only because the administrator receives from a spouse a claim to an interest in the benefits.

(2) A claim under subsection (1) includes receipt, without a full application being made under this Part, of a copy of an agreement or order under which the spouse acquires an interest in the benefits or property under Part 5 [*Property Division*].

Administrator's duties

143 (1) Subsection (2) applies if an administrator

(a) has

(i) been given notice under Division 2 [*Division of Benefits in Local Plans*] or 3 [*Division of Other Benefits*] respecting a spouse's claim to an interest in benefits, or

(ii) received an incomplete or otherwise insufficient application for a spouse to become a limited member or to divide benefits, including receiving, without a full application being made, a copy of an agreement or order under which a spouse acquires an interest in benefits, and

(b) is required to administer the benefits.

(2) In a circumstance described in subsection (1), the administrator must not take any action, or omit to take an action, in relation to the benefits unless the administrator first gives notice to the spouse in accordance with the regulations.

(3) Subject to subsection (4), no legal proceeding for damages or other relief lies or may be commenced or maintained against an administrator by or on

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behalf of a spouse because of anything done or omitted to be done by the administrator if

(a) the thing done or omitted was the subject of the notice given under subsection (2), or

(b) notice is not required under this section for the administrator to do, or omit to do, the thing.

(4) Subsection (3) does not apply to an administrator in relation to anything done or omitted by the administrator in bad faith.

Trust of survivor and pension benefits

144 (1) If a spouse is entitled to a proportionate share of survivor benefits paid to another person, the other person holds them in trust for the spouse.

(2) If a spouse is entitled to a proportionate share of a member's benefits and the spouse's proportionate share is paid to the member or another person, the member or other person holds the spouse's proportionate share in trust for the spouse.

(3) If a person waives, under section 126 [*waiving pension or survivor benefits*], entitlement to survivor benefits but receives survivor benefits after the waiver takes effect, the person who waived entitlement holds them in trust for the person in whose favour the waiver has been made.

(4) A recipient holding benefits in trust under this section who has information respecting a person's interest in the benefits must immediately pay the benefits to the person.

(5) If a spouse receives benefits in an amount that exceeds the spouse's entitlement, the spouse holds the excess amount in trust for, and must immediately pay the excess amount to, the member or the person who is otherwise entitled to the amount.

No further entitlement after division of benefits

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145 (1) This section applies

- (a) to benefits regulated under the *Pension Benefits Standards Act* or the *Pooled Registered Pension Plans Act*, and
- (b) despite any provision to the contrary in the *Pension Benefits Standards Act*, the *Pooled Registered Pension Plans Act* or any other Act.

(2) If

- (a) a spouse has become a limited member of a plan under this Act or the former Act, or
- (b) an agreement or order provides that the benefits are subject to division with a spouse under this Part or under Part 6 of the former Act,

the spouse has no further rights under the *Pension Benefits Standards Act* or the *Pooled Registered Pension Plans Act*, as applicable, arising solely from that spouse's status as a spouse, with respect to the member's share of the benefits under that plan, and the member is not required to obtain the consent or waiver of the spouse to make directions with respect to the member's benefits under that plan.

(3) [Repealed 2012-30-155.]

(4) An agreement or order that provides that

- (a) a spouse has no share of benefits, or
- (b) a spouse's share is satisfied by a means other than by dividing benefits under this Part or under Part 6 of the former Act

is to be treated for the purposes of this section as if the agreement or order provides that the benefits are subject to division under this Part or under Part 6 of the former Act, unless the agreement or order provides otherwise.

(5) In this section, "**benefit**" includes

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(a) a benefit that has been transferred to a locked-in retirement account or a retirement income arrangement, as those terms are defined in the *Pension Benefits Standards Act*, or

(b) funds that have been transferred under the *Pooled Registered Pension Plans Act* to a retirement savings plan of the kind prescribed for the purposes of section 50 (1) (b), 50 (3) (b) or 54 (2) (b) of the applied Act, as that term is defined in the *Pooled Registered Pension Plans Act*, or to a life annuity of the kind prescribed for the purposes of section 50 (1) (c), 50 (3) (c) or 54 (2) (c) of that applied Act.

END OF PART 6

Selected provisions from Part 10 - Court Processes

Time limits

198 (1) Subject to this Act, a proceeding under this Act may be started at any time.

(2) A spouse may start a proceeding for an order under Part 5 [*Property Division*] to divide property or family debt, Part 6 [*Pension Division*] to divide a pension, or Part 7 [*Child and Spousal Support*] for spousal support, no later than 2 years after,

(a) in the case of spouses who were married, the date

(i) a judgment granting a divorce of the spouses is made, or

(ii) an order is made declaring the marriage of the spouses to be a nullity, or

(b) in the case of spouses who were living in a marriage-like relationship, the date the spouses separated.

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(3) Despite subsection (2), a spouse may make an application for an order to set aside or replace with an order made under Part 5, 6 or 7, as applicable, all or part of an agreement respecting property or spousal support no later than 2 years after the spouse first discovered, or reasonably ought to have discovered, the grounds for making the application.

(4) The time limits set out in subsection (2) do not apply to a review under section 168 [*review of spousal support*] or 169 [*review of spousal support if pension benefits*].

(5) The running of the time limits set out in subsection (2) is suspended during any period in which persons are engaged in family dispute resolution with a family dispute resolution professional.

Selected provisions from Part 13 - Transitional Provisions

Transition — proceeding respecting property division

252 (1) This section applies despite the repeal of the former Act and the enactment of Part 5 [*Property Division*] of this Act.

(2) Unless the spouses agree otherwise,

(a) a proceeding to enforce, set aside or replace an agreement respecting property division made before the coming into force of this section, or

(b) a proceeding respecting property division started under the former Act

must be started or continued, as applicable, under the former Act as if the former Act had not been repealed.

Transition — pension benefits

253 (1) Subject to subsections (2) and (3), if forms prescribed under the former Act were delivered to the administrator before Part 6 [*Pension Division*] of this Act comes into force, the former Act continues to apply to the division of benefits between a member and spouse.

(2) If a spouse became a limited member under the former Act but benefits have not been divided as of the date Part 6 of this Act comes into force, Part 6 of this Act applies to the division of benefits.

(3) If, after an application was made under the former Act for the spouse to become a limited member, the administrator consulted with the member and spouse respecting how the former Act would apply to an agreement or order dividing benefits between the member and spouse, the former Act continues to apply to the extent of, and in accordance with, that consultation.

(4) If forms prescribed under the former Act are delivered to an administrator after Part 6 of this Act comes into force, the administrator may

(a) accept the forms as compliance with the requirements of Part 6 of this Act, or

(b) require the parties to give notice in accordance with section 136 [*notice or waiver*] of this Act.

APPENDIX B

FAMILY LAW ACT: DIVISION OF PENSIONS REGULATION

[SOURCE: http://www.bclaws.ca/civix/document/id/lc/statreg/348_2012; accessed Dec 23, 2016]

Family Law Act

DIVISION OF PENSIONS REGULATION

Note: Check the Cumulative Regulation Bulletin 2015 and 2016 for any non-consolidated amendments to this regulation that may be in effect.

[includes amendments up to B.C. Reg. 70/2015, September 30, 2015]

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FORMS

Part 1 — Interpretation

Definitions

1 (1) In this regulation:

"Act" means the *Family Law Act*;

"average retirement age", in relation to a plan, means

(a) the average age of retirement for the plan assumed in the most recent actuarial valuation report filed in relation to the plan with the superintendent, or

(b) if a specified age is adopted under section 23 (5), the specified age;

"commencement date" means

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(a) the date that, in a section 127 agreement or a Part 6 order, is specified as the date on which the relationship between the member and the spouse began within the meaning of section 3 of the Act, or

(b) if another date is specified in a section 127 agreement or a Part 6 order as the beginning date of the period in relation to which the spouse's proportionate share of the member's benefits is to be calculated under the Act, that specified date;

"entitlement date" means

(a) the date that, in a section 127 agreement or a Part 6 order, is specified as the date on which the spouse became entitled under section 81 (b) of the Act to an interest in the member's benefits under the plan, or

(b) if another date is specified in a section 127 agreement or a Part 6 order as the end date of the period in relation to which the spouse's proportionate share of the member's benefits is to be calculated under the Act, that specified date;

"entitlement period" means the period that begins on the commencement date and ends on the entitlement date;

"former regulation" means the Division of Pensions Regulation, B.C. Reg. 77/95;

"investment returns", in relation to money, means interest earned on, and other gains and losses accrued in relation to, the money, less related investment expenses;

"Part 6 order" means an order of the Supreme Court or of a superior court of another jurisdiction made, or enforceable in British Columbia, under Part 6 of the Act;

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"pensionable service", in relation to a member of a plan, means the quantity of time, expressed in terms of months, parts of months or other units of time,

(a) in relation to which the member accrues an entitlement to benefits under the plan, and

(b) that is to be used by the administrator to calculate the benefits;

"section 127 agreement" means an agreement under section 127 of the Act between the member and the spouse, which agreement may be in Form P9;

"superintendent" means the person appointed as the Superintendent of Pensions under section 4 of the *Pension Benefits Standards Act*, or, if the plan is registered outside of British Columbia, the person in the jurisdiction in which the plan is registered whose role in that jurisdiction is similar to the role of the Superintendent of Pensions in British Columbia.

