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1822 East Mall  
University of British Columbia  
Vancouver, British Columbia  
Canada V6T 1Z1  
Voice: (604) 822 0142  
Fax: (604) 822 0144  
E-mail: [bcli@bcli.org](mailto:bcli@bcli.org)  
Website: <https://www.bcli.org>

## **Consultation Paper on Pension Division: A Review of Part 6 of the Family Law Act**

**Prepared by the  
Pension Division  
Review Project  
Committee**

supported by:



Ministry of  
Attorney General

**May 2020**

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# British Columbia Law Institute

1822 East Mall, University of British Columbia, Vancouver, BC, Canada V6T 1Z1

Voice: (604) 822-0142 Fax: (604) 822-0144 E-mail: [bcli@bcli.org](mailto:bcli@bcli.org)

WWW: <https://www.bcli.org>

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# Pension Division Review Project Committee

The Pension Division Review Project Committee was formed in 2019 to review the pension-division provisions of the *Family Law Act* and supporting regulations and forms. This project committee is made up of leading experts in pensions and family law in British Columbia. The committee's mandate is to assist BCLI in developing recommendations to reform part 6 of the *Family Law Act*, the *Division of Pensions Regulation*, and prescribed forms. These recommendations will be set out in the project's final report, which is planned to be published in 2020.

The members of the committee are:

Colin Galinski—chair  
*(Principal, Galinski Pension and Benefits Law Corporation)*

Cynthia Callahan-Maureen  
*(Director, Pensions and Personal Property Security, Financial and Corporate Sector Policy Branch, Ministry of Finance for British Columbia)*

Stephen Cheng  
*(Managing Director & Senior Consulting Actuary, Westcoast Actuaries Inc.)*

Pierre-Luc Chénier  
*(Assistant Director, Policy, BC Pension Corporation)*

Stephanie Griffith  
*(Executive Vice President, Bilsland Griffith Benefit Administrators)*

Darryl Hrenyk  
*(Legal Counsel, Family Policy, Legislation and Transformation Division, Ministry of Attorney General for British Columbia)*

Gail Johnson  
*(Risk & Financial Analyst, Pensions, BC Financial Services Authority)*

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Margaret H. Mason, QC  
*(Partner, Norton Rose Fulbright Canada LLP)*

Beatrice C. McCutcheon  
*(Associate Counsel, Cook Roberts LLP)*

Jacqueline G. McQueen  
*(Partner, Aaron Gordon Daykin Nordlinger LLP)*

Michael J. Peters  
*(VP and Deputy Superintendent of Pensions, BC Financial Services Authority)*

Kevin Zakreski (staff lawyer, British Columbia Law Institute) is the project manager.

**For more information, visit us on the World Wide Web at:  
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# Call for Responses

We are interested in your response to this consultation paper. It would be helpful if your response directly addressed the tentative recommendations set out in this consultation paper, but it is not necessary. General comments on pension division under part 6 of the *Family Law Act* are also welcome.

A helpful way to submit a response is to use a response booklet. You may obtain a response booklet by contacting the British Columbia Law Institute or by downloading one at **<https://www.bcli.org/project/16050>**. You do not have to use a response booklet to provide us with your response.

Responses may be sent to us in any one of three ways—

by fax: (604) 822-0144

by email: [pensions@bcli.org](mailto:pensions@bcli.org)

by online survey: link from <https://www.bcli.org/project/16050>

If you want your response to be considered by us as we prepare our report on pension division, then we must receive it by **15 September 2020**.

## Privacy

Your response will be used in connection with the Pension Division Review Project. It may also be used as part of future law-reform work by the British Columbia Law Institute or its internal divisions. All responses will be treated as public documents, unless you expressly state in the body of your response that it is confidential. Respondents may be identified by name, title, and organization in the final report for the project, unless they expressly advise us to keep this information confidential. Any personal information that you send to us as part of your response will be dealt with in accordance with our privacy policy. Copies of our privacy policy may be downloaded from our website at: <https://www.bcli.org/privacy>.



# TABLE OF CONTENTS

<b>Executive Summary .....</b>	<b>xiii</b>
<b>Chapter 1. Introduction.....</b>	<b>1</b>
Why Is BCLI Consulting with the Public on Pension Division? .....	1
About the Public Consultation.....	4
About the Pension Division Review Project.....	5
Project timeline.....	5
Pension Division Review Project Committee.....	5
This project's supporter.....	6
General Approach and Overview of this Consultation Paper .....	6
<b>Chapter 2. The Basics of Pension Division under Part 6 of the Family Law Act..</b>	<b>9</b>
Introduction: The Purpose of this Chapter.....	9
Basic Family-Law Concepts.....	9
Family law and the division of family property.....	9
What triggers the division of family property?.....	10
Part 5's two guiding principles: equality and fairness.....	11
The importance of an agreement or order to property division.....	13
How do pensions fit into this property-division framework?.....	14
The Basics of Pensions.....	14
The purpose of pensions.....	14
Pension regulation and administration.....	15
Kinds of pension plans.....	16
Defined benefit plans.....	16
Defined contribution plans .....	17
Target benefit plans .....	18
An Overview of Pension Division under Part 6 of the Family Law Act.....	19
An introduction to part 6's terminology .....	19
General approach to dividing a pension under part 6 .....	21
Where is the plan located? .....	22
Local plans.....	22
Extraprovincial plans.....	22
Has the plan commenced paying benefits to the member? .....	23
Local plans after pension commencement.....	23
Local plans before pension commencement .....	24
What kind of pension plan is at issue? .....	24
Benefits determined under defined contribution provision .....	24
Benefits determined under benefit formula provision.....	25
Hybrid plans .....	27
Division of other benefits .....	28
Conclusion.....	28

<b>Chapter 3. Transitional Provisions.....</b>	<b>29</b>
Introduction.....	29
Background Information on Transitional Provisions.....	29
The current transitional provisions in the Family Law Act.....	29
Purpose and basic operation of section 253 .....	29
Elements of section 253 .....	31
Transitional provision in the Division of Pensions Regulation.....	32
The full text of the Family Law Act's transitional provision for part 6.....	33
Issues for Reform .....	33
Should a spouse who has only filed a prescribed form under the Family Relations Act be transitioned to the Family Law Act?.....	33
Brief description of the issue .....	33
Discussion of options for reform .....	34
The committee's tentative recommendation for reform .....	35
Should parties who have received a consultation from a plan be transitioned to the Family Law Act?.....	35
Brief description of the issue .....	35
Discussion of options for reform .....	36
The committee's tentative recommendations for reform .....	36
Should an administrator who has been consulted be required to notify the member or spouse that the rule has changed so they don't continue to rely on the outcome of the consultation, that the Family Relations Act applies?.....	38
Brief description of the issue .....	38
Discussion of options for reform .....	38
The committee's tentative recommendation for reform .....	39
<b>Chapter 4. Private Annuities.....</b>	<b>41</b>
Introduction.....	41
Background Information on Private Annuities .....	41
Purpose of the Family Law Act's provision on private annuities.....	41
Elements of the Family Law Act's provision on private annuities.....	41
Issue for Reform .....	45
Should private annuities continue to be divided under part 6 in the same manner as local plans after pension commencement?.....	45
Brief description of the issue .....	45
Discussion of options for reform .....	45
The committee's tentative recommendation for reform .....	46
<b>Chapter 5. Disability Benefits.....</b>	<b>49</b>
Introduction.....	49
Background Information on Disability Benefits .....	49
Purpose of the Family Law Act's provision on disability benefits.....	49
Elements of the Family Law Act's provision on disability benefits.....	50
Issue for Reform .....	52
Is the intention underlying section 122 of the Family Law Act frustrated if the member's disability occurs after the spouse becomes a limited member?.....	52
Brief description of the issue .....	52
Discussion of options for reform .....	52



The committee's tentative recommendation for reform .....	53
<b>Chapter 6. Waiving Survivor Benefits after Pension Commencement.....</b>	<b>55</b>
Introduction .....	55
Background Information on Waiving Survivor Benefits after Pension Commencement.....	56
Purpose of the Family Law Act's provision on waiving survivor benefits after pension commencement .....	56
Elements of the Family Law Act's provision on waiving survivor benefits after pension commencement .....	57
Text of the Family Law Act's provision on waiving survivor benefits after pension commencement .....	58
Issues for Reform .....	59
Should section 126 (2) (a) of the Family Law Act continue to enable a spouse to waive survivor benefits after pension commencement by giving notice in a prescribed form?.....	59
Brief description of the issue .....	59
Discussion of options for reform .....	59
The committee's tentative recommendation for reform .....	60
Should section 126 (2) (b) of the Family Law Act continue to require an explicit reference to this provision of the act in a court order? .....	61
Brief description of the issue .....	61
Discussion of options for reform .....	61
The committee's tentative recommendation for reform .....	61
Should section 126 (3) of the Family Law Act be repealed? .....	62
Brief description of the issue .....	62
Discussion of options for reform .....	62
The committee's tentative recommendation for reform .....	62
<b>Chapter 7. Commuted Value: Transfer and Calculation .....</b>	<b>63</b>
Introduction .....	63
Background Information on Commuted Value .....	63
What is a commuted value? .....	63
Purpose of relevant Family Law Act and Division of Pensions Regulation provisions .....	64
Family Law Act .....	64
Division of Pensions Regulation .....	64
Elements of relevant Family Law Act and Division of Pensions Regulation provisions .....	65
Family Law Act .....	65
Division of Pensions Regulation .....	65
Text of the relevant Family Law Act and Division of Pensions Regulation provisions.....	66
Issues for Reform .....	69
Should the Family Law Act be revised to provide that a pension plan may prohibit a commuted value transfer to a limited member in circumstances where it would be prohibited to a member? .....	69
Brief description of the issue .....	69
Discussion of options for reform .....	69
The committee's tentative recommendation for reform .....	70
Should the valuation date for the calculation of commuted value in cases involving the death of a member set out in the Division of Pensions Regulation be amended to provide for calculation on the day before the death of the member? .....	71
Brief description of the issue .....	71

---

Discussion of options for reform .....	72
The committee's tentative recommendation for reform .....	72
<b>Chapter 8. Locked-In Retirement Accounts and Life Income Funds .....</b>	<b>73</b>
Introduction.....	73
Background Information on Locked-In Retirement Accounts and Life Income Funds .....	73
Meaning of "locked-in" .....	73
Locked-in retirement accounts in pension law .....	73
Life income funds .....	75
Dividing locked-in retirement accounts and life income funds .....	75
Issue for Reform .....	77
Should the Family Law Act be amended to provide that locked-in retirement accounts and life income funds should be divided under part 6? .....	77
Brief description of the issue .....	77
Discussion of options for reform .....	77
The committee's tentative recommendations for reform .....	78
<b>Chapter 9. Death of Spouse Before Becoming Limited Member .....</b>	<b>79</b>
Introduction.....	79
Background Information on Death of Spouse Before Becoming Limited Member .....	79
The scenario: timing and the interaction of family law with wills-and-estates law .....	79
What is the general authority of a personal representative?.....	81
What are a spouse's rights to a share of a pension on separation? .....	82
How does a spouse become a limited member of a pension plan? .....	83
What other provisions in part 6 could have an impact on this scenario? .....	84
Issue for Reform .....	86
Should part 6 of the Family Law Act be amended so that it addresses a scenario when a spouse after separation dies before becoming a limited member and before the pension commences? .....	86
Brief description of the issue .....	86
Discussion of options for reform .....	86
The committee's tentative recommendation for reform .....	87
<b>Chapter 10. Administrative Fees .....</b>	<b>89</b>
Introduction.....	89
Background Information on Administrative Fees .....	89
Purpose of the provisions on administrative fees .....	89
Elements of the legal framework governing administrative fees .....	89
Family Law Act.....	89
Division of Pensions Regulation .....	90
Text of the relevant provisions on administrative fees.....	91
Issues for Reform .....	92
Should the Division of Pensions Regulation be amended to raise the maximum administrative fees? .....	92
Brief description of the issue .....	92
Discussion of options for reform .....	92
The committee's tentative recommendation for reform .....	92

Should section 140 of the Family Law Act be amended to provide that the administrator must deduct administrative fees from the payment of benefits, unless the member or spouse otherwise pay the fee to the administrator? .....	93
Brief description of the issue .....	93
Discussion of options for reform .....	93
The committee's tentative recommendation for reform .....	93
<b>Chapter 11. Forms .....</b>	<b>95</b>
Introduction .....	95
Issues for Reform .....	95
Should Form P1 (Claim and Request for Information and Notice) be revised? .....	95
Text of the form .....	95
The committee's tentative recommendation for reform .....	97
Should Form P2 (Request for Designation as Limited Member) be revised? .....	98
Text of the form .....	98
The committee's tentative recommendation for reform .....	101
Should Form P3 (Request for Transfer from Defined Contribution Account) be revised? .....	101
Text of the form .....	101
The committee's tentative recommendation for reform .....	103
Should Form P4 (Request by Limited Member for Transfer or Separate Pension) be revised? .....	104
Text of the form .....	104
The committee's tentative recommendation for reform .....	106
Should Form P5 (Waiver of Survivor Benefits after Pension Commencement) be revised? .....	106
Text of the form .....	106
The committee's tentative recommendation for reform .....	109
Should Form P6 (Administrator/Annuity Issuer Response) be revised? .....	109
Text of the form .....	109
The committee's tentative recommendation for reform .....	111
Should Form P7 (Withdrawal of Notice/Waiver of Claim) be revised? .....	112
Text of the form .....	112
The committee's tentative recommendation for reform .....	114
Should Form P8 (Change of Information) be revised? .....	115
Text of the form .....	115
The committee's tentative recommendation for reform .....	116
Should Form P9 (Agreement to Have Benefits Divided under Part 6) be revised? .....	117
Text of the form .....	117
The committee's tentative recommendation for reform .....	120
<b>Chapter 12. Extension of the Rule Providing for No Further Entitlement after Division of Benefits .....</b>	<b>121</b>
Introduction .....	121
Background Information on the Rule Providing for No Further Entitlement after Division of Benefits .....	122
Scenarios .....	122
Spouse becomes limited member of federally regulated defined benefit plan before the pension commences .....	122
Spouse becomes limited member of federally regulated defined benefit plan after the pension commences .....	123

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## Consultation Paper on Pension Division: A Review of Part 6 of the Family Law Act

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British Columbia member of a plan regulated under Ontario law.....	123
Purpose of section 145 of the Family Law Act .....	125
Elements of section 145 of the Family Law Act .....	126
The full text of section 145 of the Family Law Act.....	127
Issue for Discussion.....	129
Should British Columbia's rule providing for no further entitlement after division of benefits be extended to pensions regulated under federal legislation and legislation in force in other provinces? .....	129
<b>Chapter 13. Conclusion .....</b>	<b>131</b>
<b>Appendix A—List of Tentative Recommendations .....</b>	<b>133</b>
<b>Appendix B—Biographies of Project-Committee Members.....</b>	<b>141</b>
<b>Principal Funders in 2019 .....</b>	<b>147</b>

# EXECUTIVE SUMMARY

## The subject of the consultation paper

When a spousal relationship breaks down, the separating spouses are often faced with trying emotional, financial, and legal issues. This consultation paper is concerned with one set of legal issues that may arise from the breakdown of a spousal relationship. These legal issues involve the division of a pension between the separating spouses.

British Columbia has had pension-division legislation in force since July 1995. It has generally worked well, fulfilling its purpose to provide British Columbia with a comprehensive and detailed set of rules on pension division, largely sparing the courts from having to settle, in litigation, issues that call for specialized expertise. Part of the success of this legislation can be attributed to the fact that it has been regularly reviewed and improved, to keep pace with developments in family and pension law.

The latest version of British Columbia's pension-division legislation is found in part 6 of the *Family Law Act*. This legislation has been in force since March 2013. There have been some significant developments in family and pension law since that time. The time is ripe for another review of pension-division legislation.

This consultation paper contains that review. It has found that the legislation is still working well in general. But specific areas can be improved. These improvements are set out in the consultation paper's 25 tentative recommendations for reform.

The underlying purpose of this consultation paper is to give the public an opportunity to comment on these tentative recommendations. BCLI is interested in hearing from all perspectives on its proposals for reforming pension division. Public comment is an important part of the law-reform process. It can have a major impact on the development of a project's final recommendations. To ensure that your comments are considered when the final recommendations for this project are being formulated, BCLI must receive them by **15 September 2020**.

## About the Pension Division Review Project

BCLI began the Pension Division Review Project in January 2019. The mandate of the project is to review part 6 of the *Family Law Act*, its allied regulation (the *Division of Pensions Regulation*), and the prescribed forms used in pension division, and

to make recommendations for any improvements to part 6, the regulation, and the forms.

The bulk of time in the project in 2019 was spent considering the current law and developments in family and pension law in the seven years since part 6 came into force, identifying issues for reform, evaluating options to address these issues, and formulating tentative recommendations for reform. The project is now focused on consulting with the public. Once the consultation period closes, the project will move on to considering the responses it has received from the public and developing recommendations for reform for the project's final report. This final report is projected for publication later in 2020.