(2) A reference in this regulation to the spouse includes, if the spouse is a limited member of the plan, a reference to the spouse as limited member, and a reference in this regulation to the limited member is a reference to the spouse in his or her capacity as limited member only.

(3) If the Act applies to an agreement or order made under the former Act, the commencement date and the entitlement date to be used in respect of the agreement or order are

(a) the dates specified under that agreement or order for the same purposes as commencement dates and entitlement dates are specified under this Act, or

(b) if no dates are specified, the dates that were required to be used under the former Act for the same purposes as commencement dates and entitlement dates are used under this Act.

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1[am. B.C. Reg. 70/2015, s. 1.]

Delivery

- 2** (1) Without limiting any other means by which a record may be delivered under this regulation, a record may be delivered to a person under this regulation by faxing or emailing the record to a fax address or an email address provided by the person for that purpose.
- (2) A record that is mailed or sent by fax or email is effectively delivered under this regulation as follows:
- (a) if the record is mailed to the most recent mailing address provided by the intended recipient to the sender;
 - (b) if the intended recipient provided to the sender a fax address or an email address for the purposes of deliveries under this regulation and the record is faxed or emailed to the most recent fax address or email address provided by the intended recipient for that purpose.
- (3) Notice sent by ordinary mail is deemed to have been received 5 days after the date of mailing, and notice sent by fax or email is deemed to have been received on the day on which it was sent.

Application of regulation

- 3** (1) Subject to subsection (2), this regulation applies to
- (a) a member of a plan,
 - (b) the member's spouse,
 - (c) if the member's spouse has become a limited member of the plan, the limited member, and
 - (d) the division, under Part 6 of the Act, of the member's benefits under the plan.

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- (2) The division referred to in subsection (1) (d) may be modified by
- (a) a waiver under section 126 of the Act or a section 127 agreement, or
 - (b) a Part 6 order.

Part 2 — Requirements for Notice

Notices and other documents

- 4** (1) For the purposes of section 136 of the Act,
- (a) notice referred to in section 133 of the Act must be given in Form P1 (Claim and Request for Information and Notice),
 - (b) notice referred to in section 112 (5), 113 (2), 114 (2) (b), 116 (2) as that section relates to a benefit formula provision, 117 (2), 119 (2), 121 (2) or 122 (2) of the Act must be given in Form P2 (Request for Designation as Limited Member),
 - (c) notice referred to in section 114 (2) (a) of the Act, or in section 116 (2) of the Act as that section relates to a defined contribution account, must be given in Form P3 (Request for Transfer from Defined Contribution Account),
 - (d) notice referred to in section 115 (2) of the Act must be given in Form P4 (Request by Limited Member for Transfer or Separate Pension),
 - (e) the waiver referred to in section 126 (2) (a) of the Act must be given in Form P5 (Waiver of Survivor Benefits after Pension Commencement), and
 - (f) the waiver referred to in section 126 (1) of the Act must be given in Form P7 (Withdrawal of Notice/Waiver of Claim).

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(2) A notice or other document delivered under the Act, including under this regulation,

(a) is not defective or ineffective,

(b) is not incomplete, and

(c) does not fail to provide sufficient information

merely because it omits information referred to in section 13 (1) (a) or (b) or the information referred to in section 13 (1) (a) or (b) that is contained in the document is incomplete or incorrect.

2[am. B.C. Reg. 70/2015, s. 2.]

Withdrawal of notice

5 (1) A person may, in accordance with subsection (2) of this section, withdraw a notice delivered to the administrator under section 4 of this regulation as follows:

(a) in the case of a notice in Form P1, at any time;

(b) in the case of any other notice, at any time before the spouse's proportionate share of the benefits to which the notice relates

(i) is transferred to the spouse,

(ii) is converted into a separate pension, or

(iii) becomes a separate defined contribution account in the plan for the spouse.

(2) To withdraw one or more notices and other documents, a person must deliver to the administrator a notice in Form P7.

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(3) If a notice or document is withdrawn under this section, the entitlement of the member and the spouse or their estates to the benefits must be calculated as if the notices and documents withdrawn under subsection (2) had never been delivered to the administrator.

(4) Despite subsections (1) and (2), a Form P7 must not be used to withdraw a Form P5 or a Form P7.

Change of information

6 If personal information contained in a notice delivered under section 4 changes, the person who gave that notice must deliver to the administrator a document that provides notice of that change, which document may be in Form P8 (Change of Information).

Administrator must give notice

7 (1) Within 30 days after receiving a document referred to in section 4 or 5, the administrator must advise the member of the administrator's receipt of that document by delivering to the member a notice in Form P6 (Administrator/Annuity Issuer Response).

(2) Without limiting subsection (1), if the administrator cannot act on a document delivered under section 4 or 5 because the document is incomplete or otherwise fails to provide sufficient information, the administrator must, within 30 days after receipt of that document, deliver a notice in Form P6 to the member and the spouse indicating one or both of the following:

- (a) why the administrator cannot act on the document;
- (b) what must be provided before the administrator can act on the document.

Failure of administrator to act on notice

8 (1) If a document referred to in section 4 or 5 is delivered to the administrator, the member or the spouse may apply to the Supreme Court for an order referred to in subsection (2) of this section if

(a) the administrator does not, within 30 days after receipt of the document, do one of the following:

(i) give, or give effect to, the benefits, entitlements or other rights that under the Act ought to follow on the receipt of such document;

(ii) provide a notice under section 7 (2) to explain why the administrator has not acted on the document, or

(b) the administrator provides a notice in accordance with section 7 (2) but the applicant disputes the reasons given by the administrator in that notice as to why the administrator has not acted on the document.

(2) On an application referred to in subsection (1), the Supreme Court may make one or more of the following orders:

(a) an order requiring compliance with the Act;

(b) any other order the court may make under the Act respecting the division of the benefits between the member and the spouse.

(3) The administrator is a party to the proceedings in which the application referred to in subsection (1) is brought.

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Administrator must give notice to spouse if member's interest may be affected

- 9** (1) If the spouse is entitled to information under section 133 of the Act or to notice under section 143 of the Act or is otherwise entitled to information or notice as a limited member, the administrator must deliver to the spouse written notice of any action that the administrator intends to take as a result of any of the following:
- (a) the death of the member;
 - (b) any direction given to the administrator by the member with respect to the benefits, including an election by the member to have his or her pension commence and a change in a beneficiary designation.
- (2) If a direction referred to in subsection (1) (b) is a change in a beneficiary designation, the administrator must advise the spouse whether the spouse will become or will cease to be a beneficiary as a result of that direction.
- (3) Notice under subsection (1) must be given in Form P6.
- (4) The administrator must deliver the notice required under subsection (1) to the spouse at least 30 days before the date on which the administrator's intended action is taken.
- (5) Nothing in this section changes or otherwise affects the effective date of
- (a) rights arising on the death of the member, or
 - (b) a direction referred to in subsection (1) (b).
- (6) Neither the effective date of the member's direction nor the death of the member

(a) prejudices rights the spouse may have or acquire under the Family Law Act, or otherwise, before or within the notice period referred to in subsection (4), or

(b) prevents a court from granting an order restraining any action that is to be, or may be, taken as a result of any matter referred to in paragraph (a) or (b) of subsection (1).

Part 3 — Administrator's Duty to Provide Information

Information to be provided by administrator to spouse who has filed Form P1

10 (1) Subject to subsection (3) and section 13, if the spouse has delivered to the administrator a notice in Form P1, the administrator must, within 60 days after receiving a written request for information under section 133 of the Act from the spouse, deliver the following information to the spouse:

(a) a copy of the most recent annual statement provided to the member, or, if no annual statement is available, the same information that, under the *Pension Benefits Standards Act*, was to have been contained in the member's annual statement;

(b) any additional information that is necessary to value the benefits of the member or to finalize the division of the benefits under the Act;

(c) information as to whether or not the spouse is the beneficiary of the member's benefits;

(d) if the member is receiving a pension, whether benefits are payable on the death of the member and, if so,

(i) information about those benefits,

(ii) whether the spouse is entitled to any of those benefits, and

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(iii) confirmation whether a change of spousal status affects entitlement to those benefits;

(e) if benefits are based on the member's income for any period, information as to the member's income for that period;

(f) any information or notice that had been provided to the member after the Form P1 was filed;

(g) if benefits are transferred to the plan by or on behalf of the member after the Form P1 was filed, or within 2 years before it was filed, information about what has been transferred;

(h) if benefits are transferred from the plan by or on behalf of the member after the Form P1 was filed, or within 2 years before it was filed, information about what has been transferred and to where it was transferred;

(i) to the extent that it is not provided under paragraphs (a) to (h),

(i) information on options available to and elections that may be made by the member with respect to receiving the benefits, and

(ii) information on options available to and elections that may be made by a limited member with respect to receiving the benefits.

(2) Subject to subsection (3) and section 13, if the spouse delivers to the administrator a written request for an update of the information provided to the spouse under subsection (1) of this section, the administrator must deliver that update within 30 days after receiving that request.

(3) Unless the Supreme Court otherwise orders under section 133 (2) of the Act, the administrator need not deliver to the spouse information under subsection (1) more than once in each calendar year and need not provide to the

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spouse an update under subsection (2) of this section more than once in each calendar year.

Information to be provided by administrator to limited member

11 (1) Subject to subsection (2), after the spouse becomes a limited member of a plan, section 10 no longer applies to the limited member and at least once in each calendar year, the administrator must provide the following information to the limited member:

- (a) any information or notice available to members of the plan;
- (b) to the extent that it is not provided under paragraph (a), information on options available to and elections that may be made by the member with respect to the benefits;
- (c) to the extent that it is not provided under paragraph (a), information on options available to and elections that may be made by a limited member with respect to the benefits;
- (d) confirmation of whether the limited member is the beneficiary of the member's benefits.

(2) After the limited member is in receipt of a separate pension or begins to have his or her proportionate share of the benefits administered in a defined contribution account for the limited member in the plan under section 114 (2) (b) of the Act, the only information the limited member is entitled to receive from the administrator is information relating to the separate pension or the limited member's defined contribution account.

Authorizing representative

12 (1) A person entitled to receive information under section 10 or 11 of this regulation may, in writing, authorize a representative to request and receive from the administrator information that the person is entitled to receive under this regu-

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lation, and, subject to section 13 and subsection (2) of this section, the administrator must, after receiving such a request, provide that information to both the person and the representative.

- (2) An authorization referred to in subsection (1) ceases on the earliest of
- (a) the date, if any, specified in the authorization,
 - (b) if no date is specified in the authorization, the date that is one year after the date of the authorization,
 - (c) the date on which the administrator receives a written revocation of the authorization from the person who issued it, and
 - (d) the date on which the administrator receives a written revocation of the authorization from the representative,

and on and after that date, the administrator must cease providing to the representative any of the information that the person is entitled to receive under this regulation until a further authorization is provided.

Confidentiality and non-disclosure of personal information

13 (1) When providing information under this regulation, the administrator must not, unless the member consents in writing, provide the spouse with

- (a) the member's address, fax number, email address, telephone number or marital status, or
- (b) the identity of any beneficiary designated by the member other than the spouse.

(2) Without limiting subsection (1), the administrator must edit any information provided by the administrator to the spouse to remove any of the information that the administrator is, under subsection (1), restricted from providing to the spouse.

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- (3) An administrator acting in good faith who accidentally discloses any information listed in subsection (1) is not liable to the member or any other person to pay damages arising from the disclosure.
- (4) A person who receives any documents or information from an administrator under this regulation must keep the information in confidence and, without limiting this obligation, must not disclose the documents or information to anyone other than
- (a) for the purposes of dividing benefits under Part 6 of the Act, or determining compensation for those benefits, or
 - (b) in the course of permitting the documents to be introduced into evidence in proceedings involving the benefits.

3[am. B.C. Reg. 70/2015, s. 3.]

Administrator to provide equal rights to spouse

- 14** If, under the plan text document of the plan, a member may, with the consent of the administrator, have his or her benefits valued, calculated or provided in a particular way or exercise or obtain certain rights in relation to the member's benefits, the limited member may also seek that consent in relation to his or her proportionate share of those benefits and the administrator must not withhold consent in response to the limited member's request for that consent unless consent would have been withheld had the member applied for that consent.

Part 4 — Division of Benefits

Period for division of benefits under section 137 of Act

- 15** The benefits that the administrator is, under section 137 of the Act, required to divide are, with reference to a pension that has commenced other than by with-

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drawals from a defined contribution account, or with reference to disability benefits under section 122 of the Act, those benefits that become payable within the period that

(a) begins on the 30th day to follow the date on which the administrator has received

(i) all of the documents referred to in section 137 (2) of the Act, and

(ii) the payment of the fee permitted under section 28 of this regulation, if required by the administrator, and

(b) ends on the earlier of the termination of the pension or disability benefits, as the case may be, and the death of the limited member.

Period for complying with division requirements of Act

16 Within 60 days after the date on which the administrator has received all of the documents referred to in section 137 (2) of the Act and the payment of the fee permitted under section 28 of this regulation, if required by the administrator,

(a) if the spouse has filed a Form P2, the administrator must register the spouse as a limited member and deliver to the limited member and the member a notice in Form P6 confirming that registration,

(b) if the spouse has filed a Form P3 in which the spouse requested to have his or her proportionate share of the member's defined contribution account transferred from the plan to the credit of the spouse, the administrator must effect that transfer,

(c) if the limited member has filed a Form P4 in which he or she elected to receive his or her proportionate share of the benefits by a separate pension, the limited member's separate pension must commence, or

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(d) if the limited member has filed a Form P4 in which he or she elected to have the limited member's proportionate share of the commuted value of the benefits transferred from the plan to the credit of the limited member, the administrator must effect that transfer.

4[am. B.C. Reg. 70/2015, s. 4.]

Calculation of proportionate share in relation to pensions, benefits under benefit formula provision, disability benefits and phased retirement benefits

17 (1) If it is necessary, under the Act, including under this regulation, to calculate a proportionate share of the following:

- (a) payments under a pension that has commenced or the commuted value of those payments;
- (b) benefits under a benefit formula provision before pension commencement or the commuted value of those benefits;
- (c) disability benefits under a plan;
- (d) annuity payments;
- (e) phased retirement benefits;

this section applies to that calculation.

(2) The formula set out in subsection (3) applies to the calculation referred to in subsection (1) unless a section 127 agreement, a Part 6 order or an original agreement or order referred to in section 25 (1) of this regulation

- (a) supplants that formula, in which case the formula provided for in the agreement or order applies to the calculation, or
- (b) modifies that formula, in which case the formula as modified by the agreement or order applies to the calculation.

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(3) Subject to sections 18 and 19, the proportionate share referred to in subsection (1) of this section must be calculated in accordance with the following formula:

proportionate share = $1/2$ (pensionable service during entitlement period ÷ total pensionable service)

where

"pensionable service during entitlement period" means the pensionable service accumulated under the plan by the member in the entitlement period;

"total pensionable service" means the pensionable service accumulated by the member to the earliest of

- (a) the date that the limited member's share is transferred from the plan,
- (b) the beginning of the month in which the limited member begins to receive a separate pension,
- (c) the beginning of the month in which the limited member begins to receive a payment of benefits from the member or the administrator, and
- (d) the day immediately preceding the day of the member's death.

5[am. B.C. Reg. 70/2015, s. 5.]

Application of purchased service and transferred service

18 For the purposes of accounting in section 17 for purchased service and transferred service, **"pensionable service during entitlement period"**

- (a) includes

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- (i) all pensionable service, regardless of the period to which it is allocated, that was purchased by or on behalf of the member during the entitlement period, and
 - (ii) all pensionable service, regardless of the period to which it is allocated, that was accumulated under another plan during the entitlement period and transferred to the member's plan, and
- (b) does not include pensionable service purchased by or on behalf of the member, or accumulated under another plan, before or after the entitlement period.

Phased retirement period and recalculation of proportionate share

19 If the member accumulates additional pensionable service after the calculation of the limited member's proportionate share of a phased retirement benefit under section 115 (5) of the Act or the calculation of the spouse's proportionate share of benefits payable under section 117 (2) of the Act, the proportionate share must, whenever any of the following occurs, be recalculated to take into account the additional pensionable service accumulated by the member:

- (a) the spouse is to receive
 - (i) a proportionate share of the commuted value of the benefits under section 115 (2) (b) of the Act,
 - (ii) a separate pension, or
 - (iii) a share of benefits under section 124 (2) of the Act on the death of the member;
- (b) the spouse's estate is to receive a proportionate share of the commuted value of the benefits under section 124 (4) of the Act;
- (c) payment of the member's pension resumes.

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6[am. B.C. Reg. 70/2015, s. 6.]

Calculation of proportionate share in relation to benefits under defined contribution provision

- 20** (1) If it is necessary, under the Act, including under this regulation, to calculate a proportionate share of the member's defined contribution account, this section applies to that calculation.
- (2) The formula set out in subsection (3) applies to the calculation referred to in subsection (1) unless a section 127 agreement, a Part 6 order or an original agreement or order referred to in section 25 (1) of this regulation
- (a) supplants that formula, in which case the formula provided for in the agreement or order applies to the calculation, or
 - (b) modifies that formula, in which case the formula as modified by the agreement or order applies to the calculation.
- (3) The proportionate share referred to in subsection (1) must be calculated in accordance with the following formula:

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

where

"account balance" means the total of

- (a) the defined contribution account, before division, as at the entitlement date, and
- (b) the investment returns earned on the amount referred to in paragraph (a) after the entitlement date up to and including the date on which the spouse's proportionate share of the defined contribution account is transferred from the plan to the credit of the spouse or used to establish a defined contribution account in the plan for the spouse;

"pre-relationship contributions" means the total of

- (a) the defined contribution account as at the commencement date, and
- (b) the investment returns earned on the amount referred to in paragraph (a) after the commencement date up to and including the date on which the spouse's proportionate share of the defined contribution account is transferred from the plan to the credit of the spouse or used to establish a defined contribution account in the plan for the spouse.

Adjustment of member's benefits under benefit formula provision

21 (1) This section applies if the member's benefits under a benefit formula provision are divided under Part 6 of the Act.

(2) The administrator must, in accordance with subsection (3), adjust the benefits to which the member is entitled and the basis on which they are calculated if

(a) the division referred to in subsection (1) occurs before the member's pension commences, and

(b) the limited member or the limited member's estate has received

(i) the limited member's proportionate share of the benefits by a separate pension, or

(ii) a transfer of the limited member's proportionate share of the commuted value of the benefits.