## **The project committee and the project's supporter**

In carrying out this project, BCLI has had the assistance of the Pension Division Review Project Committee. This 12-person, expert project committee is made up of leading lawyers, actuaries, public- and private-sector pension administrators, and public officials. The committee's role is to assist BCLI in developing recommendations for this project.

This project has been made possible by funding from the Justice Services Branch, Ministry of Attorney General for British Columbia.

## **Content of the consultation paper**

### *The organization of the consultation paper*

The consultation paper is organized into 13 chapters. The bulk of these chapters is taken up with discussing tentative recommendations for reform in the nine areas of part 6, the regulation, and forms which the committee identified as areas for improvement.

### *Introduction and the basics of pension division*

The consultation paper begins with a brief introductory chapter, which sets out the subject and goals for this project and provides an overview of the chapters that follow.

Chapter 2 contains a high-level discussion of basic concepts in family and pension law. The chapter begins by reviewing property division for separating spouses under the *Family Law Act*. Then it discusses some of the special features of pensions, which include long timelines, the presence of administrators, and the variety of kinds of plans. These special features justify a distinct part of the *Family Law Act*,

which is dedicated just to the division of pensions. This part is part 6. The chapter concludes by describing the highlights of how pension division is carried out under part 6.

### *Transitional provisions*

The next chapter begins a series of nine chapters that are focused on tentative recommendations for reform.

The general approach to transitions under part 6 is to favour transitioning cases to the new *Family Law Act*. This general approach is qualified by a handful of special rules, which serve to keep some cases under the old *Family Relations Act*.

The committee tentatively recommended rethinking two of these special rules. In its view, a case involving a spouse who has only filed a prescribed form under the *Family Relations Act* should be transitioned to the *Family Law Act*. The committee also tentatively recommended revising the special transitional rule that applies to spouses who have received a consultation from a plan administrator, so that these cases are transitioned to the *Family Law Act*.

### *Private annuities*

Part 6 of the *Family Law Act* has a section that applies to privately purchased annuities. In effect, this section provides that these private annuities should be divided using the same rules that apply to the division of benefits after pension commencement.

The committee noted that there are difficulties with this section. In particular, it relies on a close association between annuities and pensions. It can be difficult to apply rules based on this assumption in practice, because annuities can lack the temporal element of pensionable service that is integral to pensions.

In view of this consideration, the committee tentatively recommended a new and more nuanced approach to private annuities. This approach would turn on whether the annuity is in pay when it is being divided. If it is in pay, then it should be divided under part 6. If it isn't, then the division should take place under the general provisions on property division found in part 5 of the *Family Law Act*.

### *Disability benefits*

The committee tentatively recommended a small improvement to part 6's approach to the division of disability benefits. The improvement would ensure that the limited member retains an option to begin receiving a share of the pension benefits, even

though the member is receiving disability benefits. The tentative recommendation addresses a scenario such as the following: a spouse becomes a limited member at a time when the member isn't disabled and no one contemplates the member becoming disabled. By the terms of the plan, the member is entitled to begin receiving a pension at age 55. But the member does, in fact, become disabled and begins receiving disability benefits. As a result, the member now won't receive pension benefits until age 65. The committee's tentative recommendation would ensure that a limited member in this case could opt to receive a share of the benefits when the member turns 55, rather than having to wait until the member actually receives those benefits at age 65.

### *Waiving survivor benefits after pension commencement*

The committee has tentatively recommended changes to how part 6 deals with a spouse's ability to waive survivor benefits after pension commencement. Part 6 of the *Family Law Act* tightened the law on this topic, and introduced a dedicated prescribed form, but still some confusion persists. In the committee's view, part 6 could be improved if it referred to "assigning" rather than "waiving" the survivor benefit, because this would more accurately reflect the fact that the survivor benefit is actually the spouse's property. In addition, the committee favours requiring spouses to work out the legal and tax issues inherent in such an assignment in an agreement or a court order. These issues are too complex to be dealt with in a prescribed form, so the committee tentatively recommended repealing the form.

### *Commuted value: transfer and calculation*

The committee made two tentative recommendations touching on commuted value.

The first tentative recommendation was intended to make it clear that a spouse's options on the transfer of the commuted value of a pension benefit must mirror the options available to the member under the plan.

The second tentative recommendation was intended to correct an anomaly in which interlocking provisions in the *Family Law Act* and the *Division of Pensions Regulation* use different dates in the calculation of commuted value, in cases involving the death of a member.

### *Locked-in retirement accounts and life income funds*

Locked-in retirement accounts and life income funds are currently divided under part 5 of the *Family Law Act*, even though they have features that align them with pensions. The committee tentatively recommended amending part 6 to allow for the division of locked-in retirement accounts and life income funds. The committee also



tentatively recommended that the rules applicable to division of benefits under the transferring pension plan apply to the locked-in retirement account or life income fund.

### *Death of a spouse before becoming a limited member*

The committee tentatively recommended an amendment to part 6 to deal with a scenario in which a spouse dies before becoming a limited member. Pension division involves a right arising at one point in time (upon the separation of spouses) and then further steps being required to perfect that right (such as negotiating an agreement, obtaining a court order, or filing a form). The time that passes before the right can be perfected creates the possibility that the spouse will pass away before completing the steps necessary to divide a pension by becoming a limited member. The committee proposes a clarifying amendment to part 6, confirming that a personal representative has the power to take the steps needed to perfect the right.

### *Administrative fees*

The committee made two tentative recommendations on administrative fees.

First, the committee tentatively recommended raising the maximum administrative fee for registering the spouse as a limited member of the plan from \$750 to \$1 000 and raising the maximum administrative fee for transferring a proportionate share of the member's defined contribution account to the credit of the spouse from \$175 to \$200.

Second, the committee recognized that administrative fees can sometimes be a barrier to spouses completing the pension-division process. Part 6 recognizes this point and addresses it with an enabling provision, allowing an administrator to deduct the fee from the payment of benefits. The committee proposed converting this enabling provision into a default rule. This would mean that the fee must be deducted from the payment of benefits, unless the parties agree to some other arrangement for its payment.

### *Forms*

The committee tentatively recommended numerous improvements to the language of the prescribed forms.

*Extension of the rule providing for no further entitlement after division of benefits*

The committee considered one issue for discussion. This issue involved potentially extending a rule in part 6 that provides a spouse has no further entitlement to pension benefits after the division of the pension. This rule doesn't apply if the pension at issue is federally regulated or is regulated under the laws of another province. The committee decided that it couldn't address this issue within its mandate, so it didn't make a tentative recommendation concerning it. But it did include a discussion of it in this consultation paper, to highlight the issue and to urge organizations with a mandate that enables them to address this issue to consider adding it to their plans for law reform.

*Conclusion*

The consultation paper ends with a brief concluding chapter, summing up the tentative recommendations and issue for discussion.

**Conclusion**

BCLI encourages readers to respond to this consultation paper. Readers' responses assist the committee in crafting the final recommendations for reform for the Pension Division Review Project.

## Chapter 1. Introduction

### Why Is BCLI Consulting with the Public on Pension Division?

When a married or an unmarried spousal relationship breaks down, the *Family Law Act* provides that the “spouses are both entitled to family property and responsible for family debt, regardless of their respective use or contribution.”<sup>1</sup> The act sets out a framework for managing legal issues that may arise as the spouses attempt to untangle and divide their financial interests in family property.

“Family property” is given an expansive definition under the act.<sup>2</sup> It expressly includes “a spouse’s entitlement under an annuity, a pension plan, a retirement savings plan or an income plan.”<sup>3</sup> For many couples, these pension benefits are among the most valuable items of family property.<sup>4</sup>

In the late 1990s an Ontario judge lamented, “I confess that there is one word which, given the choice, I would prefer not to hear in a matrimonial proceeding: ‘pension.’”<sup>5</sup> This comment reflects a view that “the division of pensions can raise many complex questions,”<sup>6</sup> which lawyers and judges (who lack specialized training in pension administration and actuarial science)<sup>7</sup> and the legal system generally

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1. SBC 2011, c 25, s 81 (a).
  2. See *ibid*, s 84 (1) (“Subject to section 85 [excluded property], family property is all real property and personal property as follows: (a) on the date the spouses separate, (i) property that is owned by at least one spouse, or (ii) a beneficial interest of at least one spouse in property; (b) after separation, (i) property acquired by at least one spouse if the property is derived from property referred to in paragraph (a) (i) or from a beneficial interest referred to in paragraph (a) (ii), or from the disposition of either, or (ii) a beneficial interest acquired by at least one spouse in property if the beneficial interest is derived from property referred to in paragraph (a) (i) or from a beneficial interest referred to in paragraph (a) (ii), or from the disposition of either.” [bracketed text in original]).
  3. *Ibid*, s 84 (2) (e).
  4. See *Rutherford v Rutherford* (1981), 127 DLR (3d) 658, 30 BCLR 145 at 149 (CA), Seaton JA (“For many families the pension plan is the most important saving.”); David L Baumer & J C Poindexter, “Women and Divorce: The Perils of Pension Division” (1996) 57:1 Ohio St LJ 203 at 203–204 (“For most families, the two most valuable marital assets are equity in the family home and the marital component of a pension plan or plans.” [footnote omitted]).
  5. *Iurincic v Iurincic* (1998), 40 RFL (4th) 258 at para 1, [1998] OJ No 2197 (QL) (Gen Div), Quinn J.
  6. *Best v Best*, [1999] 2 SCR 868 at para 2, 174 DLR (4th) 235, Major J.
  7. See Law Reform Commission of British Columbia, *Report on Division of Pension on Marriage*
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(which addresses these issues through adversarial proceedings in courts)<sup>8</sup> aren't particularly well-placed to resolve.

British Columbia has dealt with this concern by enacting a comprehensive legal framework consisting of detailed legislation and regulations that applies to the division of pensions on the breakdown of a spousal relationship.<sup>9</sup> BCLI and its predecessor, the Law Reform Commission of British Columbia, have been directly involved in the development of this legal framework since its inception.

In 1992, the law reform commission published its *Report on Division of Pensions on Marriage Breakdown*.<sup>10</sup> The LRC Report concluded that "[a] significant defect of the current law is that it requires economic and actuarial issues to be resolved through litigation."<sup>11</sup> To remedy this defect, the commission recommended reforms "to fashion legislation in which the fundamental problems of pension division have been worked out in advance, and which will operate in a fair and straightforward manner

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*Breakdown*, Report 123 (1992), online: <[www.bcli.org/sites/default/files/LRC123-Division\\_of\\_Pensions\\_on\\_Marriage\\_Breakdown.pdf](http://www.bcli.org/sites/default/files/LRC123-Division_of_Pensions_on_Marriage_Breakdown.pdf)> at 43 ("Legal training does not provide much insight into how pensions operate, or how to value them.") [LRC Report; page numbers refer to pages in the printed, as opposed to online, version of the LRC Report].

8. See *ibid* at 68 ("few people, including judges and lawyers, feel comfortable dealing with the intricacies of pension division and B.C. case law is riddled with inconsistent decisions as a result").
9. This consultation paper deliberately uses the terms *spouse* and *spousal relationship* in place of more familiar, traditional terms such as *wife*, *husband*, and *marriage*. This choice of terms reflects some assumptions that are built into the *Family Law Act* and that might not be familiar to people without training in family law. The first point to note is that the *Family Law Act* considers the term *spouse* to "[include] a former spouse" (*supra* note 1, s 3 (2)). Throughout this consultation paper, people at various points in the process of dissolving their spousal relationship—from separation through to divorce and beyond—are referred to simply as *spouses*. Using the word in this way only makes sense if the *Family Law Act*'s specialized meaning of the term is borne in mind. Second, under the *Family Law Act* a *spousal relationship* includes both married and unmarried couples. As the act puts it, "[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" (*ibid*, s 3 (1)) [bracketed text in original]. (Since this consultation paper's focus is on parts 5 and 6 of the act, that qualifier in paragraph (b) (ii) is significant—an unmarried relationship is only a spousal relationship in this consultation paper if the relationship has lasted for at least two years, whether or not the couple has had children.) So when this consultation paper refers to a couple as being in *spousal relationship*, the reference is intended to be consistent with the *Family Law Act*'s expanded sense of this concept. For these reasons, this consultation paper avoids using *wife*, *husband*, and *marriage* (and their derivatives) as general, descriptive terms—except when it is quoting from another source and that source uses those terms.
10. *Supra* note 7.
11. *Ibid* at v.

without the need for extensive actuarial and legal advice.”<sup>12</sup> The report included “extensively annotated draft legislation which provides a comprehensive structure for dividing all forms of pension entitlement.”<sup>13</sup>

The LRC Report was substantially implemented by amendments<sup>14</sup> to what was at the time British Columbia’s main family-law statute, the *Family Relations Act*.<sup>15</sup> These amendments added a new part to that act, a part dedicated solely to tackling pension division. This part of the *Family Relations Act* came into force on 1 July 1995.<sup>16</sup>

In 2006, BCLI published its report *Pension Division on Marriage Breakdown: A Ten Year Review of Part 6 of the Family Relations Act*.<sup>17</sup> The goal of the BCLI 2006 Report was to examine developments in the 10 years that followed the coming into force of pension-division legislation and “to make recommendations . . . concerning legislative amendments that may be necessary for its improvement.”<sup>18</sup> While the BCLI 2006 Report found that overall “Part 6 works extremely well,”<sup>19</sup> it did make 36 specific recommendations for reform.<sup>20</sup>

The bulk of these recommendations were implemented when British Columbia, in a major exercise in family-law reform, repealed the *Family Relations Act* and enacted the *Family Law Act*.<sup>21</sup> The *Family Law Act*, including part 6 (which is dedicated to pension division), came into force on 18 March 2013.<sup>22</sup>

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12. *Ibid*.

13. *Ibid* at vi.

14. See *Family Relations Amendment Act, 1994*, SBC 1994, c 6, s 8 (adding part 3.1 to the act).

15. RSBC 1996, c 128 [repealed]. Part 3.1 became part 6 of the act in the 1996 statute revision.

16. See BC Reg 77/95 [repealed].

17. Report 44 (2006), online: <[www.bcli.org/sites/default/files/Pension\\_Division\\_Review\\_FRA\\_Part\\_6.pdf](http://www.bcli.org/sites/default/files/Pension_Division_Review_FRA_Part_6.pdf)> [perma.cc/UH5H-N8EV] [BCLI 2006 Report].

18. *Ibid* at 1–2.

19. *Ibid* at 3.

20. The BCLI 2006 Report distinguished between major recommendations (“a necessary change, addressing fundamental questions of policy, or technical problems with the mechanics of pension division”) and housekeeping (“clarifying an ambiguity, confirming current practice, or correcting an oversight in the original legislation, but where the recommendation is consistent with current policy”) (*ibid* at 7). The report contained 7 major recommendations and 29 housekeeping recommendations.

21. *Supra* note 1.

22. See BC Reg 131/2012.

The price of enacting a legislative framework for pension division is vigilance about the operation of the legislation. As the LRC Report noted, legislation “must, necessarily, be monitored over the initial years to ensure that it operates fairly and sensibly and that the goals of reform are met.”<sup>23</sup> And the BCLI 2006 Report pointed to the importance of pension-division legislation keeping pace with “[t]he background of law and practice against which Part 6 operates.”<sup>24</sup>

Seven years have passed since the advent of part 6 of the *Family Law Act*. The act was a major change in family law, bringing about a host of reforms to pension division and to family law generally. During these seven years, pension practices and law have also evolved, including the coming into force of a new *Pension Benefits Standards Act*.<sup>25</sup>

BCLI intends this consultation paper to be another step in the development and reform of the legal framework for pension division. In its view, the time is ripe again to consider what changes are needed to improve that legal framework.<sup>26</sup>

## About the Public Consultation

The backbone of this public consultation is this consultation paper’s 25 tentative recommendations for reform. These tentative recommendations address a range of subjects, proposing reforms to part 6 of the *Family Law Act*,<sup>27</sup> the *Division of Pensions Regulation*,<sup>28</sup> and the prescribed forms under part 6.<sup>29</sup>

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23. *Supra* note 7 at vi.

24. *Supra* note 17 at “introductory note.”

25. SBC 2012, c 30 [in force 30 September 2015].

26. In addition to law-reform work on pension division, BCLI and the Law Reform Commission of British Columbia have also contributed to legal information and education about pension division through four editions of a questions-and-answers publication. For the most recent edition, see British Columbia Law Institute, *Questions and Answers about Pension Division on the Break-down of a Relationship in British Columbia*, 4th ed, Study Paper 8 (2017), online: <[www.bcli.org/wordpress/wp-content/uploads/2017/03/March-2017-Questions-and-Answers-on-Pension-Division-Final.pdf](http://www.bcli.org/wordpress/wp-content/uploads/2017/03/March-2017-Questions-and-Answers-on-Pension-Division-Final.pdf)> [perma.cc/8642-LKD3] [BCLI Q&A].

27. *Supra* note 1.

28. BC Reg 348/2012.

29. See *ibid*, Forms P1–P9.

Tentative recommendations are meant to be highly specific statements of policy. In many cases, they propose detailed changes in wording to a provision or form. They are intended to give the public the clearest and fullest picture of potential reforms.

BCLI invites all members of the public to comment on the tentative recommendations for reform in this consultation paper. Responses agreeing and disagreeing with tentative recommendations are equally valued, as BCLI wishes to hear from all perspectives on its proposed reforms. In addition to comments on specific tentative recommendations, BCLI will also accept general comments on pension division under part 6 of the *Family Law Act*.

Responses must be in writing and may be sent to BCLI by a variety of means.<sup>30</sup> If you want your response to be considered as BCLI develops the final recommendations for this project, then BCLI must receive it by **15 September 2020**.

## About the Pension Division Review Project

### Project timeline

BCLI began the Pension Division Review Project in January 2019. The project's main concerns in 2019 were research, issue identification, consideration of options for reform, and the development of tentative recommendations.

With the publication of this consultation paper, the project moves into its next phase, which consists of a four-month consultation period. Once this consultation period closes, responses will be reviewed and work will begin on the final phase of the project, which involves the formulation of final recommendations and the publication of a final report. This report's publication is projected for late 2020.

### Pension Division Review Project Committee

In developing its tentative recommendations for this project, BCLI has had the assistance of the Pension Division Review Project Committee. This 12-person committee includes many of the leading lights on pension division in British Columbia, including members of the legal and actuarial professions, as well as public- and private-sector pension administrators and representatives from government ministries and oversight bodies.<sup>31</sup>

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30. See, above, at the unnumbered fourth page of this consultation paper, headed "Call for Responses," for more detail on how to respond to this consultation paper.

31. See, below, appendix B to this consultation paper, at 141–146, for biographies of project-committee members.

## **This project's supporter**

The Pension Division Review Project was made possible by funding from the Justice Services Branch, Ministry of Attorney General for British Columbia.

## **General Approach and Overview of this Consultation Paper**

The committee began this project with a mandate to review part 6, the *Division of Pensions Regulation*, and the prescribed forms. In short order, it concluded that this legal framework is generally working well and doesn't call for root-and-branch reform. The committee then focused its attention on the details of this framework, identifying areas that could be improved. These areas form the subject of the bulk of this consultation paper; they represent chapters 3 through 11.

The focal points of these chapters of the consultation paper are the committee's 25 tentative recommendations for reform. These tentative recommendations are intended to address specific legal issues within the following subject areas:

- part 6's transitional provisions;
- private annuities;
- disability benefits;
- waiving survivor benefits after pension commencement;
- commuted value of a pension benefit: transfer and valuation;
- locked-in retirement accounts and life income funds;
- the death of a spouse before that spouse becomes the limited member of a pension plan;
- administrative fees; and
- prescribed forms.

Issues under these subjects are taken up in a consistent fashion. First, some background information about the development of the current law applying to the subject is set out. This information is followed by a brief statement of the issue for reform. Then, there is discussion of various options that the committee considered in addressing the issue for reform. This discussion is largely taken up in noting the ad-



vantages and disadvantages of adopting an option for reform. Finally, the committee makes its tentative recommendation for reform of the issue.

The consultation paper also contains one issue for discussion (in chapter 12), concerning the possible extension of a provision in part 6 that restricts a spouse from receiving any further benefits after the pension has been divided. Ultimately, the committee decided that it couldn't make any tentative recommendations within its mandate that would effectively address this issue, because the issue has extraterritorial elements. The committee did think it was worthwhile to draw attention to this issue, which could be effectively addressed by organizations that do have a mandate to consider reforms to federal legislation and legislation in provinces outside British Columbia.

Before tackling these subjects, the consultation paper begins (in the next chapter) with a summary of important pension and family-law terms and concepts.



## Chapter 2. The Basics of Pension Division under Part 6 of the Family Law Act

### Introduction: The Purpose of this Chapter

This chapter gives readers a high-level overview of some foundational concepts for pensions and family law. It's aimed at readers who may not be familiar with these areas. The goal is to give these readers general information that forms a backdrop to the specific legal issues and tentative recommendations for reform that appear in the chapters that follow. Because this chapter is intended as a prelude for a discussion of specific law-reform topics, it necessarily excludes a lot of detail that may be relevant to readers who want to gain a comprehensive understanding of pensions and family law or who want to analyze a specific legal issue arising in practice. There are other publications that tackle these subjects, such as the BCLI Q&A on pension division<sup>32</sup> and the *Family Law Sourcebook*.<sup>33</sup>

### Basic Family-Law Concepts

#### Family law and the division of family property

Family law concerns the responsibilities that spouses have to one another and (if the spouses have reproduced) that parents have to their children. Just as family occupies a large and important area in an individual's life, family law covers a vast and significant area of the law. As an illustration of family law's range, consider the subjects addressed by the *Family Law Act*, which include parentage,<sup>34</sup> care and time with children,<sup>35</sup> child and spousal (financial) support,<sup>36</sup> and protection from family violence.<sup>37</sup>

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32. See *supra* note 26.

33. See Canadian Bar Association, British Columbia Branch, Family Law Section & Continuing Legal Education Society of British Columbia, eds, *Family Law Sourcebook for British Columbia: A Project of the Vancouver Family Law Section, British Columbia Branch, Canadian Bar Association*, 3rd ed (Vancouver: Continuing Legal Education Society of British Columbia, 2003) (loose-leaf 2019 update).

34. See *supra* note 1, part 3 (ss 20–36).

35. See *ibid*, part 4 (ss 37–80).

36. See *ibid*, part 7 (ss 146–174).

37. See *ibid*, part 9 (ss 182–191).

While the *Family Law Act* does address issues that arise when a family is formed and that may occur over the course of a family's existence, much of it is concerned with the consequences of a family's breakup. This consultation paper is wholly taken up with one issue of family law, which has developed to address one of those consequences. This branch of the law governs how to divide property between separating spouses.

The *Family Law Act* contains a dedicated part that addresses property division. This is part 5 of the act, which contains general rules as well as provisions addressing topics such as how to determine family property and family debt and how to divide family property and family debt.<sup>38</sup>

Part 5 of the *Family Law Act* defines *family property* expansively.<sup>39</sup> Effectively, family property is whatever isn't excluded property. Determining excluded property is a complex task. Fortunately, this consultation paper doesn't need to take up this task, because pensions are clearly family property.

## What triggers the division of family property?

Part 5 of the *Family Law Act* provides for a "single trigger event" that "defines the scope of the . . . property to be divided."<sup>40</sup> This event is "the date of separation."<sup>41</sup> When spouses separate, on the date of that 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."<sup>42</sup>

Part 5 doesn't define *separation*. It only goes so far as to tell readers when a certain combination of facts means that spouses haven't separated ("spouses are not considered to have separated if, within one year after separation, (a) they begin to live

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38. See *ibid*, part 5 (ss 81–109). Note that owing "family debt" is simply the flip side to owning "family property." If a family has debts in addition to owning property, and if the spousal relationship breaks down, then the process of property division includes dividing responsibility for debts between the spouses.

39. See *ibid*, s 84 (1).

40. British Columbia, Ministry of Attorney General, "The Family Law Act Explained" (last visited 21 March 2019), online (pdf): *Government of British Columbia* <[www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/legislation-policy/fla/notes-binder.pdf](http://www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/legislation-policy/fla/notes-binder.pdf)> [perma.cc/86CD-RSWD] [Ministry Transition Guide] at s 81.

41. *Ibid*. The importance of the date of separation explains why the definition of family property is set up as a double-provision, with specific rules applying "(a) on the date the spouses separate" and "(b) after separation" (see *Family Law Act*, *supra* note 1, s 84 (1)).

42. *Supra* note 1, s 81 (b).

together again and the primary purpose for doing so is to reconcile, and (b) they continue to live together for one or more periods, totalling at least 90 days”).<sup>43</sup>

This approach isn’t surprising, since determining whether and when spouses have separated involves a careful examination of the individual facts in a specific case. It would be difficult for a legislative provision to spell out a single rule that captures all of the factual variation that occurs in real life.

If there is a legal issue concerning separation, and the spouses can’t agree how to resolve it, then it falls to the court to settle the issue. Judges dealing with disputes over separation have set out some considerations that tend to be applied in these cases. The key consideration is the intention to separate and bring the spousal relationship to an end, which may be formed in a legally effective way even if the spouses remain physically together at the same residence.<sup>44</sup> It isn’t necessary for both parties to form this intention or agree to separate; it’s sufficient if one spouse forms the intention.<sup>45</sup> That said, “the party wishing to separate must take some action consistent with that intention.”<sup>46</sup> In seeking to discern “some action consistent with that intention,” courts look for “various objective indicia of the parties’ intention to live separate and apart,” such that “[t]he analysis focuses on the generally accepted characteristics of a marriage, including the intention to remain married, sexual relations, activities carried on in public, sharing of financial resources, and sharing significant family events.”<sup>47</sup>

## Part 5’s two guiding principles: equality and fairness

If spouses have separated, then part 5 provides them with a legal framework that governs the orderly division of family property. This legal framework contains a fair amount of detail, which is important for its application to actual cases. But for readers who want to grasp part 5 at a high level, it’s necessary to pay some heed to the two principles that form the foundation of this legal framework: equality and fairness.

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43. *Ibid*, s 83 (1).

44. See *Ishebab v Temu*, 2015 BCSC 1321 at para 38, Jenkins J (“In order for a couple to ‘separate,’ there must be an intention of at least one of the parties to terminate their relationship as a married couple. Couples can separate but still live under the same roof but there must be an intention to bring the relationship to an end.”). See also *Family Law Sourcebook*, *supra* note 33 at § 4.4.

45. See *Cole v Cole*, 2016 BCSC 716 at para 30, Voith J (“A meeting of the minds, or a shared mutual intention to separate, is also not required.”).

46. *Ibid* [citations omitted].

47. *Ibid* at para 31 (quoting *Sachdeva v Sachdeva*, 2013 BCSC 313 at para 87).

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Equality—in the sense of “equal entitlement and responsibility”<sup>48</sup>—is “the starting point and rationale underlying the division of family property regime.”<sup>49</sup> Equality “provides that, subject to any agreement or order, spouses are both entitled to family property and responsible for family debt regardless of their respective use or contribution.”<sup>50</sup> Under this principle of equality, the starting place for property division is that “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.”<sup>51</sup>

Even though equality is the starting place for property division under part 5, an equal division of family property isn’t necessarily going to be the result in any specific case. This is because the spouses may reach that result by way of an agreement they craft or a court order. But, although part 5 allows departures from equality, it doesn’t offer a free hand to depart from that principle. This is because part 5 is set up in a way that also emphasizes the importance of fairness in dividing family property.

Part 5 takes a very specific approach to this principle of fairness. When it comes to agreements between spouses, it’s important to note that part 5 doesn’t simply tell the courts to review agreements for their fairness. Instead, part 5 gives the court the power to set aside agreements respecting property division in specific circumstances, which aim first to root out procedural flaws.<sup>52</sup> (The word *fairness* doesn’t even appear in this provision.) But, even in the absence of these procedural flaws, an agreement may be set aside if it is “significantly unfair,” with regard to listed criteria.<sup>53</sup>

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48. *Family Law Act*, *supra* note 1 s 81 (heading).

49. Ministry Transition Guide, *supra* note 40 at s 81.

50. *Ibid.*

51. *Family Law Act*, *supra* note 1, s 81 (b). *Family debt* is defined in part 5 to “[include] all financial obligations incurred by a spouse (a) during the period beginning when the relationship between the spouses begins and ending when the spouses separate, and (b) after the date of separation, if incurred for the purpose of maintaining family property” (*ibid*, s 86).

52. See *ibid*, s 93 (3) (“On application by a spouse, the Supreme Court may set aside or replace with an order made under this Part all or part of an agreement described in subsection (1) only if satisfied that one or more of the following circumstances existed when the parties entered into the agreement: (a) a spouse failed to disclose significant property or debts, or other information relevant to the negotiation of the agreement; (b) a spouse took improper advantage of the other spouse’s vulnerability, including the other spouse’s ignorance, need or distress; (c) a spouse did not understand the nature or consequences of the agreement; (d) other circumstances that would, under the common law, cause all or part of a contract to be voidable.”).

53. *Ibid*, s 93 (5) (“Despite subsection (3), the Supreme Court may set aside or replace with an order

Part 5 also tries to mediate between these concepts of equality and fairness. Its approach to this issue is broadly similar to the approach described in the preceding paragraph. Instead of making a simple, flat declaration that fairness prevails over equality, part 5 uses the negative language of avoiding “significant unfairness.” Specifically, part 5 empowers the British Columbia Supreme Court to “order an unequal division of family property or family debt, or both, if it would be significantly unfair to (a) equally divide family property or family debt, or both, or (b) divide family property as required under Part 6 [*Pension Division*].”<sup>54</sup>

### The importance of an agreement or order to property division

Part 5 is set up such that “a division of property or debt is finalized by agreement or court order.”<sup>55</sup> It specifically provides that “spouses may make agreements respecting the division of property and debt, including agreements to do one or more of the following”:

- divide family property or family debt, or both, and do so equally or unequally;
- include as family property or family debt items of property or debt that would not otherwise be included;
- exclude as family property or family debt items of property or debt that would otherwise be included;
- value family property or family debt differently than it would be valued under section 87 [*valuing family property and family debt*].<sup>56</sup>

Part 5 is meant to encourage spouses to settle property division by an agreement. But if the spouses fail to come to an agreement on dividing property (or an item of property), then the court may make an order on property division “on application by a spouse.”<sup>57</sup> In addition, the court has a limited jurisdiction to set aside agreements, as discussed in the previous section in relation to the concept of fairness.

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made under this Part all or part of an agreement if satisfied that none of the circumstances described in that subsection existed when the parties entered into the agreement but that the agreement is significantly unfair on consideration of the following: (a) the length of time that has passed since the agreement was made; (b) the intention of the spouses, in making the agreement, to achieve certainty; (c) the degree to which the spouses relied on the terms of the agreement.”).

54. *Ibid*, s 95 (1) [bracketed text in original]. Section 95 goes on to provide a lengthy list of items for a court to consider in applying this power (see *ibid*, s 95 (2)).

55. Ministry Transition Guide, *supra* note 40 at part 5, division 3.

56. *Supra* note 1, s 92.

57. *Ibid*, s 94 (1).

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## How do pensions fit into this property-division framework?

Pensions are clearly family property. This point can be made with confidence by recalling that part 5 contains a list of items of property that are declared to be family property.<sup>58</sup> This list includes “a spouse’s entitlement under an annuity, a pension plan, a retirement savings plan or an income plan.”<sup>59</sup>

But, even though pensions are family property, they aren’t actually divided under part 5. All part 5 does is include pensions within the concept of family property, which is significant because it means that pensions are subject to division under the *Family Law Act*. But the mechanics of that division take place under a different part of the act. This is part 6, a part dedicated solely to pension division.

All this raises the question why pensions, alone among items of property, are singled out for this special treatment. The answers to this question, which have been given since before the advent of part 6, are that pensions are a special kind of property, that trying to apply to them general rules developed primarily in relation to other kinds of property will lead to frustration and protracted litigation, and that it’s therefore necessary to apply a special body of rules to pension division.<sup>60</sup> These answers may leave readers wondering about those special qualities that pensions possess. They are the subject of the next part of this chapter.

## The Basics of Pensions

### The purpose of pensions

There are 663 pension plans registered in British Columbia, collectively with 1 118 000 members and total assets of \$161.4 billion.<sup>61</sup> These pensions exist “because they serve an important social purpose: they provide income on retirement.”<sup>62</sup>

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58. See, above, at 9–10.

59. *Supra* note 1, s 84 (2) (e).

60. See LRC Report, *supra* note 7 at 1 (“British Columbia law regards a pension as being just as much a family asset as the matrimonial home. A pension, however, is not as easy to divide as most other assets.” [footnote omitted]); BCLI 2006 Report, *supra* note 17 at “Introductory Note” (“a pension is a very complex form of asset which requires a sophisticated body of rules if it is to be divided fairly”).

61. See Financial Institutions Commission of British Columbia, *Report on Pension Plans Registered in British Columbia* (September 2019), online: <[www.bcfsa.ca/pdf/pensionplans/ReportOnPensionPlans2019.pdf](http://www.bcfsa.ca/pdf/pensionplans/ReportOnPensionPlans2019.pdf)> at 3 (“The total number of members covered by plans registered in BC continues to increase even as the total number of



In very basic terms, pensions fulfil this purpose by collecting contributions—from a member’s employer and sometimes from the member too—during the member’s employment, investing these contributions, and using the proceeds to fund periodic payments in the member’s retirement. The lengthy timelines involved in this process is the first thing that sets pensions apart from other items of property that spouses would divide under part 5. As the BCLI 2006 Report noted “[w]hile there is little difficulty in dividing most assets, such as bank accounts, automobiles or the family residence, many problems quickly arose in trying to somehow give both spouses the benefit of the pension that accrued during the relationship, but would not be payable until perhaps years later.”<sup>63</sup>

## Pension regulation and administration

Pensions that are registered in British Columbia are regulated under the *Pension Benefits Standards Act*.<sup>64</sup> The bulk of this act’s provisions concern plan administrators.<sup>65</sup> Administrators are necessary because pension plans are large-scale and sophisticated. They would flounder without an administrator.