(3) For the purposes of subsection (2), if the member's benefits have vested, the member's pensionable service must be reduced by the amount of pensionable service reflected in the limited member's proportionate share of the benefits.

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(4) As an example of the application of subsection (3), if the proportionate share of the benefits to which a limited member is entitled is calculated under section 17 and the member's benefits have vested, the member's pensionable service is to be reduced by one-half of the pensionable service that, in section 17, constitutes the "pensionable service during entitlement period".

(5) A reduction of pensionable service under subsection (3) of this section

(a) is only for the purpose of adjusting

(i) the portion of the benefits that the member is entitled to receive after the division referred to in subsection (1), or

(ii) if the member is deceased, the amount of survivor benefits, if any, and

(b) is not to be taken into account in any determination of eligibility for those benefits under the plan.

7[am. B.C. Reg. 70/2015, s. 7.]

Adjustment of member's benefits if divided on death of member

22 In a situation referred to in section 124 (2) of the Act,

(a) the member's benefits must be adjusted, to reflect that division, in accordance with section 21 of this regulation, and

(b) any survivor benefits payable under the plan must be calculated on the adjusted amount referred to in paragraph (a) of this section.

Calculation of commuted value

23 (1) In this section, "**valuation date**", in relation to a matter referred to in subsection (3) (a), (b), (c), (d) or (e), means the date that, under subsection (3), applies to that matter.

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(2) This section applies if

(a) the limited member is entitled under Part 6 of the Act to a proportionate share of the benefits under a benefit formula provision, and

(b) it is necessary, under the Act, including under this regulation, to calculate the commuted value of the benefits.

(3) The commuted value of the benefits referred to in subsection (2) (b) must

(a) when calculating the separate pension payable to the limited member for the purposes of section 115 (2) (a), 119 (3) (c) or 121 (3) of the Act, be calculated as at a date not earlier than the end of the month immediately preceding the commencement date of the separate pension,

(b) when calculating the amount to be transferred to the limited member for the purposes of section 115 (2) (b) or (6) of the Act, be calculated as at a date not earlier than the end of the month immediately preceding the date of the transfer,

(c) when calculating the commuted value of the benefits for the purposes of section 124 (2) of the Act, be calculated as at a date not earlier than the end of the month immediately preceding the day before the death of the member,

(d) when calculating the amount payable to the estate of the limited member for the purposes of section 124 (4) of the Act, be calculated as at a date not earlier than the end of the month immediately preceding the date of the limited member's death, and

(e) when calculating the amount required by the administrator to be transferred for the purposes of section 139 (b) of the Act, be calculated as at a date not earlier than the end of the month

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immediately preceding the date on which the administrator notifies the limited member that the transfer is required.

(4) Subject to subsection (5) of this section, the limited member's proportionate share of the commuted value of benefits must be calculated as follows:

(a) the commuted value of the pension the member would have received must be calculated as if

(i) there had been no division under the Act,

(ii) the member's pension had been calculated by reference only to the benefits accrued to the valuation date, and

(iii) the member had elected a pension in the unadjusted normal form, applicable to the member, provided under the plan commencing at the later of

1(A) the valuation date, and

2(B) the date the member would reach the average retirement age for the plan;

(b) after that, the limited member's proportionate share of the amount referred to in paragraph (a) must be calculated.

(5) For the purposes of subsection (4) (a) (iii) (B), the administrator may elect, as the average retirement age for the plan, a specific age that is younger than the actual average retirement age for the plan, and if that election is made, the administrator must not change the average retirement age for the plan without first applying for and obtaining the written consent of the superintendent.

8[am. B.C. Reg. 70/2015, s. 8.]

Limited member's separate pension in a local defined benefit plan

24 (1) If the limited member is entitled to receive a separate pension,

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(a) the separate pension must be calculated on the basis of his or her proportionate share of the commuted value of the benefits as calculated under section 23, and

(b) the separate pension must be provided in one of the following forms as elected by the limited member:

(i) in the form of a pension payable for the limited member's lifetime only;

(ii) in any other form of pension, or any combination of forms of pension, that members of the plan may elect to receive

adjusted in accordance with actuarial principles.

(2) If, in a situation referred to in section 124 (2) of the Act, the member was eligible at the date of his or her death to have his or her pension commence, the limited member may elect to receive the limited member's proportionate share of the commuted value of the benefits by a separate pension.

Original agreements and orders

25 (1) If, in a situation referred to in section 112 (2) of the Act, the member and the spouse agree under section 112 (3) (a) (i), or are deemed to agree under section 112 (5), to divide benefits in accordance with Part 6 of the Act, the following applies unless the member and spouse otherwise agree:

(a) despite paragraph (b) of this subsection and subject to section 131 of the Act and to subsection (2) of this section, the spouse's proportionate share of the benefits is calculated by the share or formula set out in the original agreement or order;

(b) provisions of the original agreement or order that are inconsistent with division of benefits under Part 6 of the Act cease to have effect;

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(c) provisions of the original agreement or order that clarify, supplement or are collateral to division of benefits under Part 6 of the Act continue in effect.

(2) If subsection (1) applies and the benefits referred to in subsection (1) are in a defined contribution account, the spouse's share of those benefits is calculated in accordance with section 20 of this regulation, using the commencement date and entitlement date specified in the original agreement or order.

Transfer from plan to locked in retirement plan

26 If the Act requires or authorizes an administrator of a plan to transfer from the plan an amount to the credit of the spouse, the transfer must be made in accordance with the provisions of the *Pension Benefits Standards Act*, and any regulations under that Act, that would have applied had the transfer been made to the credit of the member.

9[am. B.C. Reg. 70/2015, s. 9.]

Calculation of a compensation payment

27 (1) This section applies if provision is made for satisfaction of the spouse's interest in benefits by any of the following:

- (a) a compensation payment under section 97 (2) (c) of the Act;
- (b) a compensation payment under section 127 (1) (b) of the Act;
- (c) a compensation payment or amount transferred under section 128 (2) of the Act.

(2) A compensation payment or transfer referred to in subsection (1) must be equal to the spouse's proportionate share of the commuted value of the future benefits payable to the member.

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- (3) Without limiting the contingencies that may be considered in calculating the amount of a compensation payment or transfer referred to in subsection (1), the calculation must make reasonable provision for the following contingencies:
- (a) the possibility that the member may terminate employment or die before commencement of the member's pension;
 - (b) the possibility that the member's pension commences earlier or later than the date at which the member is entitled, under the plan text document, to begin receiving a pension without reduction or increase to the pension;
 - (c) the possibility that benefits being divided and paid under the plan will increase in value, whether by an automatic formula or on an ad hoc basis, after the date of the calculation of the compensation payment or transfer;
 - (d) to the extent that benefits being divided are related to future salary levels, the possibility that salary levels will increase after the date of the calculation of the compensation payment or transfer.
- (4) If an entitlement to receive a pension has not vested in the member at the date of valuation, the spouse may elect to
- (a) postpone valuation until it is ascertained whether the entitlement vests, or
 - (b) have the valuation proceed assuming the entitlement will vest, but adjusting it to take into account the contingency that the member may die or leave employment before vesting.

10[am. B.C. Reg. 70/2015, s. 10.]

Administrative costs

28 The amount to be paid to the administrator by the member and the spouse under section 140 of the Act must not exceed the following:

- (a) for registering the spouse as a limited member of the plan, \$750;
- (b) for transferring a proportionate share of the member's defined contribution account to the credit of the spouse under section 114 (2) (a) of the Act, \$175.

Transition

29 (1) In this section, "**limited member**" has the same meaning as in section 70 of the former Act.

(2) If, before March 18, 2013, the administrator received written notice from a limited member seeking to have the limited member's proportionate share of the commuted value of benefits transferred from a plan to the credit of the limited member or seeking to receive the limited member's proportionate share of benefits by a separate pension, the former Act and the former regulation apply to the calculation of the limited member's proportionate share of the commuted value.

(3) If, before March 18, 2013, the administrator delivered written notice to a limited member setting out options as to how the limited member's proportionate share of benefits could be provided to the limited member, the following applies:

- (a) the limited member may, after March 18, 2013, in accordance with paragraph (b), elect one of those options;
- (b) to make an election under paragraph (a), the limited member must, within the period referred to in the notice, or, if no

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period is referred to in the notice, within 60 days after the date of the notice, deliver to the administrator a notice in Form P4 within which the limited member elects one of the options referred to in the administrator's notice;

(c) if the limited member makes an election in accordance with paragraph (b), the limited member is entitled to receive his or her share of benefits in accordance with that election and the former Act and the former regulation applies;

(d) if the limited member does not make an election in accordance with paragraphs (a) and (b), the Act applies.

FORMS

[am. B.C. Reg. 70/2015, s. 11.]

**Questions and Answers About
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Form P1

Form P1 (Division of Pensions Regulation, s. 4 (a))

CLAIM AND REQUEST FOR INFORMATION AND NOTICE

When to Use this Form

A Form P1 is used by a spouse who is making a claim to an interest in the member's/annuitant's benefits. After this form is delivered to the administrator/annuity issuer, the spouse is entitled to receive

- *information from the administrator/annuity issuer about the benefits, and*
- *30 days' advance notice of changes of circumstances affecting the benefits.*

[Please print]

To: Administrator of plan/annuity issuer

Name of
plan/annuity.....