But the existence of administrators is another way in which pensions differ from most other items of property. As was noted above, one of the guiding principles of part 5 is to provide for fairness to each spouse in property division. Once it was decided that administrators should have a role in pension division,<sup>66</sup> then this notion of fairness for two parties had to be expanded to encompass three parties. Part 6 was needed because “fairness must extend to not only the parties to the marriage, but also to those who must administer pension plans.”<sup>67</sup>

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plans has declined. The total number of members increased from 1,079,007 in 2017 to 1,118,000 in 2018, while the number of plans decreased from 677 to 663.”), 4 (“The total assets for all plans registered in B.C. increased from \$157.6 billion to \$161.4 billion, an increase of \$3.8 billion or 2.4 per cent over the previous year.”).

62. LRC Report, *supra* note 7 at 43.

63. *Supra* note 17 at 1.

64. *Supra* note 25.

65. See *Family Law Act*, *supra* note 1, s 110 “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”).

66. See LRC Report, *supra* note 7 at 13–21 (discussion of the reasons for legislation requiring administrators to participate in pension division).

67. BCLI 2006 Report, *supra* note 17 at “Introductory Note.”

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## Kinds of pension plans

While pensions are regulated, this doesn't mean that the terms of pension plans are standardized. In fact, "[t]here are different kinds of pensions which provide different kinds of options."<sup>68</sup> This is the third quality that sets pensions apart from other kinds of property and makes it difficult to divide them under the general provisions of part 5. This is because "[a]ll too often, a technique for division that works well for one kind of plan fails completely for another."<sup>69</sup> So the kind of detailed, tailored rules that part 6 contains provide a better legal framework for pension division.

While the details of what part 6 calls *plan text documents* (= "the record that sets out the rights, obligations and entitlements under the plan")<sup>70</sup> vary considerably, it is possible to group pensions together by kinds, which share broadly similar provisions. The major dividing line in practice is between "two principal types of . . . pension plans [which] are *defined benefit plans* and *defined contribution plans*."<sup>71</sup>

### *Defined benefit plans*

"Under a defined benefit plan," the author of a law-review article notes, "the *future benefit* to be received is specified in advance and 'defined' by a benefit formula or benefit schedule."<sup>72</sup> This means that "plan contributions are then made as required to fund the specified benefit."<sup>73</sup> Further, "individual account balances need not be maintained for each participant. Instead, the employer pools all contributions (both the employer's and employee's if [the plan is] contributory) into one common fund."<sup>74</sup> In basic terms, defined benefit plans are plans "that promise a specific monthly income at retirement based on factors such as earnings and years worked."<sup>75</sup>

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68. LRC Report, *supra* note 7 at 1.

69. *Ibid.*

70. *Supra* note 1, s 110 "plan text document."

71. Steven R. Brown, "An Interdisciplinary Analysis of the Division of Pension Benefits in Divorce and Post-Judgment Partition Actions: Cures for the Inequalities in *Berry v. Berry*" (1987) 39:4 *Baylor L Rev* 1131 at 1137 [emphasis in original].

72. *Ibid* [emphasis in original].

73. *Ibid.*

74. *Ibid* at 1140–1141.

75. Alberta-British Columbia Joint Expert Panel on Pension Standards, *Getting Our Acts Together: Pension Reform in Alberta and British Columbia: Report of the Joint Expert Panel on Pension Standards* (Edmonton & Victoria: Alberta-British Columbia Joint Expert Panel on Pension Stand-

The *Report on Pension Plans Registered in British Columbia* notes that, on 31 December 2018, there were 146 defined benefit plans in British Columbia with 779 000 members, distributed as follows:

- 19 000 members in 108 plans with fewer than 1 000 members each;
- 51 000 members in 26 plans with 1 000–5 000 members each;
- 34 000 members in 5 plans with 5 000–10 000 members each;
- 675 000 members in 7 plans with 10 000 or more members each.<sup>76</sup>

### *Defined contribution plans*

In basic terms, defined contribution plans are plans “where contributions by the employer and (usually) the employee are put aside each year. There is no promise of a specified monthly income.”<sup>77</sup> In contrast to a defined benefit plan, “[e]ach participant in a defined contribution plan maintains an individual account balance.”<sup>78</sup> As a law-review article has noted, “[a]lthough the contributions under a defined contribution plan are specified, the future benefit received will vary, depending on the contributions made, the investment earnings thereon, plan expenses incurred, and the normal retirement age under the plan.”<sup>79</sup> As a result, “the future benefit amount can only be estimated,” but “[t]he accuracy of this estimate increases as the employee reaches retirement.”<sup>80</sup>

In British Columbia, on 31 December 2018, there were 83 000 members in 480 defined contribution plans, distributed as follows:

- 11 000 members in 357 plans with fewer than 100 members each;
- 19 000 members in 95 plans with 100–500 members each;
- 9 000 members in 13 plans with 500–1 000 members each;

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ards, 2008) at 12 [*Getting Our Acts Together*].

76. *Supra* note 61 at 3 (table 3.1: number of members in defined benefit plans on December 31, 2018).

77. *Getting Our Acts Together*, *supra* note 75 at 12.

78. Brown, *supra* note 71 at 1139 [footnote omitted].

79. *Ibid* at 1140.

80. *Ibid*.

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- 44 000 members in 15 plans with 1 000 or more members each.<sup>81</sup>

### *Target benefit plans*

While defined benefit plans and defined contribution plans are the two main types of pension plans, other kinds do exist. Target benefit plans, an example of another type of plan, figured into the committee's considerations in this project.

Target benefit plans have three "essential characteristics":

- Contributions are limited to specified employer and [in some cases] employee contributions ("specified" by the parties to the deal, whether through a collective bargaining agreement or another method).
- Employer(s) are limited in their liability to providing the specified contributions.
- There is a formula benefit set out in the plan document but it is subject to reduction if funding is not sufficient and can therefore be considered a target benefit.<sup>82</sup>

They are, in essence, a form of hybrid between defined contribution plans and defined benefit plans.<sup>83</sup> These types of plans existed for a number of years in the form of negotiated cost defined benefit plans. Leading up to 2015, it was agreed by various pension committees that these plans were misnamed, as the benefit provided was not, in fact, "defined" but rather a "target" that could be adjusted based on plan funding. The new target benefit model was introduced in 2015 in the wake of the repeal and replacement of the *Pension Benefits Standards Act*.<sup>84</sup>

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81. *Report on Pension Plans in British Columbia*, *supra* note 61 at 4 (table 3.3: defined contribution plan membership on December 31, 2018). The report notes that "this table refers to membership in plans specifically set up as defined contribution plans and *does not* include the nearly 27,000 members in benefit formula plans currently contributing to a defined contribution component" (*ibid*).

82. *Getting Our Acts Together*, *supra* note 77 at 147–148 (recommendation no. 8.2.1-A).

83. See Jana Steele, "Target Benefit Plans in Canada" (2016) 32:2 ETPJ 186 at 186–187 ("Target benefit pension plans contain elements of both defined benefit ('DB') and defined contribution ('DC') pension plans. Similar to DC plans, TBPs have fixed contribution rates, which provides cost certainty to employers. And similar to DB plans, TBPs provide a targeted future pension benefit based on a pension formula, which allows members to predict with some accuracy their expected income during retirement. However, unlike a defined benefit plan, benefits are 'targeted' rather than guaranteed. Benefits under a TBP can be adjusted (both up and down) in order to balance the plan's funding. This ability to adjust benefits is the lever that can be used to keep employer contributions stable. However, critics of target benefit plans express concern about the ability to adjust benefits and also communication issues surrounding benefit adjustments.").

84. *Supra* note 25.

On 31 December 2018, there were 37 target benefit plans in British Columbia, with 256 000 members. This total membership was distributed as follows:

- 5 000 members in 9 plans with fewer than 1 000 members each;
- 35 000 members in 16 plans with 1 000–5 000 members each;
- 49 000 members in 7 plans with 5 000–10 000 members each;
- 167 000 members in 5 plans with 10 000 or more members each.<sup>85</sup>

There is no section in part 6 dedicated just to the division of benefits in a target benefit plan. As will be seen in the section of this chapter that follows, benefits in a target benefit plan are divided by methods developed for defined benefit plans. The committee discussed whether this approach needed to be rethought, and whether any other issues arise for part 6 in light of the advent of target benefit plans.

In the end, the committee decided that the status quo is fair, as no inequity appears to exist between the member and his or her spouse in the division of pensions. Further, when the *Pension Benefits Standards Act* was revised in 2015 to deal expressly with target benefit plans, there were corresponding amendments made to the *Family Law Act*.<sup>86</sup> So there are no issues for reform directly related to target benefit plans in the chapters that follow.

## An Overview of Pension Division under Part 6 of the Family Law Act

### An introduction to part 6's terminology

Up to this point, this consultation paper has been discussing pensions in rather informal terms, which are likely familiar even to readers with only a passing acquaintance with the topic. But it is important to appreciate that part 6 of the *Family Law Act* has its own specialized terminology that it applies to pension division. This means that some terms, such as *pension* are given a specific legislative definition, and other terms, such as *defined benefit plan* and *define contribution plan*, don't even appear in part 6, because they are replaced by other, specifically defined terms.

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85. *Supra* note 61 at 3 (table 3.2: number of members in target benefit plans on December 31, 2018).

86. See *Pension Benefits Standards Act*, *supra* note 25, ss 135–157 (consequential amendments to the *Family Law Act*).

As this consultation paper turns to consider pension division under part 6, and the issues for reform that arise from part 6, readers should bear in mind the following terms:

- *pension* is given a specialized meaning under part 6;<sup>87</sup>
- a pension is delivered through a *plan*, which is “a plan, a scheme or an arrangement, other than a prescribed plan, scheme or arrangement, organized and administered to provide pensions for members”;<sup>88</sup>
- pension plans have *members*, another specifically defined term;<sup>89</sup>
- these members may receive a *benefit* from the plan, which, “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”;<sup>90</sup>
- in terms of kinds of pension plans, one major kind is referred to as plans with a *benefit formula provision*,<sup>91</sup> which embraces both plans with a *defined benefit provision*<sup>92</sup> and plans with a *target benefit provision*;<sup>93</sup> and

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87. *Supra* note 1, s 110 “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”).

88. *Ibid*, s 110 “plan.”

89. See *ibid*, s 110 “member” (“in relation to a plan, means a person, other than a limited member, who (a) has made contributions to the plan or on whose behalf an employer 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”).

90. *Ibid*, s 110 “benefit.”

91. See *ibid*, s 110 “benefit formula provision” (“means (a) a defined benefit provision, (b) a target benefit provision, or (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”).

92. See *ibid*, s 110 “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 pre-

- the other major kind of plan is referred to as a plan with a *defined contribution provision*.<sup>94</sup>

## General approach to dividing a pension under part 6

The general approach of part 6 (and its regulation) is to provide detailed rules that are geared to the specific features of different pensions. As a leading practice guide has explained, the starting place for dividing a given pension involves asking three questions.

- **Where is the plan located?** Different rules apply, depending on “whether the pension is in a ‘local plan’ or an ‘extraprovincial plan.’”<sup>95</sup>
- **Has the plan commenced paying benefits to the member?** “A pension commences when the member retires” and “[d]ifferent division methods apply depending on whether marriage breakdown occurs before or after member retires.”<sup>96</sup>
- **What kind of pension plan is at issue?** “[D]ifferent division methods are used depending on whether the pension is a defined benefit plan, defined contribution plan, or hybrid plan.”<sup>97</sup>

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scribed under the *Pension Benefits Standards Act* to be a benefit formula provision”).

93. See *ibid*, s 110 “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”).
94. See *ibid*, s 110 “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”).
95. *Family Law Sourcebook*, *supra* note 33 at § 5.16.
96. *Ibid*.
97. *Ibid*. See also *Family Law Act*, *supra* note 1, s 110 “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”).
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## Where is the plan located?

### *Local plans*

Some clear examples of local plans are British Columbia public sector pension plans and private-sector plans that are registered in British Columbia under the *Pension Benefits Standards Act*.<sup>98</sup> That said, it's important to appreciate that part 6 has a legislative definition of *local plan*.<sup>99</sup> This definition is intricate and detailed. This intricate, detailed definition can lead to some unexpected results, such as plans that are registered outside British Columbia being considered local plans, because they have some British Columbia members.<sup>100</sup>

Once a plan is determined to be a local plan, it's necessary to move on to the other two questions to divide a pension benefit under that plan.

### *Extraprovincial plans*

Part 6 defines an *extraprovincial plan* to be, in essence, a plan that isn't a local plan.<sup>101</sup> Concrete examples of extraprovincial plans "include a federal public [sector]

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98. *Supra* note 25.

99. *Supra* note 1, s 110 "local plan" ("subject to the regulations, means any of the following: (a) a plan that is established by the government; (b) a plan that (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").

100. See *Family Law Sourcebook*, *supra* note 33 at § 5.17A ("The term 'local plan' includes all of the provincial public plans and any occupational plan registered under the B.C. *Pension Benefits Standards Act*. It also includes plans registered federally or in other provinces that have British Columbia members. Basically, all plans having British Columbia members 'must' be registered under the B.C. *PBSA*, but the superintendent [of pensions] can exempt plans registered in other provinces from this obligation. As a result, federal private sector registered pension plans, to which the federal *PBSA* applies, that have British Columbia members are 'local plans' for the purposes of the *Family Law Act*."). See also BCLI Q&A, *supra* note 26 at para 1.8.

101. See *supra* note 1, s 110 "extraprovincial plan" ("subject to the regulations, means a plan that is



plan or any plan registered outside British Columbia that does not have B.C. members and in which all of the member's pension entitlement was earned outside British Columbia."<sup>102</sup> For a contrasting example, a pension plan for telecommunications workers is registered in the federal jurisdiction but is a "local plan" to the extent that plan members work in British Columbia.

Part 6 sets out the following methods to divide an extraprovincial plan:

- "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";<sup>103</sup>
- "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."<sup>104</sup>

## Has the plan commenced paying benefits to the member?

### *Local plans after pension commencement*

Part 6 has a dedicated section that applies to a local plan after the member has commenced receiving pension benefits.<sup>105</sup> This section applies if the benefits being divided:

- are under a local plan,
- are not in a defined contribution account, and
- the pension has commenced.<sup>106</sup>

Notice that this application provision effectively carves out a specific kind of pension: those with benefits "in a defined contribution account." These are pensions with benefits determined by a defined contribution provision. So this question main-

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not a local plan, and includes a supplemental plan to an extraprovincial plan").

102. *Family Law Sourcebook*, *supra* note 33 at § 5.17A.

103. *Family Law Act*, *supra* note 1, s 123 (2) (a). If this method "would operate unfairly," then "the Supreme Court may order that the spouse's proportionate share of the benefits be satisfied in accordance with [the method set out in the next bullet point]" (*ibid*, s 123 (3)).

104. *Ibid*, s 123 (2) (b). See also BCLI Q&A, *supra* note 26 at paras 7.1–7.6 (further discussion of issues arising from dividing extraprovincial plans).

105. *Supra* note 1, s 117.

106. *Ibid*, s 117 (1).

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ly has significance for pensions with benefits determined by a benefit formula provision.

Under this section, “the pension is left intact and it is the income stream that is divided.”<sup>107</sup> This division is effected “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).”<sup>108</sup>

### *Local plans before pension commencement*

If the benefits to be divided are in a local plan (with benefits determined by a benefit formula provision) and the member hasn’t commenced receiving benefits, then it’s necessary to ask about the kind of pension at issue to determine the applicable rules.

## **What kind of pension plan is at issue?**

### *Benefits determined under defined contribution provision*

Part 6 contains a dedicated section that applies “if the benefits to be divided”:

- are under a local plan, and
- are in a defined contribution account.<sup>109</sup>

(Note that, when benefits are provided under a plan with a defined contribution provision, by definition the member will have a defined contribution account.)<sup>110</sup>

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107. BCLI Q&A, *supra* note 26 at ch 5 (introduction).

108. *Ibid.* See also *Family Law Act*, *supra* note 1, s 117 (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.” [bracketed text in original]). See, below, at 27 (for more information on the concept of a limited member).

109. *Supra* note 1, s 114 (1).

110. See *ibid.*, s 110 “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”).

“If the member’s benefits are in a defined contribution account,” the BCLI Q&A explains, “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.”<sup>111</sup> In this case, “[t]he spouse would send to the plan administrator the agreement or court order dividing the benefits, together with a Form P3” and “[t]he 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).”<sup>112</sup>

### *Benefits determined under benefit formula provision*

Part 6 contains a section that applies if

- the benefits to be divided are under a local plan and are determined under a benefit formula provision, and
- the pension has not commenced.<sup>113</sup>

In this case, “the benefits are divided by designating the spouse to be a kind of member of the plan, called a ‘limited member.’”<sup>114</sup> A limited member is someone who is designated as a member of a pension plan by following a procedure set out in part 6 and to whom part 6 gives the following “rights”:

- to receive from the [pension plan] benefits as determined under section 115 or 117, as applicable;
- 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;
- 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;

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111. See *supra* note 26 at ch 3 (introduction).

112. *Ibid.* See also *Family Law Act*, *supra* note 114 (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” [bracketed text in original]); *Division of Pensions Regulation*, *supra* note 28, s 20 (calculation of proportionate share in relation to benefits under defined contribution provision). See also, below, at 77–79 (for more information on locked-in retirement accounts).

113. *Supra* note 1, s 115 (1).

114. BCLI Q&A, *supra* note 26 at ch 2 (introduction).

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- the additional rights that are set out in this Part.<sup>115</sup>

“To become a limited member,” the BCLI Q&A explains, “the spouse would send to the plan the agreement or court order dividing the benefits, together with a Form P2.”<sup>116</sup>

In dividing benefits in a local plan that are determined by a benefit formula provision before pension commencement, the limited member is effectively given a choice: “[t]he 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.<sup>117</sup>

Calculation of a proportionate share (referred to in paragraph (a), above) is carried out by applying a formula found in the *Division of Pensions Regulation*.<sup>118</sup> The formula is detailed, because it covers a number of options, but at its core is the following calculation:

proportionate share =  $1/2$  (pensionable service during entitlement period ÷ total pensionable service).<sup>119</sup>

The “entitlement period” is “determined by dates specified in the agreement or court order, usually determined by the date the relationship began and the date of separation, but other dates can be used.”<sup>120</sup> “Pensionable service” is “measured in months

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115. *Supra* note 1, s 113 (3).

116. *Supra* note 26 at ch 2 (introduction).

117. *Ibid.* See also *Family Law Act*, *supra* note 1, s 115 (2)–(6).

118. See *supra* note 28, s 17 (calculation of proportionate share in relation to pensions, benefits under benefit formula provision, disability benefits and phased retirement benefits). See also, below, at 67–68 (for more information on the concept of commuted value).

119. *Supra* note 28, s 17 (3).

120. BCLI Q&A, *supra* note 26 at para 2.17 (“There are four situations when the limited member’s share would be determined: (a) the date the limited member’s share is transferred from the plan (in which case, that would be the end date for determining total pensionable service), (b) the date the limited member begins receiving a separate pension (in which case, the end date would be the beginning of the month in which the separate pension commences), (c) for a matured pension, the end date would be the date the limited member begins receiving a share of the income stream (however, in these cases, pensionable service would ordinarily have stopped accruing when the pension commenced), and (d) if the benefits have not been divided and the

or parts of months” and “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.”<sup>121</sup>

Readers should also note that this formula is effectively a default rule, which “applies unless the spouse and member agree upon, or the court orders, another approach.”<sup>122</sup>

### *Hybrid plans*

Some pension plans are hybrids of plans with benefits determined by a defined contribution provision and benefits determined by a benefit formula provision.<sup>123</sup> “If the member’s benefits are in a hybrid plan,” the BCLI Q&A explains, “and the member’s pension has not commenced at the time of the breakdown of a relationship, it is divided in two steps.”<sup>124</sup> First, “[t]he defined contribution account is divided using the methods that apply to defined contribution accounts.”<sup>125</sup> Then, “[t]he benefits determined by a benefit formula provision are divided by the methods that apply to plans using benefit formula provisions.”<sup>126</sup>

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member dies before pension commencement, the end date would be the day immediately preceding the day of the member’s death.” [cross-references omitted]). See also *Division of Pensions Regulation*, *supra* note 28, s 1 (1) “entitlement date,” “entitlement period.”

121. BCLI Q&A, *supra* note 26 at para 2.17. See also *Division of Pensions Regulation*, *supra* note 28, s 17 (3).

122. BCLI Q&A, *supra* note 26 at para 2.17.

123. See *Family Law Act*, *supra* note 1, s 110 “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”).

124. *Supra* note 26 at c 4 (introduction).

125. *Ibid* [cross-reference omitted].

126. *Ibid* [cross-reference omitted]. Note that “[t]he 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” (*ibid*). See also *Family Law Act*, *supra* note 1, s 116.

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## Division of other benefits

Some pensions “provide additional benefits payable on the premature death, disability or termination of employment of the member.”<sup>127</sup> Part 6 contains sections on the division of the following:

- privately purchased annuities;<sup>128</sup>
- supplemental plans;<sup>129</sup>
- benefits for specified individuals;<sup>130</sup>
- disability benefits.<sup>131</sup>

## Conclusion

This chapter has dwelled on some of the details of pension division under part 6 of the *Family Law Act* for two reasons. First, this information is intended to equip readers who don’t have a background in family law and pensions with basic information that will allow them to make their way through the chapters that follow, which are focused on specific issues for reform. Second, providing an outline of the current system underscores the committee’s basic orientation to reform of part 6, which broadly affirms the current system and directs attention to fine-tuning specific details.

That said, it is worth underlining that this chapter has only given an outline of part 6. Readers who are interested in exploring part 6 in greater detail should turn to the BCLI Q&A.<sup>132</sup>

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127. Jack Patterson, *Pension Division and Valuation: Family Lawyers’ Guide* (Aurora, ON: Canada Law Book, 1991) at 7.

128. See *supra* note 1, s 118. See also, below, at 45–51 (for more information on private annuities and discussion of issue for reform).

129. See *supra* note 1, s 119. See also *ibid*, s 110 “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 (b) under which benefits are provided that supplement those provided under the other plan”).

130. See *ibid*, s 121.

131. See *ibid*, s 122. See also, below, at 53–57 (for more information on disability benefits and discussion of issue for reform).

132. *Supra* note 26.

## Chapter 3. Transitional Provisions

### Introduction

With this chapter, this consultation paper moves from discussing background material to considering issues for reform.<sup>133</sup>

When new legislation is enacted, it's "common" for that legislation to contain provisions managing the transition from older legislation (which previously applied to the subjects addressed in the new legislation) to the new statute.<sup>134</sup> This was the case with the *Family Law Act*, which contains a whole part dedicated to provisions that deal with the transition from the act it replaced, the *Family Relations Act*.<sup>135</sup>

One section (section 253) in this part applies specifically to transitional issues that arise for the division of pension benefits.<sup>136</sup> This section has cropped up in some family-law litigation.<sup>137</sup> Applying the section is an important practical consideration for lawyers and other professionals working under the new act. While the importance of transitional provisions always diminishes over time, the committee decided that there were benefits to paying some attention to how the provisions have been operating and to considering whether improvements may be made. In particular, the committee decided it was time to revisit certain special rules that have the effect of keeping cases under the old legislation, the *Family Relations Act*.

### Background Information on Transitional Provisions

#### The current transitional provisions in the Family Law Act

##### *Purpose and basic operation of section 253*

A transition guide's comments on section 253 help to explain the purpose of that section's approach to the transition from part 6 of the *Family Relations Act* to part 6

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133. See, above, at 6–7 (for an overview of the issues for reform discussed in this and the upcoming chapters).

134. Ruth Sullivan, *Statutory Interpretation*, 3rd ed (Toronto: Irwin Law, 2016) at 370 ("But transitional provisions applicable to specific legislation are common and, in many cases, clarify or override the general rules of the Interpretation Acts.").

135. See *Family Law Act*, *supra* note 1, part 13.

136. See *ibid*, s 253.

137. See *Betz v Betz*, 2019 BCSC 2198 at paras 47–54; *Bressette v Henderson*, 2013 BCSC 1661 at paras 120–138.

of the *Family Law Act*. This guide noted that the basic approach of section 253 is that “unless an order or agreement provides otherwise, undivided pension benefits will be divided according to the rules under this Act.”<sup>138</sup> This approach differs from the approach taken elsewhere in the act for division of property: “[t]he difference is that the changes to the pension regime are minor and will not likely result in very different decisions. The property division scheme is entirely different and will result in different decisions.”<sup>139</sup> Further, since part 6 of the *Family Law Act* was felt to “[provide] greater clarity regarding pensions” and will be “used mostly by administrators who are experts in this area of law,” providing for immediate application of part 6 “will streamline the process rather than complicate it.”<sup>140</sup>

For an example illustrating the significance of this approach, consider a pension that is a local plan with benefits determined under a benefit formula provision. Before commencement of the pension, its benefits are divided by a spouse becoming a limited member of the plan. The spouse elects to receive benefits by way of a separate pension.

In these cases, a form of a broader “conflict between the financial interests of the parties as to when the pension should commence being paid” may appear.<sup>141</sup> As the BCLI 2006 Report explained it, “[t]he member, who would have to give up employment to receive the pension, was often better off financially in deferring retirement. The spouse, on the other hand, was usually better off the sooner the pension commenced being paid.”<sup>142</sup>

Under the relevant provision of the *Family Relations Act*,<sup>143</sup> “the separate pension option was available only if the spouse waited until the member chose to have the pension commence.”<sup>144</sup> In contrast, the *Family Law Act* has liberalized this rule, so that “the spouse no longer has to wait until the pension commences to choose the separate pension option . . . it is available once the member is eligible to have the pension commence.”<sup>145</sup> Section 253’s approach to transition is to favour the immediate application of the *Family Law Act*’s rules on pension division, which will en-

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138. *Ibid* at s 253.

139. *Ibid*.

140. *Ibid*.

141. BCLI 2006 Report, *supra* note 17 at 1.

142. *Ibid*.

143. *Supra* note 15, s 74 [repealed].

144. Ministry Transition Guide, *supra* note 40 at s 115.

145. *Ibid*. See *Family Law Act*, *supra* note 1, s 115 (3).



hance the fairness of the act in cases like this example. But this approach is subject to some special rules, which are spelled out in the paragraphs that follow.

### *Elements of section 253*

The bulk of section 253 is taken up with two special transitional rules. The first rule applies when forms prescribed under the old *Family Relations Act* were delivered to a pension administrator before part 6 came into force (18 March 2013).<sup>146</sup> The second rule applies when such forms are delivered to a pension administrator after part 6 came into force.<sup>147</sup>

Under the first special rule, “the former Act [i.e., the *Family Relations Act*] continues to apply to the division of benefits between a member and spouse.”<sup>148</sup> This specific rule is subject to its own exception, which applies 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.”<sup>149</sup> In this case, part 6 applies to the division of pension benefits. And there’s also a qualification to note, which applies if a spouse had applied under the *Family Relations Act* to become a limited member and “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.”<sup>150</sup> In this case, the *Family Relations Act* would continue to apply “to the extent of, and in accordance with, that consultation.”<sup>151</sup>

Under the second special rule (when forms are delivered after part 6 came into force), the pension administrator is presented with a choice. It may “accept the forms as compliance with the requirements of Part 6 of this Act” or “require the parties to give notice in accordance with section 136 [notice or waiver] of this Act.”<sup>152</sup>

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146. See *supra* note 1, s 253 (1).

147. See *ibid*, s 253 (4).

148. *Ibid*, s 253 (1).

149. *Ibid*, s 253 (2).

150. *Ibid*, s 253 (3).

151. *Ibid*, s 253 (3).

152. *Ibid*, s 253 (4) [bracketed text in original].

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## Transitional provision in the Division of Pensions Regulation

The *Division of Pensions Regulation* also contains one transitional provision.<sup>153</sup> The provision deals with a specific situation: when a spouse has become a limited member under a plan.<sup>154</sup> It sets out two transitional rules.

The first rule deals with a limited member giving notice before the *Family Law Act* came into force (on 18 March 2013) either to transfer the limited member's proportionate share of the commuted value of benefits to the credit of the limited member or to receive the limited member's proportionate share of benefits by a separate pension. In these cases, "the calculation of the limited member's proportionate share of the commuted value" is done by applying the former act and the former regulation.<sup>155</sup>

The second rule deals with cases in which "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" before the coming into force of the *Family Law Act*.<sup>156</sup> The rule goes on to confirm that the limited member may elect to take one of these options, to set out the mechanics of making

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153. See *supra* note 28, s 29 ("(1) In this section, "**limited member**" has the same meaning as in section 70 of the former Act. (2) If, before March 18, 2013, the administrator received written notice from a limited member seeking to have the limited member's proportionate share of the commuted value of benefits transferred from a plan to the credit of the limited member or seeking to receive the limited member's proportionate share of benefits by a separate pension, the former Act and the former regulation apply to the calculation of the limited member's proportionate share of the commuted value. (3) If, before March 18, 2013, the administrator delivered written notice to a limited member setting out options as to how the limited member's proportionate share of benefits could be provided to the limited member, the following applies: (a) the limited member may, after March 18, 2013, in accordance with paragraph (b), elect one of those options; (b) to make an election under paragraph (a), the limited member must, within the period referred to in the notice, or, if no period is referred to in the notice, within 60 days after the date of the notice, deliver to the administrator a notice in Form P4 within which the limited member elects one of the options referred to in the administrator's notice; (c) if the limited member makes an election in accordance with paragraph (b), the limited member is entitled to receive his or her share of benefits in accordance with that election and the former Act and the former regulation applies; (d) if the limited member does not make an election in accordance with paragraphs (a) and (b), the Act applies." [emphasis in original])).

154. See *ibid*, s 29 (1). The regulation adopts the definition of *limited member* found in the former legislation. See *Family Relations Act*, *supra* note 15, s 70 (1) "limited member" ("means a person designated as a limited member of a local plan under section 72 (1)") [repealed].

155. *Supra* note 28, s 29 (2). See, above, at 28 (for more information on calculating a proportionate share of pension benefits).

156. *Supra* note 28, s 29 (3).

an election, to confirm that the former act and regulation apply to the election, and to provide that the *Family Law Act* applies if the limited member doesn't make an election.

## The full text of the Family Law Act's transitional provision for part 6

Section 253 reads in full as follows:

### 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.<sup>157</sup>

## Issues for Reform

### Should a spouse who has only filed a prescribed form under the Family Relations Act be transitioned to the Family Law Act?

#### *Brief description of the issue*

Under section 253 (1), “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

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157. *Supra* note 1, s 253 [bracketed text in original].

spouse.”<sup>158</sup> This transitional rule is subject to an exception, which applies “[i]f 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.”<sup>159</sup>

It could be seen as inconsistent, on the one hand, to provide a spouse who has become a limited member with the benefits of the new legislative framework found in part 6 of the *Family Law Act*, while, on the other hand, to provide that these benefits are denied to a spouse who has only started the process by filing a prescribed form. Should section 253 be revised to provide that spouses who have filed a prescribed form are transitioned to the *Family Law Act*?

### *Discussion of options for reform*

There are essentially two options to consider for this issue: (1) amend section 253 and revise the transitional rule for spouses who have filed a prescribed form; (2) retain the status quo.

The main advantage of the first option is that it brings more spouses into the regime for pension division set out in part 6 of the *Family Law Act*. This regime is an upgrade over what preceded it. Among the disadvantages of the former scheme is that a spouse under it who becomes a limited member usually faces a longer wait before receiving a share of the pension benefits. The general approach to transition is to favour transitions to the *Family Law Act* for this reason. This approach may be usefully extended to this specific area.

In addition, the current transitional rule might create something of a trap for spouses and their lawyers. It enhances the significance of filing a prescribed form, giving this act a substantive effect that might not be fully appreciated at first glance. Finally, it should be borne in mind that pensions operate on long time frames. This transitional rule will continue to apply for years to come, so if it can be improved there is reason to make that improvement.

On the other hand, the current provision might have some advantages of its own. Most notably, it might reflect the reasonable expectations of spouses. A spouse could reasonably believe that filing the form began the process under the *Family Relations Act*, and now the process should be allowed to unfold under that act. Another argument that could be mounted in favour of the current provision would be that it amounted to a just result for spouses who failed to take procedural steps diligently.

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158. *Family Law Act*, *ibid*, s 253 (1) [bracketed text in original].

159. *Ibid*, s 253 (2).

### *The committee's tentative recommendation for reform*

The committee was concerned about the effect of this transitional rule. It has been recognized that the *Family Relations Act* was in some respects unfavourable to a spouse's financial interests. In particular, the former act's position that a spouse who becomes a limited member may not begin receiving a share of the pension benefits until the member spouse retires can put the limited member at the mercy of the member, who has a financial interest in delaying retirement. The committee is aware of cases in practice in which the transitional rule that is the subject of this issue has operated to the detriment of limited-member spouses. A revised rule favouring transition to the *Family Law Act* would likely be fairer, and the committee decided that a reformed provision should be proposed for this reason.