Address of administrator/annuity
issuer.....

.....

From: Spouse of member/annuitant [Note: "spouse" includes a person who has lived in a marriage-like relationship with the member/annuitant for a continuous period of at least two years and also includes a former spouse.]

Name of
spouse.....

Address

.....

Email address

Telephone (home) (work)

Social Insurance Number

[The administrator/annuity issuer will use this information to contact you about important matters. Make sure it is accurate and that you promptly advise the administrator/annuity issuer of any changes.]

In relation to: Plan member/annuitant

Name of
member/annuitant.....

Address

.....

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Email address
Telephone (home) (work)
Social Insurance or Plan Identity Number
Employer

Declaration of spouse claiming interest

I, [name of spouse] am claiming an interest
in the benefits of the member/annuitant based on section 81 of the *Family Law Act*. [see below]

In support of that claim, I declare that

- (a) I began living in a marriage-like relationship with the member/annuitant on[date],
- (b) I was married to the member/annuitant on [date], and
- (c) I was separated from the member/annuitant on [date].

[You are not required to authorize the administrator/annuity issuer to communicate with a representative. If you wish to authorize that communication, you must complete the following, otherwise, the administrator/annuity issuer cannot communicate with your representative.]

I authorize you to communicate with and release information to my representative(s):

.....
..... [name(s) and address(es) of representative(s)]

This authorization expires on [date].

Signed (spouse)

.....

Date of declaration

.....

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Signed (witness to signature of spouse)

.....

Name of witness

.....

Address of witness

.....

Family Law Act, section 81:

- 81** Subject to an agreement or order that provides otherwise and except as set out in this Part and Part 6 [*Pension Division*],
- (a) spouses are both entitled to family property and responsible for family debt, regardless of their respective use or contribution, and
 - (b) on separation, each spouse has a right to an undivided half interest in all family property as a tenant in common, and is equally responsible for family debt.

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Form P2

Form P2 (Division of Pensions Regulation, s. 4 (b))

REQUEST FOR DESIGNATION AS LIMITED MEMBER

When to Use this Form

A Form P2 is used any time a spouse's share of the benefits remains in the plan/annuity to be administered. The spouse becomes a kind of member/annuitant, with respect to the benefits, called a "limited member" and is entitled to receive a proportionate share of

- *payments under a pension that has commenced,*
- *benefits under a defined benefit provision before pension commencement,*
- *disability benefits under a plan,*
- *annuity payments,*
- *benefits that are subject to an original order or agreement made before Part 6 of the Family Law Act came into force, and*
- *benefits in a defined contribution account, if the administrator consents to the spouse's proportionate share remaining in the plan.*

Form P2 is used in every case for dividing benefits except where benefits in a defined contribution account are being transferred from the plan, when a Form P3 is required.

[Please print]

To: Administrator of plan/annuity issuer

Name of
plan/annuity.....
Address of administrator/annuity
issuer.....
.....

From: Spouse of member/annuitant [Note: "spouse" includes a person who has lived in a marriage-like relationship with the member/annuitant for a continuous period of at least two years and also includes a former spouse.]

Name of spouse.....
Address
.....
Email address
Telephone (home) (work)
Social Insurance Number
Date of birth

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[The administrator/annuity issuer will use this information to contact you about important matters. Make sure it is accurate and that you promptly advise the administrator/annuity issuer of any changes.]

In relation to: **Plan member/annuitant**

Name of member/annuitant.....
Address
.....
Email address
Telephone (home) (work)
Social Insurance or Plan Identity Number
Employer

Other requirements:

A copy of the agreement or order dividing the benefits must be provided. *[Please attach or enclose the agreement or order with this Form.]*

An administrator/annuity issuer is entitled to charge a fee to register a spouse as a limited member of \$750 (or \$925 if the benefits are in a hybrid plan).

Request:

I request that *[name of spouse]* be designated as a limited member with respect to the benefits/annuity.

The following applies to a spouse who becomes a limited member:

- for a pension, disability benefits or an annuity that is being paid, this form will also act as a request for the administrator/annuity issuer to pay the limited member his or her proportionate share of those payments;
- for benefits if the pension has not commenced, the administrator will advise the limited member about his or her options for receiving a separate pension, or, in some cases, a transfer of his or her proportionate share from the plan in a lump sum. The limited member may exercise those options by filing a Form P4;
- for benefits in a defined contribution account, the limited member will be entitled to have his or her proportionate share transferred to a separate account in the plan, if the administrator consents.

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Signed..... [This is normally signed by the spouse but may be signed by the member under section 113 (2) of the Family Law Act.]

Date

Signed (witness to signature)

.....

Name of witness

.....

Address of witness

.....

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Form P3

Form P3 (Division of Pensions Regulation, s. 4 (c))

REQUEST FOR TRANSFER FROM DEFINED CONTRIBUTION ACCOUNT

When to Use this Form

A Form P3 is used when

- *there is an agreement or order dividing the benefits,*
- *the benefits are in a defined contribution account, and*
- *the spouse wants the spouse's proportionate share transferred to another plan (such as an RRSP).*

[Please print]

To: Administrator of plan

Name of plan

.....

Address of administrator

.....

.....

From: Spouse of member *[Note: "spouse" includes a person who has lived in a marriage-like relationship with the member for a continuous period of at least two years and also includes a former spouse.]*

Name of spouse.....

Address

.....

Email address

Telephone (home) (work)

Social Insurance Number

[The administrator will use this information to contact you about important matters. Make sure it is accurate and that you promptly advise the administrator of any changes.]

In relation to: Plan member

Name of member

.....

Address

.....

Email address

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Telephone (home) (work)
Social Insurance or Pension Plan Identity Number
Employer

Other requirements:

A copy of the agreement or order dividing the benefits must be provided. [*Please attach or enclose the agreement or order with this Form.*]

An administrator is entitled to charge a fee to transfer the benefits from the defined contribution account of \$175.

Request:

I request that you

- (a) transfer my proportionate share of the member's defined contribution account from the plan in accordance with the *Family Law Act* and 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

.....

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Form P4

Form P4 (Division of Pensions Regulation, s. 4 (d))

REQUEST BY LIMITED MEMBER FOR TRANSFER OR SEPARATE PENSION

When to Use this Form

A Form P4 is used by a limited member to choose how to receive a share of benefits under a benefit formula provision if the member is not yet receiving a pension.

[Please print]

To: Administrator of plan

Name of plan

Address of administrator

From: Spouse of member [Note: "spouse" includes a person who has lived in a marriage-like relationship with the member for a continuous period of at least two years and also includes a former spouse.]

Name of spouse

Address

Email address

Telephone (home) (work)

Social Insurance Number

Date of birth

[The administrator will use this information to contact you about important matters. Make sure it is accurate and that you promptly advise the administrator of any changes.]

**In
relation
to: Plan member**

Name of member

Address

Email address

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Telephone (home) (work)
Social Insurance or Pension Plan Identity Number
Employer of member

Request

As the limited member named above, I request *[Check the correct box.]*

- ☐ that you
- (a) transfer from the plan my proportionate share of the commuted value of the member's benefits in accordance with the *Family Law Act* and the *Pension Benefits Standards Act*, and
 - (b) advise me in writing of the information that you require in order to do this.
- ☐ that you provide me with a separate pension from the plan.

[These options are only available after the member is allowed to receive a pension but the pension has not yet commenced. If this form is used for a supplemental plan or a plan for specified individuals, a lump sum transfer is not available, and a separate pension is not available until the member's pension commences, unless the administrator consents.]

Signed (limited member)

Date

Signed (witness to signature of limited member)

.....

Name of witness

.....

Address of witness

.....

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Form P5

Form P5 (Division of Pensions Regulation, s. 4 (e))

WAIVER OF SURVIVOR BENEFITS AFTER PENSION COMMENCEMENT

When to Use this Form

A Form P5 is used

- *if the member's pension/annuity has commenced,*
- *the spouse is entitled to survivor benefits under the pension/annuity, and*
- *the spouse agrees to give up the survivor benefits and pay them to another person.*

[Please print]

To: Administrator of plan/annuity issuer

Name of plan/annuity.....

Address of administrator/annuity issuer.....

.....

From: Spouse of member/annuitant *[Note: "spouse" includes a person who has lived in a marriage-like relationship with the member/annuitant for a continuous period of at least two years and also includes a former spouse.]*

Name of spouse.....

Address

.....

Email address

.....

Telephone (home) (work)

Social Insurance Number

Date of birth

[This administrator/annuity issuer will use this information to contact you about important matters. Make sure it is accurate and that you promptly advise the administrator/annuity issuer of any changes.]

**In
relation
to: Plan member/annuitant**

Name of
member/annuitant.....

Address

.....

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Email address

Telephone (home) (work)

Social Insurance or Plan Identity Number

Waiver:

I confirm that I am aware of the following:

- (a) the member/annuitant is receiving a pension/annuity, and I am entitled to survivor benefits under the pension/annuity as follows:; [Specify the amount of survivor benefits or if not known, how they are calculated.]
- (b) these survivor benefits may have substantial value, and may be important to me to provide me with income in my old age;
- (c) these survivor benefits are my separate property;
- (d) I am permitted to waive any claim to these benefits under section 126 (2) (a) of the *Family Law Act* only if I sign this prescribed waiver;
- (e) I understand that the administrator/annuity issuer cannot be required to pay the survivor benefits to anyone else, and, unless the administrator/annuity issuer consents to do this, I must pay the benefits to: [specify person];
- (f) I have read this form and understand it;
- (g) neither the member/annuitant nor anyone else has put any pressure on me to sign this form;
- (h) the member/annuitant is not present while I am signing this form;
- (i) I realize that
 - (i) this form only gives a general description of the legal rights I have under the *Family Law Act* and the *Pension Benefits Standards Act* and the regulations to those Acts, and
 - (ii) if I wish to understand exactly what my legal rights are I must read the *Family Law Act* and the *Pension Benefits Standards Act* and the regulations to those Acts, and/or seek legal advice;
- (j) there may be tax implications to this waiver that should be addressed;
- (k) I realize that I am entitled to a copy of this waiver form.

I am signing this form to waive the survivor benefits.

Date Signed (spouse)

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

Signed (witness to signature of spouse):
Name of witness:
Address of witness:

COMMENTS AND INSTRUCTIONS

Survivor benefits are important, and the *Family Law Act* provides that a waiver is not effective unless it is in this prescribed form. This form is not prescribed because it is expected that survivor benefits will usually be waived but rather because, in most cases, waiving survivor benefits would not be prudent. As a result, a waiver is only enforceable if this prescribed form is used.

When dealing with valuable assets, obtaining legal advice is usually considered prudent. This form is not a substitute for legal advice.

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Division of Pensions Regulation

Form P6

Form P6 (Division of Pensions Regulation, s. 7 (1))

ADMINISTRATOR/ANNUITY ISSUER RESPONSE

When to Use this Form

A Form P6 is used by the administrator/annuity issuer to

- *advise the member/annuitant of notices received from his or her spouse in connection with the spouse's claim to an interest in the benefits,*
- *advise the spouse or member/annuitant if a notice cannot be acted on, and*
- *notify the spouse of a change of circumstances affecting the benefits.*

[Please print]

A Plan member/annuitant

Name of member/annuitant.....

B Limited member or spouse claiming an interest

Name of limited member or spouse.....

C Plan/annuity

Name of plan/annuity.....

Address of administrator/annuity issuer.....

.....

Contact person

Telephone

This notice is provided *[Check the correct box(es).]*

- ☐ to confirm receipt of a notice *[Complete Part 1 below]*
- ☐ to advise that the administrator/annuity issuer is unable to take any action on the notice *[Complete Part 2 below]*
- ☐ to advise of a change of circumstances such as the death of the member/annuitant, the commencement of the pension/annuity or the receipt of a direction from the member/annuitant *[Complete Part 3 below]*

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

PART 1: Receipt of Notice

The administrator/annuity issuer has received the following notice or document dated [date of notice] under the *Family Law Act* from [name as shown on notice] in relation to the member's/annuitant's entitlement under the plan/annuity identified above: [Check the correct box.]

- ☐ Form P1: Claim and Request for Information and Notice
- ☐ Form P2: Request for Designation as Limited Member
- ☐ Form P3: Request for Transfer from Defined Contribution Account
- ☐ Form P4: Request by Limited Member for Transfer or Separate Pension
- ☐ Form P5: Waiver of Survivor Benefits after Pension Commencement
- ☐ Form P7: Withdrawal of Notice/Waiver of Claim
- ☐ [specify]

PART 2: Inability to take action

The administrator/annuity issuer is unable to take any action on the notice referred to in Part 1 as a result of the following:

If you wish the administrator/annuity issuer to take any action in relation to the notice, you must [Check the correct box and provide any required information.]

- ☐ submit a new Form or document that includes the above-noted information
- ☐ provide the administrator/annuity issuer with the missing information
- ☐ other: [describe]

PART 3: Notice of change of circumstances

Under the *Family Law Act* and regulations, the administrator/annuity issuer is required to give you 30 days advance notice before taking any step with respect to any of the following which may affect your interest or claim to an interest in benefits under the plan/annuity:

- ☐ the administrator/annuity issuer has been advised of the death of the member/annuitant and
 - ☐ survivor benefits are payable to you
 - ☐ survivor benefits are not payable to you
- ☐ the member/annuitant has elected to have the pension/annuity commence as at[date]
- ☐ the member/annuitant has changed his/her beneficiary designation and

Appendix B
Division of Pensions Regulation

<input type="checkbox"/>	you have ceased to be the beneficiary
<input type="checkbox"/>	you have become the beneficiary
<input type="checkbox"/>	the member/annuitant has given the administrator/annuity issuer the following direction:

Date:

.....
Signature of administrator/annuity issuer

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

Form P7

Form P7 (Division of Pensions Regulation, s. 4 (f))

WITHDRAWAL OF NOTICE/WAIVER OF CLAIM

When to Use this Form

A Form P7 is used if a spouse decides to withdraw a notice or other document delivered to the administrator/annuity issuer, or give up the spouse's claim to the benefits. A Form P5 or P7 cannot be withdrawn by this form, and a notice cannot be withdrawn once the benefit division arrangements are completed.

[Please print]

To: Administrator of plan/annuity issuer

Name of
plan/annuity.....

Address of administrator/annuity issuer

.....

From: Spouse of member/annuitant *[Note: "spouse" includes a person who has lived in a marriage-like relationship with the member/annuitant for a continuous period of at least two years and also includes a former spouse.]*

Name of spouse.....

Address

.....

Email address

Telephone (home) (work)

Social Insurance Number

Date of birth

[If spouse is deceased]

Date of spouse's death

Name of spouse's personal representative:.....

Contact information for spouse's personal representative:

.....

[The administrator/annuity issuer will use this information to contact you about important matters. Make sure it is accurate and that you promptly advise the administrator/annuity issuer of any changes.]

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Division of Pensions Regulation

In relation to: **Plan member/annuitant**

Name of member/annuitant.....
Address
.....
Email address
Telephone (home) (work)
Social Insurance or Plan Identity Number
Employer

[Check the correct box.]

- ☐ I withdraw the notice in Form dated[date].
☐ I withdraw[identify document] dated[date].
☐ I withdraw all forms and documents filed in connection with my claim to an interest in the member's/annuitant's benefits and waive my claim to any interest.

Signed:

[] spouse [] personal representative of the spouse

Date

Signed (witness)

Name of witness

.....

Address of witness

.....

COMMENTS AND INSTRUCTIONS

Your interest in the benefits is important, and the *Family Law Act* provides that withdrawing forms or documents, or a waiver of division of benefits, is not effective unless it is in this form. When dealing with valuable assets, obtaining legal advice is usually considered prudent. This form is not a substitute for legal advice.

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

Form P8

Form P8 (Division of Pensions Regulation, s. 6)

CHANGE OF INFORMATION

When to Use this Form

It is important to keep contact information up to date. Form P8 can be used to notify the administrator/annuity issuer of any changes.

[Please print]

To: Administrator of plan/annuity issuer

Name of
plan/annuity.....
Address of administrator/annuity
issuer.....
.....

From: Spouse of member/annuitant *[Note: "spouse" includes a person who has lived in a marriage-like relationship with the member/annuitant for a continuous period of at least two years and also includes a former spouse.]*

Name of spouse.....
Address
.....
Email address
Telephone (home) (work)
Social Insurance Number
Date of birth

[The administrator/annuity issuer will use this information to contact you about important matters. Make sure it is accurate and that you promptly advise the administrator/annuity issuer of any changes.]

In relation to: Plan member/annuitant

Name of
member/annuitant.....
Address
.....

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Email address

Telephone (home) (work)

Social Insurance or Plan Identity Number

Employer

I am updating information previously provided by me as follows:.....
.....

Signed.....

Date

Signed (witness)

Name of witness
.....

Address of witness
.....

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

Form P9

Form P9 (Division of Pensions Regulation, s. 1)

AGREEMENT TO HAVE BENEFITS DIVIDED UNDER PART 6

When to Use this Form

An agreement or order dividing the benefits is required before a spouse is entitled to receive a proportionate share of the benefits. If the parties complete Form P9, this will satisfy the requirement for an agreement. Don't file this form if you already have a written agreement, or an order, dividing the benefits

[Please print]

To: Administrator of plan/annuity issuer

Name of
plan/annuity.....
Address of administrator/annuity
issuer.....
.....

From: Spouse of member/annuitant [Note: "spouse" includes a person who has lived in a marriage-like relationship with the member/annuitant for a continuous period of at least two years and also includes a former spouse.]

Name of spouse.....
Address
.....
Email address
Telephone (home) (work)
Social Insurance Number
Date of birth

[The administrator/annuity issuer will use this information to contact you about important matters. Make sure it is accurate and that you promptly advise the administrator/annuity issuer of any changes.]

In relation to: Plan member/annuitant

Name of
member/annuitant.....
Address
.....
Email address

Appendix B
Division of Pensions Regulation

Telephone (home) (work)
Social Insurance or Plan Identity Number
Employer

We agree to have the member's/annuitant's benefits under the plan/annuity divided between us in accordance with Part 6 of the *Family Law Act*.

The benefits to be divided are those that accrued between

- (a) [date] [*the commencement date as defined in the Division of Pensions Regulation, which date is usually the earlier of the date on which the parties commenced living together in a marriage-like relationship and the date on which they were married.*], and
- (b) [date] [*the entitlement date as defined in the Division of Pensions Regulation, which date is usually the date of separation*].