The committee was also concerned that the transitional rule could operate as a trap for family-law lawyers. This rule departs from the general approach to transitions under part 6, which is to favour transition to the *Family Law Act* in most cases. Since there can be a significant difference in some cases between proceeding under the *Family Law Act* and the *Family Relations Act*, the committee was concerned about investing the filing of forms with a significance that might not be readily apparent.

Finally, the committee was of the view that changing this transitional rule would likely have few ill effects in practice. The number of cases that will be caught by this transitional rule likely decreases every year. In the committee's view, there is a greater prospect for abuse under the current rule than there would be under a reformed rule. A reformed transitional rule that is more in line with the general approach of section 253 would also promote administrative efficiency in pension division.

The committee tentatively recommends:

1. *A spouse who has only filed a prescribed form under the Family Relations Act should be transitioned to the Family Law Act.*

## **Should parties who have received a consultation from a plan be transitioned to the Family Law Act?**

### *Brief description of the issue*

The overarching approach to transitions for part 6 of the *Family Law Act* was to favour transitioning parties to the new act over leaving them under the old *Family Relations Act*. This overarching rule was made subject to a few specific exceptions. An exception applies to cases in which "the [plan] 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,” which consultation occurred “after an application was made under the former Act for the spouse to become a limited member.”<sup>160</sup>

It’s open to question whether having a consultation should result in the parties remaining under the *Family Relations Act*. Would their interests be better served by transitioning them to the new framework found in the *Family Law Act*?

### *Discussion of options for reform*

The committee considered two options for this issue: (1) repeal the special transitional rule for consultations; or (2) retain the status quo.

The main advantage of repealing this special transitional rule is that it would enhance the application of the *Family Law Act*’s general approach to transitions, which is to favour transitioning parties to the new act. The fewer exceptions to the general rule, the simpler the law is to apply in practice.

It may also be possible to criticize the specific elements of this exception. Its key term—*consultation*—can be rather ambiguous. What qualifies as a consultation for the purposes of the provision? The concern is that the provision could catch communications (particularly communications that aren’t in writing) that were initiated for a different purpose but that end up touching generally on the transition to the *Family Law Act*. Uncertainty about the scope of this transitional rule could raise the prospect of liability for plan administrators.

Finally, the passage of time will likely have the effect of reducing the number of cases subject to this rule, correspondingly reducing the need for a specific transitional rule to address them.

The advantages of the retaining the current provision are that it would promote consistency and may meet the expectations of the parties in most cases.

### *The committee’s tentative recommendations for reform*

The committee was concerned about the scope and operation of this transitional rule. It wondered how often communications may take place between a plan administrator and a spouse in less-than-full awareness of their implications for this transitional rule.

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160. *Ibid*, s 253 (3).

The committee also understood that, while there was a need for many plan administrators to engage with spouses in the immediate aftermath of the *Family Law Act*'s coming into force (on drafting issues, for example), these communications are less frequent now. There was a sense that the utility of this special rule is declining each year.

In light of these considerations, the committee favoured doing away with this special transitional rule, letting the general approach to transitions for part 6 prevail in these circumstances.

The committee tentatively recommends:

*2. The special transitional provision that kept spouses under the Family Relations Act if they had received a consultation from a plan administrator should no longer apply, so that the Family Law Act will apply to the division of the pension.*

The committee gave some thought to the implications of this tentative recommendation. It was particularly concerned that it could give rise to some unwanted transitional issues in its own right.

While the committee was generally satisfied that its tentative recommendation would have no ill effects, there was one area where the committee decided to proceed with caution. This area concerns entitlement dates.

An entitlement date, as the BCLI 2006 Report explains the term, “marks the end of the period subject to division.”<sup>161</sup> It is a defined term, both under the current *Division of Pensions Regulation*,<sup>162</sup> as well as under the former *Division of Pensions Regulation* prescribed under *Family Relations Act*.<sup>163</sup> These definitions differ in their wording.<sup>164</sup>

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161. *Supra* note 17 at 12.

162. *Supra* note 28.

163. *Supra* note 16 [repealed].

164. See *supra* note 28, s 1 “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”); *supra* note 16, s 1 “entitlement date” (“means, in relation to a spouse, the date on which the spouse became entitled to an interest in family assets in accordance with section 56 (1) [entitlement to family assets on marriage break down] of the Act” [bracketed text in original; repealed]).

The committee was of the view that its tentative recommendation shouldn't affect entitlement dates. The goal of the tentative recommendation is to give a limited member access to the enhanced options available under the *Family Law Act*. But there was some concern that, since this tentative recommendation would have the effect of bringing more cases under the *Family Law Act* that it could be interpreted as also affecting entitlement dates. In the spirit of caution, the committee decided to make a further tentative recommendation, to address this point.

The committee tentatively recommends:

*3. The tentative recommendation to transition parties who have received a consultation should not affect entitlement dates.*

### **Should an administrator who has been consulted be required to notify the member or spouse that the rule has changed so they don't continue to rely on the outcome of the consultation, that the Family Relations Act applies?**

#### *Brief description of the issue*

This issue arises as a consequence of the committee's tentative recommendation to end the application of the special transitional rule for consultations under section 253 (3) of the *Family Law Act*. As has been noted previously, there can be significant differences in the mechanics of pension division under the *Family Law Act* as opposed to its predecessor, the *Family Relations Act*. Most notably, a limited member has the option under the *Family Law Act* to begin receiving a share of benefits earlier than would be possible under the *Family Relations Act*.

In view of the substantive differences between the acts, should the administrator who has been consulted be under an obligation to notify the member or the spouse that the transitional rule has changed?

#### *Discussion of options for reform*

Requiring notice from the administrator would have advantages for the spouse. First, changing the transitional rule means that the advice the spouse received in the consultation will no longer be accurate. There are obvious concerns about spouses continuing to rely on inaccurate advice.

Second, the transition to the *Family Law Act* would have some noteworthy benefits for a spouse, in particular a spouse who has become a limited member of a pension



plan. In this case, the spouse has the option to begin receiving a share of the pension benefits when the member is eligible to retire. This is a more favourable rule for the spouse's financial interests than the rule under the *Family Relations Act* (which only allowed the limited member to receive a share of the benefits when the member spouse actually retired). A spouse might not be aware of that the transitional rule has changed, and that the change opens up new options for the spouse.

The downsides of this proposed reform tend to fall on plan administrators. There will be costs associated with complying with the proposed reform, which will also create some administrative burdens. Some plan administrators may find it difficult to track spouses who have received a consultation on the transition to the *Family Law Act*.

### *The committee's tentative recommendation for reform*

While the committee was concerned about the burdens that this proposed reform would place on administrators, it decided that the benefits of the proposal for spouses outweigh its drawbacks for administrators. The committee noted that plan administrators already have an obligation to provide limited members with "information on options available to and elections that may be made by a limited member with respect to the benefits."<sup>165</sup> This provision points to a policy in favour of not simply leaving it to spouses to make their own investigations about options and elections under a plan, but rather to require some active intervention from administrators. The proposed amendment would be an extension of this policy. The committee also noted that the plan must provide annual statements to members and limited members, and that this annual statement could provide a vehicle for fulfilling this new requirement for notification.

The committee tentatively recommends:

*4. The plan administrator should be required to annually notify a limited member who has not yet received benefits of the earliest date of the limited member's pension eligibility.*

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165. *Division of Pensions Regulation*, *supra* note 28, s 11 (1) (c).



## Chapter 4. Private Annuities

### Introduction

An annuity is “[a] right, often acquired under a life-insurance contract, to receive fixed payments periodically for a specified duration.”<sup>166</sup> The focus of this chapter is on a new provision (section 118), which entered part 6 only on the enactment of the *Family Law Act*, applying to the division of an annuity that has been privately purchased by one of the spouses.<sup>167</sup>

### Background Information on Private Annuities

#### Purpose of the Family Law Act’s provision on private annuities

The purpose of section 118 was to “clarif[y] that an annuity privately purchased by a member and an annuity purchased by an administrator on behalf of a member are both to be treated in the same way.”<sup>168</sup> Under the “Family Relations Act pension division rules have been interpreted as applying to an annuity purchased by a plan administrator on behalf of a member, but there is some doubt as to whether it applies to a privately purchased annuity.”<sup>169</sup> Section 118 places a private annuity on the same footing as an annuity purchased by an administrator on behalf of a spouse. The section turns on the perception that part 6’s pension-division provisions should “apply equally in both cases.”<sup>170</sup>

#### Elements of the Family Law Act’s provision on private annuities

Section 118 essentially provides that private annuities may be divided under part 6 in the same manner as a specific kind of pension: a local plan, after the pension has

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166. Bryan A Garner, ed, *Black’s Law Dictionary*, 11th ed (St Paul: Thomson Reuters, 2019) sub verbo “annuity (3).”

167. See *supra* note 1, s 118.

168. Ministry Transition Guide, *supra* note 40 at s 118.

169. *Ibid.*

170. *Ibid* (“In principle, there is no reason why the pension division rules should not apply equally in both cases.”). See also BCLI 2006 Report, *supra* note 17 at 32 (“In terms of principle, there is no reason why the mechanics of pension division set out under Part 6 should not be equally available, whether the owner of the annuity is a plan member or a private purchaser. Similarly, from the perspective of the annuity issuer, there is no difference in substance depending on whether the owner of the annuity purchased it directly using personal funds, or it was acquired on behalf of the owner using pension funds.”).

commenced payment of benefits.<sup>171</sup> The section states that “the provisions under this Part that apply to the division of benefits after pension commencement apply to the division of the annuity.”<sup>172</sup> This language in section 118 effectively applies section 117—a general provision that deals with pension division of local plans<sup>173</sup> after the pension commences—to private annuities.<sup>174</sup> The operative part of section 117 holds that, upon the spouse giving notice as required under the act,<sup>175</sup> the spouse is entitled to “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.”<sup>176</sup> The “proportionate share” is determined by a formula set out in the *Division of Pensions Regulation*.<sup>177</sup>

## Text of the relevant provisions of the Family Law Act and the Division of Pensions Regulation

Section 118 is part 6’s dedicated provision on private annuities.

### 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.<sup>178</sup>

Section 118 provides that section 117 will apply to a private annuity.

### Local plans after pension commencement

- 117** (1) This section applies if

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171. See, above, at 25 (for more information on division of benefits after a pension has commenced).

172. *Supra* note 1, s 118.

173. See, above, at 23–24 (for more information on local plans).

174. See BCLI Q&A, *supra* note 26 at para 5.17 (“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.” [bracketed text in original]).

175. See *supra* note 1, s 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.”).

176. *Ibid*, s 117 (2).

177. See *supra* note 28, s 17.

178. *Supra* note 1, s 118.

- (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]*.<sup>179</sup>

A "proportionate share" of benefits is calculated using the formula set out in section 17 of the *Division of Pensions Regulation*.

**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

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179. *Ibid*, s 117 [bracketed text in original].

(b) modifies that formula, in which case the formula as modified by the agreement or order applies to the calculation.

(3) Subject to sections 18 and 19, the proportionate share referred to in subsection (1) of this section must be calculated in accordance with the following formula:

proportionate share =  $1/2$  (pensionable service during entitlement period ÷ total pensionable service)

where

**“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.<sup>180</sup>

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180. *Supra* note 28, s 17 [emphasis in original]. See also *ibid*, ss 18 (“For the purposes of accounting in section 17 for purchased service and transferred service, **“pensionable service during entitlement period”** (a) includes (i) all pensionable service, regardless of the period to which it is allocated, that was purchased by or on behalf of the member during the entitlement period, and (ii) all pensionable service, regardless of the period to which it is allocated, that was accumulated under another plan during the entitlement period and transferred to the member’s plan, and (b) does not include pensionable service purchased by or on behalf of the member, or accumulated under another plan, before or after the entitlement period.” [emphasis in original]), 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.”).

## Issue for Reform

### Should private annuities continue to be divided under part 6 in the same manner as local plans after pension commencement?

#### *Brief description of the issue*

When the *Family Law Act* was enacted, a new provision was added to deal expressly, for the first time, with the division of “benefits under an annuity that is purchased by the member rather than by an administrator on behalf of the member.”<sup>181</sup> Under this provision, these private annuities are to be divided in the same manner as local pension plans after payment of pension benefits has commenced. Is this the best approach to dividing a private annuity after the breakdown of a spousal relationship?

#### *Discussion of options for reform*

There may be advantages to retaining section 118 in its current form. The section largely fulfills its purpose, which is to clarify the law. Thanks to section 118, it is now clear that private annuities may be divided under part 6. This approach ensures that the sophisticated tools for pension division are applicable to private annuities. In their absence, spouses would have to come to an agreement under part 5 on how to divide a private annuity.<sup>182</sup> If they couldn’t come to an agreement, a dispute over division of a private annuity would have to be resolved through litigation. As has been noted throughout this consultation paper, the policy of the *Family Law Act* is to strive to keep these kinds of disputes out of the courts.

But, that said, there may also be drawbacks to the current approach. Section 118 rests on the insight that it’s desirable to divide a private annuity in the same manner as local pension plan after pension commencement. In practice, drawing these two different things so tightly together may create problems and uncertainties. This point raises the concern that section 118 might be out of step with the broader policy of part 6, which is to provide detailed rules for pension division that are tailored to specific kinds of pensions. Instead of taking this approach, section 118 simply relies on an analogy between private annuities and local plans after pension commencement. This analogy might not be possible to sustain through the entire process of dividing the private annuity.

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181. *Supra* note 1, s 118.

182. Private annuities are clearly family property. See *ibid*, s 84 (2) (“family property includes the following: . . . (e) a spouse’s *entitlement under an annuity*, a pension plan, a retirement savings plan or an income plan” [emphasis added]).

Finally, unlike many other issues for reform in this consultation paper, this issue doesn't present a clear-cut, yes-or-no policy choice. The proposed response to this issue could reasonably include elements of the current law along with specific changes to it.

*The committee's tentative recommendation for reform*

The committee gave extensive consideration to this issue. In the end, it settled on an approach that would preserve some aspects of the current law and would change other aspects of it.

The committee is of the view that the equivalence created in section 118 between private annuities and local plans after pension commencement is open to question. In particular, it was noted that annuities may be purchased all at one time. In this way, they can lack the temporal element that is integral to pensions. This can create problems in applying the formula for determining a proportionate share of a pension to an annuity.<sup>183</sup> There is simply no equivalent to the concept of pensionable service for an annuity. This creates uncertainty for a key aspect of the formula that applies to division of an annuity.

The committee also noted that annuity is a very broad term. The funds used to purchase an annuity may come from a variety of sources. These funds may not, in practice, derive from pension funds.

That said, dividing an annuity retains many aspects of the division of an income stream. Looked at in this respect, it does make sense to divide many annuities under part 6, because part 6 has appropriate tools for the division of an income stream. The other option, which is to make all private annuities divisible under part 5, could create frustration in some cases.

The committee decided to propose retaining division under part 6 for some private annuities, while requiring an order or agreement under part 5 for others. In the committee's view, the relevant dividing line is whether payments have commenced under the annuity. If the annuity is in pay, then it should be divided under part 6. If not, then the *Family Law Act* should be amended to provide for division of the private annuity under part 5.

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183. See, above, at 28 (for more information on calculating a proportionate share of pension benefits), 46 (regulatory provisions spelling out this formula).

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The committee tentatively recommends:

*5. The Family Law Act should be amended to make the following changes to the treatment of private annuities:*

- (a) for annuities that have been purchased but are not in pay then
  - (i) the drafting of the provisions should be clarified such that it's clear that the legislation applies to the purchase of an annuity by each spouse and part 5 applies, and*
  - (ii) division should be 50-50 to each spouse, subject to a different share by agreement or court order;**
- (b) if the annuity is in pay, then part 6 applies, and the income stream should be divided 50-50 to each spouse, subject to a different share by agreement or court order, and a spouse is entitled, by giving notice in accordance with section 136 of the act, to receive a share of the benefits payable under the annuity during the annuitant's lifetime until the earlier of
  - (i) the death of the spouse, and*
  - (ii) the termination of benefits under the annuity.**



## Chapter 5. Disability Benefits

### Introduction

This chapter focuses on section 122 of the *Family Law Act*, which is part 6's dedicated provision on the division of disability benefits. As the BCLI 2006 Report noted, "under B.C. law, disability benefits (with a few exceptions, such as [workers' compensation board] benefits) are considered to be a pension and therefore divisible as a family asset [i.e., what would under the *Family Law Act* be called family property]."184

The committee takes no issue with the basic principle that disability benefits should be subject to division under part 6. This chapter's issue for reform concerns the clarification of that principle in a specific fact pattern.

### Background Information on Disability Benefits

#### Purpose of the Family Law Act's provision on disability benefits

In order to grasp the rationale for section 122, it's necessary to look back on the legislative history of part 6.

While there was no direct predecessor to section 122 in the old *Family Relations Act*, that act did "[address] dividing disability benefits, by stipulating that after the spouse reaches age 60, these are subject to the rules that apply after pension commencement."<sup>185</sup> This age limit ended up "leaving in doubt what arrangements are possible before the former spouse reaches that age."<sup>186</sup>

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184. *Supra* note 17 at 35 (citing *Webb v Webb* (1985), 70 BCLR 15, 49 RFL (2d) 279 (SC)).

185. Ministry Transition Guide, *supra* note 40 at s 122. Under the *Family Relations Act*, disability benefits were incorporated into the act's provisions applying to "matured pensions" (i.e., what the *Family Law Act* refers to as pensions after the commencement of pension benefits). See *supra* note 15, ss 70 "disability pension" ("means a benefit paid to a member under a plan as a consequence of a member's disability"), "matured pension" or "matured" ("with reference to a pension, means a pension under which benefits are being paid to a retired member or a beneficiary and includes a payment of a disability pension when the member reaches a prescribed age"), 76 (rules for local plans: benefit split of a matured pension) [repealed]; *Division of Pensions Regulation*, *supra* note 16, s 12 ("The payment of a disability pension to a member after the member reaches age 60 is a matured pension for the purposes of Part 6 of the Act and this regulation.") [repealed]. See, above, at 25 (for more information on dividing benefits in a local plan after pension commencement under the *Family Law Act*).

186. Ministry Transition Guide, *supra* note 40 at s 122.

The BCLI 2006 Report recommended that legislation be enacted to “provide that where disability benefits are divisible between the parties under an order or agreement, (a) the division is to be administered by the provider of the benefits, and (b) the division must commence as of the later of the date stipulated in the agreement or court order and 30 days after the agreement or court order is delivered to the plan administrator.”<sup>187</sup>

The report characterized the *Family Relations Act*’s approach to disability benefits as “relatively meaningless” in practice “in the current legal environment, where courts typically reapportion entitlement to disability benefits 100% to the disabled party and, in the few cases where disability benefits are being divided, the division is to be effective immediately.”<sup>188</sup> In light of this point, the report recommended a legislative reform that would do away with the old act’s age restriction, which delayed the division of disability benefits until the member spouse turned 60 years old.<sup>189</sup>

Section 122 “adopts the BCLI [2006] Report recommendation.”<sup>190</sup>

## Elements of the Family Law Act’s provision on disability benefits

Section 122 of the *Family Law Act* applies to disability benefits, which are described in the section as benefits “paid to a member under a plan as a consequence of the member’s disability.”<sup>191</sup> Section 122 sets out the framework for dividing disability benefits as follows:

- the benefits are divided by giving notice as required under part 6;<sup>192</sup>

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187. *Supra* note 17 at 35 (recommendation no. 36).

188. *Ibid* at 36.

189. See *ibid* (“It is not the intention of the Committee that disability benefits be routinely divided between former spouses. The Committee’s sole concern in this respect is that, where such a division is appropriate having regard to principles currently worked out by the courts, there is no reason to restrict the mechanics of pension division by reference to the member attaining some arbitrary age.”).

190. Ministry Transition Guide, *supra* note 40 at s 122.

191. *Supra* note 1, s 122 (1). See also, above, at 21–22 (for more information on terms defined under part 6, including *member* and *plan*).

192. See *supra* note 1, s 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.”).

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- the benefits are divided in accordance part 6's provisions for local plans after pension commencement;<sup>193</sup> and
- the division continues until the earlier of (i) the spouse's death and (ii) termination of the benefits under the plan.<sup>194</sup>

Section 122 also supplies a default rule that applies when an agreement between spouses is silent on the issue of disability benefits. In these cases, the benefits "are deemed to be allocated to the member."<sup>195</sup>

## Text of the Family Law Act's provision on disability benefits

Section 122 reads in full as follows:

### Disability benefits

- 122** (1) This section applies if benefits are paid to a member under a plan as a consequence of the member's disability.
- (2) If a spouse is entitled under an agreement or order to receive a proportionate share of disability benefits paid under the plan,
- (a) the disability benefits are to be divided by giving notice in accordance with section 136 [*notice or waiver*],
  - (b) the 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.<sup>196</sup>

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193. See *ibid*, s 117. See also, above, at 25 (for more information on division of benefits in a local plan after pension commencement).

194. See *supra* note 1, s 122 (2).

195. *Ibid*, s 122 (3).

196. *Ibid*, s 122 [bracketed text in original].

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## Issue for Reform

### **Is the intention underlying section 122 of the Family Law Act frustrated if the member's disability occurs after the spouse becomes a limited member?**

#### *Brief description of the issue*

This issue is concerned with the application of section 122 to a specific fact pattern, which is best expressed as a hypothetical scenario.

A spouse agrees to become a limited member of a pension plan.<sup>197</sup> At the time this agreement is made, the member isn't disabled and no one contemplates the member becoming disabled. But the member does become disabled and receives disability benefits from the pension plan until age 65. Because the agreement is silent on this issue, the *Family Law Act's* default rule applies and the member is entitled to all of the disability benefits.<sup>198</sup> The agreement may provide that the spouse is entitled to division of the pension when the member turns 55 years old, but the member is receiving disability benefits and therefore isn't entitled to a pension at this time. So the spouse will have to wait until the member turns 65 years old (or ceases to be disabled) and starts receiving the pension for it to be divided.

Could section 122 be extended to cover this scenario?

#### *Discussion of options for reform*

This issue presents readers with a clear-cut set of two options.

The first option would be to amend section 122 to cover the hypothetical scenario described above. The rationale for this amendment would be to enhance the fairness of part 6. An amendment addressing this scenario would have benefits for the limited-member spouse. It may also have advantages for some plans, by helping to spread the risk that arises in a small number of cases.

The second option would be to retain the status quo. Relatively few pension plans feature both disability benefits and pension benefits. (Though, those plans that do

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197. See, above, at 27 (for more information on becoming a limited member).

198. See *supra* note 1, s 122 (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.").

tend to have a lot of members.) There doesn't appear to be a groundswell in favour of such a narrowly tailored reform, which would apply only to a small number of cases.

*The committee's tentative recommendation for reform*

The committee wrestled with this issue, ultimately coming around to favouring an amendment.

The committee is aware that the scenario likely only describes a small number of plans. And it may be technically challenging to implement a recommendation to address the scenario.

That said, the kinds of plans that do offer both disability benefits and pension benefits are likely to be large-scale plans, with benefits determined by a benefit formula provision (which are often informally called defined benefit plans).<sup>199</sup> While these plans might be relatively small in number, they do cover a large number of people. The proposed amendment could amount to a fine-tuning of part 6, which enhances its fairness for a significant group of people.

In the end, the committee also decided to propose an amendment as a means of stimulating discussion of this issue. It formed its tentative recommendation primarily for the purpose of consulting with the public and gauging its reaction to the tentative recommendation.

The committee tentatively recommends:

*6. If an agreement or order dividing benefits is silent on entitlement to disability benefits, all of a member's disability benefits should be allocated to the member and the limited member should have all the rights under the Family Law Act, including timing to commence the limited member's share of the pension benefits.*

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199. See, above, at 18–19 (for more information on defined benefit plans).





## Chapter 6. Waiving Survivor Benefits after Pension Commencement

### Introduction

Part 6 defines *survivor benefits* as “lump-sum or periodic benefits paid under a plan to a beneficiary when a member dies.”<sup>200</sup> There are extensive provisions in the *Pension Benefits Standards Act* on survivor benefits,<sup>201</sup> including provisions on how a spouse may waive them.<sup>202</sup> The *Pension Benefits Standards Regulation* sets out the forms prescribed to effect such a waiver.<sup>203</sup> Nevertheless, experience over the years has shown that some spouses will try to effect a waiver of survivor benefits in an agreement to divide family property. This approach has caused considerable confusion and frustration in practice, particularly when the spouses have attempted have a plan administrator assist in carrying out the waiver. To address this problem, the *Family Law Act* contains a dedicated provision (and a dedicated form) for the waiver of survivor benefits after pension commencement.<sup>204</sup>

This chapter examines that provision and asks whether improvements may be made to it.

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200. *Supra* note 1, s 110 “survivor benefits.”

201. See *supra* note 25, ss 78–81.

202. See *ibid*, ss 79 (1) (b), 80 (4)–(8).

203. See BC Reg 71/2015, ss 76 (“The statement referred to in section 79 (1) (b) of the Act must be in Form 4 of Schedule 3.”), 77 (“(1) The statement referred to in section 80 (4) (a) of the Act must be in Form 2 (Waiver A) of Schedule 3. (2) The statement referred to in section 80 (6) (a) of the Act must be in Form 2 (Waiver B) of Schedule 3.”).

204. See *Family Law Act*, *supra* note 1, s 126 (2)–(3); *Division of Pensions Regulation*, *supra* note 28, Form P5 (Waiver of Survivor Benefits after Pension Commencement).

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## Background Information on Waiving Survivor Benefits after Pension Commencement

### Purpose of the Family Law Act's provision on waiving survivor benefits after pension commencement

Section 126 (2)–(3)<sup>205</sup> is another example of a provision in the *Family Law Act* that can only be grasped in relation to the law as it developed under earlier legislation. The purpose of these two subsections was to alleviate problems that had arisen under the *Family Relations Act*.

The *Family Relations Act* contained a provision that enabled a spouse to waive “any right to or interest in a member’s pension or any benefit under it,” so long as the waiver was set out in a “written agreement.”<sup>206</sup> As is readily apparent, this provision was couched in general terms. It didn’t specifically mention survivor benefits.

But this didn’t stop some spouses (or their beneficiaries) from arguing that a general waiver in a written agreement was sufficient to waive a spouse’s entitlement to survivor benefits.<sup>207</sup> It was possible that a convincing case could be made on this front by reference solely to the provision in the *Family Relations Act*. But such a case would collide headlong with specific language on survivor benefits in the *Pension*

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205. *Supra* note 1. Note that *Family Law Act*, *ibid*, s 126 (1) addresses the waiver of division of pension benefits “[b]efore an administrator implements the division of benefits under a plan” rather than after pension commencement. Since subsection (1) and its associated form (*Division of Pensions Regulation*, *supra* note 28, Form P7 (Withdrawal of Notice/Waiver of Claim)) deal with a different subject, they are outside the scope of this chapter. See, above, at 25–26 (for more information on dividing benefits before and after pension commencement).

206. *Supra* note 15, s 80 [repealed].

207. See BCLI 2006 Report, *supra* note 17 at 19 (“Anecdotal evidence suggests that spouses not infrequently enter into agreements to waive any interest in matured pensions that have survivorship benefits without actually addressing the survivorship benefit. Perhaps the reason is that the marriage was a short one, and most if not all of the pension contributions were made before the parties’ relationship commenced. Or perhaps the spouse has been compensated in some other way. Whatever the reason for making such an agreement, the scope of the waiver is uncertain because the survivor benefit actually belongs to the spouse, not the member. When the member dies, the beneficiaries of the estate sometimes argue that the spouse is not entitled to the survivor benefit on the basis of the waiver. Problems arise here because the parties often don’t understand their rights under the pension. If they think of the survivor benefits at all, the member often mistakenly believes he can appoint another beneficiary of them. While there are certainly many who believe that the spouse’s general waiver should be given effect, this would be contrary to the policy adopted under the B.C. PBSA, which provides that a member having a spouse must elect a survivor benefit for the spouse, unless the spouse signs a prescribed waiver.”).

*Benefits Standards Act*. And, as a leading case decided under the *Family Relations Act* put it, that argument based on a general provision couldn't survive contact with this specific language:

[a] review of the family law and pension statutes at issue in this case reveals that survivorship interests, by operation of legislation, become the property of the spouse upon pension commencement, and therefore cannot be blithely or ambiguously 'waived' in favour of the member's beneficiaries. Explicit language is necessary to relinquish entitlement to such benefits in the context of marriage breakdown.<sup>208</sup>

So section 126 was enacted with the goal of "clarif[ying] rules for waiving a share of benefits, including survivor benefits."<sup>209</sup> The section is intended to fulfill this goal by setting out a procedure that "permits a spouse entitled to survivor benefits under a pension that has commenced to waive those benefits, provided it is done expressly."<sup>210</sup>

### **Elements of the Family Law Act's provision on waiving survivor benefits after pension commencement**

Section 126 (2) provides, in essence, that a spouse may waive survivor benefits, after a pension commences, in an agreement or a court order.

An agreement is only effective if "the spouse waives his or her entitlement by giving notice in accordance with section 136."<sup>211</sup> Meeting this standard requires the spouse to use Form P5, a form developed specifically for waiver of survivor benefits after pension commencement.

A court order is only effective under section 126 (2) if "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."<sup>212</sup>

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208. *Tarr Estate v Tarr*, 2014 BCCA 315 at para 1 [*Tarr Estate*], Kirkpatrick JA. See also *Kraft v Kraft*, 2020 BCSC 283 at paras 12–13, 14, *Maisonville J* ("this [case] is a circumstance that s. 126(2)(b) was intended to remedy: an interest has crystallized in a second spouse, but it would be unjust and inequitable to completely disentitle a competing spouse from the benefit given her contribution to the marriage and to the member's ability to accrue a pension").

209. Ministry Transition Guide, *supra* note 40 at s 126.

210. *Ibid.*

211. *Supra* note 1, s 126 (2) (a).

212. *Ibid.*, s 126 (2) (b).

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Section 126 (2) contains these detailed requirements to guard against a spouse waiving survivor benefits after pension commencement “accidentally.”<sup>213</sup> It “may seem a complicated method for waiving survivor benefits, but the policy underlying this part of the *FLA* is not to promote waiver,” because “[t]he 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.”<sup>214</sup>

Section 126 (3) confirms that an administrator isn’t required to assist in the waiver of survivor benefits, but it “may consent to pay survivor benefits to a person other than the spouse.”<sup>215</sup> If an administrator doesn’t consent to this arrangement, then “[p]ayments would still be made to the spouse, who would have to pay them to the person entitled” under the waiver or order.<sup>216</sup>

## Text of the Family Law Act’s provision on waiving survivor benefits after pension commencement

Section 126 reads as follows:

### Waiving pension or survivor benefits

126 ...

- (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 survi-

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213. BCLI Q&A, *supra* note 26 at para 5.20.

214. *Ibid.*

215. *Supra* note 1, s 126 (3).

216. *Ibid.*

vor benefits, the person is liable to the administrator to repay the overpayment.<sup>217</sup>

## Issues for Reform

### **Should section 126 (2) (a) of the Family Law Act continue to enable a spouse to waive survivor benefits after pension commencement by giving notice in a prescribed form?**

#### *Brief description of the issue*

The purpose of section 126 (2) (a) was to clarify the law on waiving survivor benefits after pension commencement. With the perspective of seven years' experience under the new provision, has section 126 (2) (a) delivered on this purpose?

#### *Discussion of options for reform*

The options for this issue are relatively straightforward: either amend the provision or endorse the status quo.

Section 126 (2) (a) can be seen to have advantages. The provision is an improvement on its predecessor in the *Family Relations Act*. As a leading court case has noted, the procedure established under section 126 (2) (a), "roughly mirrors the form required under s. 35(4) of the [*Pension Benefits Standards Act*], and ensures that a waiver of a survivorship interest will only be accomplished deliberately and unambiguously."<sup>218</sup>

That said, it is open to question whether the provision's mechanism of requiring a waiver in a prescribed form has significantly clarified the law. Even though a prescribed form may be sufficient to prevent an accidental waiver of survivor benefits, its existence as the centrepiece of a statutory procedure for waiving these benefits may be oversimplifying a transaction that requires careful and detailed planning. This oversimplification can lead to confusion and frustration, particularly if the parties attempt to involve the administrator in their plans.

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217. *Ibid*, s 126 (2)–(3). See also *ibid*, s 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.").

218. *Tarr Estate*, *supra* note 208 at para 51.

*The committee's tentative recommendation for reform*

While the committee agreed with the goal of clarifying the law on waiving survivor benefits after pension commencement, it was of the view that section 126 (2) (a) could be improved.

First, the committee decided that a key term in the provision should be changed. In the committee's view, it's more accurate to describe the transaction governed by the provision as an assignment of survivor benefits, rather than a waiver. Using *assignment* would more accurately reflect the point that the survivor benefits already belong to the spouse. They aren't a right or an entitlement that may be waived.

Second, the committee favoured making it clear that the assignment under this provision is effected by an agreement that requires a spouse to pay all or part of the survivor benefits received by the spouse to another person. This point clarifies the content of the assignment, and serves to differentiate it from a waiver under the *Pension Benefits Standards Act*. In the committee's view, an assignment of survivor benefits requires navigating some complex legal and tax issues. Spouses shouldn't be left with the impression that giving notice in a prescribed form is sufficient to address these issues.