We confirm that each of us is aware of the following:

- (a) the benefits are valuable;
- (b) pension plans are complicated;
- (c) securing the interest in the benefits is important to each of us, particularly with respect to providing us with income in old age;
- (f) each of us has read this form and understands it;
- (g) no one has put any pressure on either of us to sign this form;
- (h) each of us realizes that
 - (i) this form only gives a general description of the legal rights either of us has under the *Family Law Act* and the *Pension Benefits Standards Act* and the regulations to those Acts, and
 - (ii) if either of us wishes to understand exactly what our legal rights are we must read the *Family Law Act*, and the *Pension Benefits Standards Act* and the regulations to those Acts, and/or seek legal advice;
- (i) there may be tax implications to this agreement that should be addressed;
- (j) if the pension/annuity has already commenced, the administrator/annuity issuer will make no adjustment to the payments already made under the pension/annuity. We will need to address between ourselves any compensation for payments made before the administrator/annuity issuer is able to implement the division of the benefits;
- (k) we must provide further documents or evidence of entitlement as reasonably requested by the administrator/annuity issuer;
- (l) each of us is entitled to a copy of this form.

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

Each of us is signing this form to have the benefits divided under Part 6 of the *Family Law Act*.

<p>Signed..... [member/annuitant]</p> <p>Date</p> <p>Signed (witness)</p> <p>Name of witness</p> <p>Address of witness</p>	<p>Signed..... [spouse]</p> <p>Date</p> <p>Signed (witness)</p> <p>Name of witness</p> <p>Address of witness</p>
---	---

COMMENTS AND INSTRUCTIONS

Dividing benefits under Part 6 of the *Family Law Act* requires an agreement between the parties, or an order, that provides for that division. The agreement or order must set out the dates to be used for determining the portion of the benefits that are subject to division. This form can be used by the parties for that purpose and if signed by them constitutes an agreement under section 127 of the *Family Law Act* to divide the benefits.

When dealing with valuable assets, obtaining legal advice is usually considered prudent. This form is not a substitute for legal advice.

[Provisions relevant to the enactment of this regulation: [Family Law Act](#), S.B.C. 2011, c. 25, sections 246 and 248.]

APPENDIX C

Checklist for Plan Administrators

Overview of Pension Division Under Part 6 of the Family Law Act

Section references are to the *Family Law Act* S.B.C. 2011, c. 25.

Regulation references are to the *Division of Pensions Regulation*, B.C. Reg. 348/2012.

References to forms are to the Forms set out in the *Division of Pensions Regulation*.

References to the Q&A are to *Questions and Answers About Pension Division on the Breakdown of a Relationship in British Columbia* (2016).

Unless clearly indicated to the contrary, the word “member” is used to refer to the person who has pension entitlement and the word “spouse” is used to refer to the person who claims a share of the benefits.

Note: These materials have been prepared on the assumption that users will exercise their professional judgment regarding the correctness and applicability of the material. Checklists and forms should be used only as an initial reference point. Reliance on them to the exclusion of other resources is imprudent. These materials should be regarded as a secondary reference. For definitive answers refer to applicable statutes, regulations and practice notes.

Plan administrators will find it saves them time and expense if they prepare information brochures to hand out to spouse and member on first inquiry concerning pension division. These brochures should provide information on:

- what the spouse is entitled to
- what the administrator will do
- what the spouse must do to come within Part 6 of the *FLA*: which forms to file and what else the administrator requires

Have a supply of the forms handy.

- Administrator Checklist 1: **Form P1 is received.**
- Administrator Checklist 2: **Form P2 is received.**
- Administrator Checklist 3: **Form P3 is received**

Administrator Checklist 1: Form P1 is Received

The administrator receives Form P1: Claim and Request for Information and Notice: What is the administrator supposed to do?

1. The form does not request the administrator to divide the benefits.
2. The benefits may end up being divided without the administrator's involvement at all (*for example*, by the member transferring other property to satisfy the spouse's share)
3. Form P1 simply places the administrator on notice that the spouse is claiming an interest. An administrator can charge a fee for dividing the benefits, but the administrative fee can't be charged at this point (not until the administrator receives a Form P2 or P3).
4. Filing a Form P1 with an administrator places two responsibilities on the Administrator:
 - the administrator must provide the spouse with information about the member's benefits within 60 days of a request by the spouse. The spouse cannot request information more often than once in each calendar year. [*Reg.*, s.10] (A spouse, however, can request additional information or clarification, or an update on information: *see Q&A*, para. 15.19.)
 - the administrator must not act upon a direction about the member's benefits (*for example*, by reason of death, employment termination, pension commencement, change of beneficiary designation) that will prejudice the spouse's interest without first giving the spouse 30 days' notice that the transaction is going to take place. [*Reg.*, s. 9]
5. Notice to the spouse is given using Form P6. [*Reg.*, s. 9(3)]
6. The notice to the spouse is sent to the address the spouse provides on Form P1, unless the spouse has provided the administrator with a change of address. [*Reg.*, s. 2(2)] If the spouse provided an e-mail address or a fax number, the notice can be e-mailed or faxed. [*Reg.*, s. 2(2)]
7. the administrator must:
 - within 30 days of receiving Form P1 notify the member that it was received, using Form P6. [*Reg.*, s. 7(1)]
 - be able to track a Form P1 by reference to the member's benefits, so that when any instruction is received with respect to the benefits, notice can be given to the spouse.

Appendix C
Checklist for Plan Administrators

Administrator Checklist 2: Form P2 is Received

The administrator Receives Form P2: Request for Designation as Limited Member: What is the administrator supposed to do?

1. Form P2 is a request by the spouse to be designated a “limited member” of the plan. It must be accompanied by the agreement or court order that gives the spouse an interest in the benefits.

Form P2 is used if the benefits are determined by a benefit formula provision, if the member's pension has already commenced, if the benefits are in a supplementary pension plan or an individual pension plan, for annuities and for disability benefits (basically, any situation where the former spouse must wait to receive a share, or it will be paid out over a period of time).

(If the benefits are in a defined contribution account, however, even if the member is making withdrawals or receiving Life Income Type Benefits, *see Administrator Checklist 3*).

2. *If the member's pension has not yet commenced*, the administrator must:
 - (a) give notice to the member in Form P6 that the Form P2 has been received. [*Reg.*, s. 7(1)]
 - (b) record the spouse's interest in the member's benefits [*FLA*, s. 113(2)] so that when anything takes place with respect to the member's benefits the limited member's interest is not overlooked. Paying out the limited member's share of the benefits is deferred. [*See* 2(d) of this Checklist]
 - (c) be able to give the limited member once a year the same information or notices given to members, including information about options and elections that can be made by members and limited members, and confirmation whether the limited member is the beneficiary of the member's benefits. [*Reg.*, s. 11(1)]
 - (d) pay out the limited member's share when one of the following events takes place:
 - the limited member dies before receiving the limited member's proportionate share: the proportionate share is transferred to the limited member's estate. [*FLA*, s. 124(4),

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

Reg., s. 23(3)(d)]

- the member dies before the limited member receives the limited member's proportionate share: the limited member receives the proportionate share of the benefits determined the day before the member's death. [*FLA*, s. 124(2), *Reg.*, s. 23(3)(c)]
- the member is eligible for pension commencement or elects to have the pension commence: the limited member can elect to receive the proportionate share by a separate pension payable for the limited member's lifetime. [*FLA*, s. 115(2)(a); Form P4]

Or, the limited member can elect to have the proportionate share transferred to a pension vehicle, such as a LIRA. [*FLA*, s. 115(2)(b); Form P4]

Reg., s. 26 provides that the transfer options are the same as those that apply had the transfer been made to the credit of the member: *for example*, to purchase an annuity, to transfer to a LIRA, LIF, or another pension plan, [*PBSA*, s. 88] or an account in the same plan, with the consent of the administrator.

(e) when the limited member's share is paid out, adjust the member's remaining interest in the benefits. [*Reg.*, s. 21]

3. *If the member's pension has commenced*, the administrator must:

- (a) give the member Notice in Form P6 that the Form P2 was received. [*Reg.*, s. 7(2)]
- (b) record the spouse as a limited member.
- (c) pay directly to the limited member a share of each payment made to the member starting with the payment due after 30 days from all required documents being received, making appropriate withholding deductions. [*FLA*, s. 117(2); s. 141(3), *Reg.*, s. 15]

Appendix C
Checklist for Plan Administrators

Administrator Checklist 3: Form P3 is Received

Benefits in Defined Contribution Account

The administrator Receives a Form P3: Request for Transfer From Defined Contribution Account and agreement or court order dividing the benefits. What is the administrator supposed to do?

1. Form P3 is a request by the spouse for the spouse's proportionate share to be transferred from a defined contribution account. It must be accompanied by the agreement or court order that gives the spouse an interest in the benefits.
2. *If there are benefits in the defined contribution account, even if the member is making withdrawals (or receiving Life Income Type Benefits):* the administrator must:
 - (a) give the member Notice in Form P6 that the Form P3 was received. [Reg., s. 7(2)]
 - (b) request directions from the spouse concerning where the spouse's proportionate share is to be paid (*for example*, to purchase an annuity, to transfer to a LIRA, LIF, or to another pension plan or an account in the same plan with the consent of the plan administrator). [FLA, s. 114(2)(b), Reg., s. 26, PBSA, s. 88]
If the administrator consents to the spouse keeping the proportionate share in a separate account in the plan, the spouse must file a Form P2 with the plan and become a limited member.
 - (c) pay out the spouse's proportionate share as directed.
3. *If the member's benefits have been used to purchase an annuity, the administrator of the annuity must:*
 - (a) require a Form P2. (Form P3 would not be used. The pension has matured. The transfer option is no longer available if there are no funds left in the defined contribution account. The pension is divided exactly the same as a matured pension in a defined benefit plan: *See Administrator Checklist 2, s. 3*)
 - (b) when a Form P2 is received, give the member Notice in Form P6 that the Form P2 was received. [Reg., s. 7(2)]
 - (c) record the spouse as a limited member.
 - (d) pay directly to the limited member a share of each payment made to the member starting with the payment due after 30 days from all required documents being received, making appropriate withholding deductions. [FLA, s. 117(2); s. 141(3), Reg., s. 15]

APPENDIX D

Checklists for Lawyers

Overview of Pension Division Under Part 6 of the Family Law Act

Overview:

Section references are to the *Family Law Act*, S.B.C. 2011, c. 25.

Regulation references are to the *Division of Pensions Regulation*, B.C. Reg. 348/2012.

References to forms are to the Forms set out in the *Division of Pensions Regulation*.

References to the Q&A are to *Questions and Answers About Pension Division on the Breakdown of a Relationship in British Columbia* (2016).

Unless clearly indicated to the contrary, the word “member” is used to refer to the person who has pension entitlement and the word “spouse” is used to refer to the person who claims a share of the benefits.

Note: These materials have been prepared on the assumption that users will exercise their professional judgment regarding the correctness and applicability of the material. Checklists and forms should be used only as an initial reference point. Reliance on them to the exclusion of other resources is imprudent. These materials should be regarded as a secondary reference. For definitive answers refer to applicable statutes, regulations and practice notes.

- Lawyer Checklist 1: **Dividing a Matured Pension**
- Lawyer Checklist 2: **Dividing Benefits in a Defined Contribution Account**
- Lawyer Checklist 3: **Dividing Unmatured Benefits Determined by a Benefit Formula Provision**

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

**Lawyer Checklist 1: Dividing a Matured Pension
(the member's pension has commenced)**

(Note: if the benefits are in a defined contribution account, even if the member is making withdrawals or receiving Life Income Type Benefits, this checklist does not apply. See Lawyer Checklist 2).

1. prepare *Form P1: Claim and Request for Information and Notice* and deliver it to the administrator (which includes an annuity issuer). Complete the portion of Form P1 authorizing administrator to release information to spouse's representative. Request information from the administrator respecting the benefits. [FLA, s. 133, Reg., s. 10]

[Some administrators request additional information about the spouse's status to make the request, such as a copy of the parties' marriage certificate, or if the parties are unmarried, an affidavit verifying the marriage-like relationship.]

2. negotiate or litigate the division of the benefits and prepare the agreement or court order. (For sample precedents, see *Family Law Agreements - Annotated Precedents* (Continuing Legal Education Society of B.C.) and *B.C. Family Practice Manual* (Continuing Legal Education Society of B.C.))
3. prepare *Form P2: Request for Designation as Limited Member*, and deliver it to the administrator with the agreement or court order dividing the benefits. [FLA, ss. 113, 117, Reg., s. 17]
4. the administrator may require payment of an administrative fee. [Reg., s. 28 sets out the maximum amounts that may be charged: \$750 for registering a spouse as a limited member.]

[The former spouse becomes a limited member of the plan, entitled to receive directly from the administrator a share of each monthly payment made under the plan, less withholdings for taxes.]

Appendix D
Checklists for Lawyers

**Lawyer Checklist 2: Dividing Benefits in a
Defined Contribution Account**

1. prepare *Form P1: Claim and Request for Information and Notice* and deliver it to the administrator. Complete the portion of Form P1 authorizing administrator to release information to spouse's representative. Request information from the administrator respecting the benefits. [FLA, s. 133, Reg., s. 10]

[Some administrators request additional information about spouse's status to make the request, such as a copy of the parties' marriage certificate, or if the parties are unmarried, an affidavit verifying the marriage-like relationship.]

2. negotiate or litigate the division of the benefits and prepare agreement or court order. (For sample precedents, see *Family Law Agreements - Annotated Precedents* (Continuing Legal Education Society of B.C.) and *B.C. Family Practice Manual* (Continuing Legal Education Society of B.C.))
3. prepare *Form P3: Request for Transfer from Defined Contribution Account*, and deliver it to the administrator with the agreement or court order dividing the benefits. [FLA, s. 114, Reg., s. 20]
4. the administrator may require payment of an administrative fee. [Reg., s. 13 sets out the maximum amount that may be charged: \$175 for transferring benefits from a defined contribution account; \$750 for registering a spouse as a limited member.]

[The benefits will be divided by an immediate transfer of a share of contributions plus investment returns accumulated during the relationship to a prescribed pension vehicle, such as an RRSP or LIRA. Usually, the funds will be locked-in, meaning they can't be cashed out, but must be used to provide a life income. The administrator may consent to keeping spouse's share in separate account in the plan. A spouse who chooses this option must file a Form P2 and become a limited member of the plan. In that case, the maximum administrative fee would be \$750.]

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

**Lawyer Checklist 3: Dividing Unmatured Benefits Determined
by a Benefit Formula Provision**

1. prepare *Form P1: Claim of Spouse to Interest and Notice* and deliver it to the administrator (which includes an annuity issuer). Complete the portion of *Form P1* authorizing administrator to release information to spouse's representative. Request information from the administrator respecting the benefits. [FLA, s. 133, Reg., s.10]

[Some administrators request additional information about spouse's status to make the request, such as a copy of the parties' marriage certificate, or if the parties are unmarried, an affidavit verifying the marriage-like relationship.]

2. negotiate or litigate the division of the benefits and prepare the agreement or court order. (For sample precedents, see *Family Law Agreements - Annotated Precedents* (Continuing Legal Education Society of B.C.) and *B.C. Family Practice Manual* (Continuing Legal Education Society of B.C.)
3. prepare *Form P2: Request for Designation as Limited Member*, and deliver it to the administrator with the agreement or court order dividing the benefits. [FLA, ss. 113, 115, Reg., s. 17]
4. the administrator may require payment of an administrative fee. [Reg., s. 13 sets out the maximum amounts that may be charged: \$750 for registering a spouse as a limited member.]
5. provide the spouse with a copy of *Form P4: Request by Limited Member for Transfer of Pension* and advise about the future choice between taking a transfer of commuted value or a separate pension, that may be made on or after the member becomes eligible for pension commencement. [FLA, s. 115, Reg., ss. 24] Also provide spouse with a copy of *Form P8: Change of Information* and emphasize importance of both (a) keeping contact information up to date and (b) making the choice to receive the share before the member's pension commences.

Appendix D

Checklists for Lawyers

[The benefits will be divided by the administrator implementing the spouse's choice to receive either (a) a transfer of a portion of the commuted value of the benefits to, for example, a LIRA, LIF, another pension plan, or used to purchase an annuity [PBSA, s. 88], or (b) a separate pension. The spouse can make this choice when the member becomes eligible for pension commencement. In most cases, the transfer of the commuted value will be locked-in, meaning the funds can't simply be withdrawn, but must be used to provide a life income.]

APPENDIX E

List of Abbreviations

Here is the key to abbreviations used in the Q&A:

BCCA	British Columbia Court of Appeal
BCSC	British Columbia Supreme Court
CRA	Canada Revenue Agency
DB	Defined Benefits
DC Account	Defined Contribution Account
FICOM	Financial Institutions Commission of B.C.
<i>FLA</i>	<i>Family Law Act</i>
<i>FRA</i>	<i>Family Relations Act</i>
IPP	Individual Pension Plan
<i>ITA</i>	<i>Income Tax Act</i>
LIRA	Locked-In Retirement Account
LITB	Life Income Type Benefit
LIF	Life Income Fund
LM	limited member
<i>PBSA</i>	<i>Pension Benefits Standards Act</i>
<i>PBSA Reg.</i>	<i>Pension Benefits Standards Regulation</i>
Q&A	Questions and Answers About Pension Division on the Breakdown of a Relationship in British Columbia
<i>Reg.</i>	<i>Division of Pensions Regulation (under the Family Law Act)</i>
RRIF	Registered Retirement Income Fund
RRSP	Registered Retirement Savings Plan
SPP	Supplemental Pension Plan
WESA	<i>Wills, Estates and Succession Act</i>

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- Condominium Home Owners Association
- Ministry of Natural Gas Development and Responsible for Housing for British Columbia
- Employment and Social Development Canada
- Vancouver Foundation
- Coalition of BC Businesses
- BC Government Employees Union
- Health Employees Union
- Ministry of Jobs, Tourism and Skills Training
- Canadian Network for Prevention of Elder Abuse
- BC Ministry of Health - Council to Reduce Elder Abuse
- eHealth Saskatchewan (Vital Statistics)
- Service New Brunswick (Vital Statistics)
- Statistics Canada
- Government of Nunavut (Vital Statistics)
- Ontario Law Foundation Access to Justice Fund
- Canadian Women's Foundation
- Canadian Human Rights Commission

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