The committee tentatively recommends:

*7. Section 126 (2) (a) of the Family Law Act should be amended to read as follows: "the spouse assigns his or her entitlement by entering into an agreement that requires the spouse to pay all or part of the survivor benefits received by the spouse from a plan to a person other than the spouse, or".*

This tentative recommendation to amend section 126 (2) (a) goes hand-in-hand with the committee's tentative recommendation to repeal Form P5 (Waiver of Survivor Benefits after Pension Commencement), which appears in chapter 11.<sup>219</sup>

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219. See, below, at 106–109.

## **Should section 126 (2) (b) of the Family Law Act continue to require an explicit reference to this provision of the act in a court order?**

### *Brief description of the issue*

Section 126 (2) (b) imposes a formal requirement on court orders dealing with the waiver of survivor benefits after pension commencement, requiring them to contain an explicit reference to section 126 (2) (b). Is this formal requirement necessary?

### *Discussion of options for reform*

Similar to the previous issue, this issue presents a choice between amending section 126 (2) (b) and retaining the status quo.

The requirement currently found in section 126 (2) (b) does support the section's overall purpose of reducing the chances that a spouse could accidentally waive entitlement to survivor benefits after pension commencement. It establishes a simple way of confirming that the process set out in section 126 (2) was in the court's and the parties' minds when an order was made waiving survivor benefits.

That said, the provision is something of an anomaly in British Columbia legislation. In the ordinary course, legislation wouldn't require an express reference to a particular subsection as an ingredient of an effective court order. It's also open to question whether a formal requirement is the best approach to achieve the section's goals.

### *The committee's tentative recommendation for reform*

In the committee's view, it is desirable to amend section 126 (2) (b). The provision should simply describe the substantive matter at issue. If the court is making an order that a spouse must pay all or part of the survivor benefits received by the spouse from a plan to a person other than the spouse, then it should be clear that the order wasn't made accidentally or that the parties failed to grasp what they were doing.

The committee tentatively recommends:

*8. Section 126 (2) (b) of the Family Law Act should be amended to read as follows: "the Supreme Court orders the spouse to pay all or part of the survivor benefits received by the spouse from a plan to a person other than the spouse."*

## Should section 126 (3) of the Family Law Act be repealed?

### *Brief description of the issue*

Section 126 (3) provides that an administrator “may consent to pay survivor benefits to a person other than the spouse,” also making the point that an administrator isn’t required to consent to this arrangement.<sup>220</sup> In practice, it’s exceedingly rare for an administrator to consent to pay survivor benefits to someone other than a spouse. Should the legislation continue to address this very rare case?

### *Discussion of options for reform*

This issue also gave the committee a choice between two options: proposing repeal of section 126 (3) or endorsing the status quo.

The main argument for repealing the provision is that it addresses something that is unusual in practice. It would be rare for an administrator to want to participate in the waiver of survivor benefits. The subsection could be creating some confusion and, ultimately, frustration by making it appear that administrators may generally be willing to support these kinds of arrangements.

That said, the provision is permissive. Nothing in it forces the administrator to assist with a waiver of survivor benefits. It could be seen as simply stating an uncontroversial legal position.

### *The committee’s tentative recommendation for reform*

The committee decided that section 126 (3) should be repealed. The committee noted that it would be highly unlikely for any well-advised administrator to consent to pay survivor benefits to a person other than the spouse. Legislation shouldn’t be needed to address this highly unusual case. Repealing section 126 (3) wouldn’t necessarily prevent an administrator from consenting to pay survivor benefits to a person other than the spouse. But it would reduce the visibility of this unusual sort of arrangement.

The committee tentatively recommends:

*9. Section 126 (3) of the Family Law Act should be repealed.*

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220. *Supra* note 1, s 126 (3).



## Chapter 7. Commuted Value: Transfer and Calculation

### Introduction

Commuted value is an important concept for the valuation of pensions. This chapter deals with two issues for reform. The first concerns a limited member's option to have a proportionate share of the commuted value of the benefits transferred from the plan to the credit of the limited member, when the benefits to be divided are under a local plan and are determined under a benefit formula provision. The second relates to the valuation date for the calculation of commuted value in cases when the member has died.

### Background Information on Commuted Value

#### What is a commuted value?

A commuted value is "the amount of a lump sum payment that is payable today (or as of a fixed date) and that is estimated to be equal in value to a future series of pension payments, based on actuarial assumptions."<sup>221</sup> The *Family Law Act* defines this term for the purposes of pension division under part 6 by reference to the *Pension Benefits Standards Act*.<sup>222</sup>

The *Pension Benefits Standards Act* employs a definition of commuted value that has two parts.<sup>223</sup> These parts relate to the two major kinds of pensions.

One part of the definition embraces pensions with a defined contribution provision (a category that covers defined contribution pensions). In this case, the calculation of commuted value is relatively straightforward. Commuted value, under the *Pension Benefit Standards Act's* definition, "in relation to benefits that a person is entitled to receive under a defined contribution provision of a pension plan, means the balance in the person's defined contribution account."<sup>224</sup>

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221. Financial Services Regulatory Authority of Ontario, *Glossary of Pension Terms* (Toronto: Queen's Printer for Ontario, 2017), online: <[www.fsco.gov.on.ca/en/pensions/pension-plan-guide/pages/Glossary.html](http://www.fsco.gov.on.ca/en/pensions/pension-plan-guide/pages/Glossary.html)> sub verbo "commuted value."

222. See *supra* note 1, s 110 "commuted value" ("means the commuted value of a benefit, determined in accordance with the *Pension Benefits Standards Act*").

223. See *supra* note 25, s 1 (1) "commuted value."

224. *Ibid*, s 1 (1) "commuted value" (b). See, above, at 19 (for more information on defined contribu-

The other part of the definition concerns pensions with a benefit formula provision (a category that includes, among other types of pensions, defined benefit pensions). In this case, the definition is more involved. Commuted value, “in relation to benefits that a person is or may become entitled to receive under a benefit formula provision of a pension plan, means the actuarial present value of those benefits.”<sup>225</sup> The “actuarial present value” is to be determined:

- on the basis of actuarial assumptions and methods that are appropriate and in accordance with accepted actuarial practice,
- in the prescribed manner [i.e., as set out in the *Pension Benefits Standards Regulation*], and
- in a manner acceptable to the superintendent.<sup>226</sup>

## Purpose of relevant Family Law Act and Division of Pensions Regulation provisions

### *Family Law Act*

Section 115 applies to division of a pension with benefits determined under a benefit formula provision, if the pension is a “local plan” and it “has not commenced.”<sup>227</sup> The section’s purpose is to “[provide] rules [for] dividing benefits in a local plan that are determined under a benefit formula provision where the pension division arrangements take place before pension commencement.”<sup>228</sup>

### *Division of Pensions Regulation*

Section 23 of the *Division of Pensions Regulation* sets out detailed rules for calculating commuted value in relation to pension division under various sections of the act.<sup>229</sup> The section supports one of the key goals of the legal framework established by part 6, which is the articulation of the legal and actuarial principles that apply to pension division in legislation and regulation, as opposed to requiring separating

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tion pensions), 26 (for more information on dividing a pension with benefits determined by a defined contribution provision).

225. *Supra* note 25, s 1 (1) “commuted value” (b).

226. *Ibid*, s 1 (2). See, above, at 18–19 (for more information on defined benefit pensions), 27–28 (for more information on dividing a pension with benefits determined by a benefit formula provision).

227. *Supra* note 1, s 115 (1).

228. Ministry Transition Guide, *supra* note 40 at s 115.

229. See *supra* note 28, s 23.

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spouses to come to an agreement on these principles or to determine them through litigation.<sup>230</sup>

## Elements of relevant Family Law Act and Division of Pensions Regulation provisions

### *Family Law Act*

Under section 115, pension benefits are divided by having the spouse become a limited member of the pension plan.<sup>231</sup> A limited member, after giving the required notice, has two options under the section:

- to receive the limited member's proportionate share of the benefits by a separate pension, or
- 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.<sup>232</sup>

The section provides that either option may commence or be made "no earlier than the earliest date that the member could elect to have the member's pension commence."<sup>233</sup>

### *Division of Pensions Regulation*

Section 23 of the *Division of Pensions Regulation* applies if

- the limited member is entitled under Part 6 of the Act to a proportionate share of the benefits under a benefit formula provision, and
- it is necessary, under the Act, including under this regulation, to calculate the commuted value of the benefits.<sup>234</sup>

A limited member who selects the second option from section 115—the transfer of the limited member's proportionate share of the commuted value of the benefits—would turn to section 23 for rules on the calculation of commuted value.<sup>235</sup>

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230. See LRC Report, *supra* note 7 at v.

231. See *supra* note 1, s 113. See, above, at 27 (for more information on becoming a limited member of a pension plan).

232. *Supra* note 1, s 115 (2).

233. *Ibid*, s 115 (3).

234. *Supra* note 28, s 23 (2).

235. See *ibid*, s 23 (3) (b).

Section 23 contains rules on calculating commuted value in a variety of cases, including when a separate pension is payable to a limited member,<sup>236</sup> upon the death of a member,<sup>237</sup> and upon the death of a limited member.<sup>238</sup> These rules provide for a varying definition for one of the provision's key terms ("valuation date"), allowing it to be tailored to specific cases.<sup>239</sup>

## Text of the relevant Family Law Act and Division of Pensions Regulation provisions

Section 115 reads in full as follows:

### 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.
- (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*.

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236. See *ibid*, s 23 (3) (a).

237. See *ibid*, s 23 (3) (c).

238. See *ibid*, s 23 (3) (d).

239. See *ibid*, s 23 (1).

- (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.<sup>240</sup>

Section 23 of the regulation reads as follows:

**Calculation of commuted value**

- 23**
- (1) In this section, "**valuation date**", in relation to a matter referred to in subsection (3) (a), (b), (c), (d) or (e), means the date that, under subsection (3), applies to that matter.
  - (2) This section applies if
    - (a) the limited member is entitled under Part 6 of the Act to a proportionate share of the benefits under a 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

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240. *Supra* note 1, s 115 [bracketed text in original].

- (e) when calculating the amount required by the administrator to be transferred for the purposes of section 139 (b) of the Act, be calculated as at a date not earlier than the end of the month immediately preceding the date on which the administrator notifies the limited member that the transfer is required.
- (4) Subject to subsection (5) of this section, the limited member's proportionate share of the commuted value of benefits must be calculated as follows:
  - (a) the commuted value of the pension the member would have received must be calculated as if
    - (i) there had been no division under the Act,
    - (ii) the member's pension had been calculated by reference only to the benefits accrued to the valuation date, and
    - (iii) the member had elected a pension in the unadjusted normal form, applicable to the member, provided under the plan commencing at the later of
      - (A) the valuation date, and
      - (B) the date the member would reach the average retirement age for the plan;
  - (b) after that, the limited member's proportionate share of the amount referred to in paragraph (a) must be calculated.
- (5) For the purposes of subsection (4) (a) (iii) (B), the administrator may elect, as the average retirement age for the plan, a specific age that is younger than the actual average retirement age for the plan, and if that election is made, the administrator must not change the average retirement age for the plan without first applying for and obtaining the written consent of the superintendent.<sup>241</sup>

This provision turns in part on the definition of *average retirement age*:

**"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.<sup>242</sup>

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241. See *supra* note 28, s 23 [emphasis in original].

242. *Ibid*, s 1 (1) "average retirement age" [emphasis in original].

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## Issues for Reform

### **Should the Family Law Act be revised to provide that a pension plan may prohibit a commuted value transfer to a limited member in circumstances where it would be prohibited to a member?**

#### *Brief description of the issue*

If the pension benefits to be divided are under a local plan, are determined under a benefit formula provision, and the pension hasn't commenced, then section 115 of the *Family Law Act* gives a limited-member spouse the option "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."<sup>243</sup> The limited member may choose this option "no earlier than the earliest date that the member could elect to have the member's pension commence."<sup>244</sup>

Section 115 opens the door to a limited member taking a commuted-value transfer even in circumstances in which this option, under the terms of the plan, isn't available to the member. Should the section be amended to foreclose this possibility?

#### *Discussion of options for reform*

Addressing this issue boils down to a choice between amending section 115 to provide that the limited member's options mirror those of the member or retaining the current provision.

The arguments in favour of amending the section were canvassed in the BCLI 2006 Report, which contained a recommendation for such an amendment.<sup>245</sup> The report noted the following reasons as support for its recommendation:

- the limited-member spouse may lack the capacity to manage a large lump-sum payment, resulting in the spouse becoming worse off financially than would have been the case if the spouse had remained a limited member;

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243. *Supra* note 1, s 115 (2) (b).

244. *Ibid*, s 115 (3).

245. See *supra* note 17 at 14 (recommendation no. 7 (2)) ("For greater certainty, a limited member may not elect to receive the limited member's share of the pension by a transfer of commuted value unless that option is otherwise available to members of the plan who have become eligible for pension commencement.").

- the commuted-value transfer in these circumstances can be difficult for plan administrators to administer; and
- there are concerns about the perceived lack of fairness in a provision that gives a limited member rights that the member doesn't have.<sup>246</sup>

Conversely, there may be advantages to the status quo. The current provision does give greater flexibility and control to the limited member. The BCLI Q&A noted some circumstances in which these qualities might be particularly prized by a limited member:

- the limited-member spouse may prefer the control afforded by this provision and may feel, with professional assistance, better able to invest the funds effectively than the plan;
- the limited-member spouse may have health concerns and a reduced life expectancy, effectively placing a higher value on a lump-sum transfer;
- the limited-member spouse may want to ensure that financial resources are available for a dependent after the former spouse's death;
- the limited-member spouse may, in some cases, have greater flexibility about the amount of income received on a lump-sum transfer;
- the limited-member spouse may be concerned about the plan's solvency.<sup>247</sup>

### *The committee's tentative recommendation for reform*

The committee favoured amending section 115. The committee noted that giving the limited-member spouse greater flexibility under the option to take a commuted-value transfer made a certain amount of sense under the previous act, because it took a relatively rigid approach to the other option (receiving a separate pension). Now, section 115 of the *Family Law Act* gives the limited member more flexibility in choosing when to receive a separate pension.<sup>248</sup> In view of this change, the committee views the rationale for giving a limited-member spouse greater flexibility with respect to a commuted-value transfer to be attenuated.

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246. See *ibid* at 15.

247. See *supra* note 20 at para 2.40.

248. See *supra* note 1, s 115 (3) ("A separate pension under subsection (2) (a) may commence . . . no earlier than the earliest date that the member *could* elect to have the member's pension commence." [emphasis added]).

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The committee was also concerned about the legislation indirectly making the option of a commuted-value transfer more attractive to limited-member spouses. The committee noted that many people can fail to appreciate the value of a pension with benefits determined under a benefit formula provision. In many circumstances, a limited-member spouse could end up being financially disadvantaged by electing a commuted-value transfer.

Finally, the committee was concerned about the fairness of a provision that gives an option to the limited-member spouse that is not available to the member spouse.

The committee tentatively recommends:

*10. The Family Law Act should be amended to make the limited member's options with respect to commuted-value transfer mirror those of the member.*

### **Should the valuation date for the calculation of commuted value in cases involving the death of a member set out in the Division of Pensions Regulation be amended to provide for calculation on the day before the death of the member?**

#### *Brief description of the issue*

Section 23 (3) (c) of the *Division of Pensions Regulation* sets out the rule for determining the valuation date in the calculation of commuted value for cases in which a member has died. The section refers to section 124 (2) of the act, which applies when “a member dies before (a) the member’s pension commences, and (b) the limited member receives the limited member’s proportionate share of the benefits.”<sup>249</sup> In these circumstances, section 124 (2) provides that “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.*”<sup>250</sup> But section 23 (3) (c) of the regulation calls for commuted value to “be calculated *as at a date not earlier than the end of the month immediately preceding the day before the death of the member.*”<sup>251</sup>

Should the regulation be amended to address the inconsistency between these two dates?

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249. *Ibid*, s 124 (2).

250. *Ibid*, s 124 (2) [emphasis added].

251. *Supra* note 28, s 23 (3) (c) [emphasis added].

### *Discussion of options for reform*

Having different dates in two closely associated provisions is apt to create confusion. Ordinarily, consistency would be favoured in these circumstances, and there would be little reason to oppose this approach.

In this specific case, section 23 (3) (c) was drafted to give plan administrators greater flexibility in calculating commuted value.<sup>252</sup>

### *The committee's tentative recommendation for reform*

The committee understands that the practical concerns cited as a rationale for the wording of section 23 (3) (c) related to time lags that arose in receiving information necessary to do the calculation. Historically, these lags were significant. But their significance has been declining as electronic communication has become more widespread. This development may have reached a point in which time lags are no longer a practical concern. In view of this, the committee favours amending section 23 (3) (c) to make it consistent with section 124 (2) of the act.

The committee tentatively recommends:

*11. Section 23 (3) (c) of the Division of Pensions Regulation should be amended so that commuted value is calculated on the day before the death of the member.*

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252. See BCLI Q&A, *supra* note 26 at para 2.9 (“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.”).

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## Chapter 8. Locked-In Retirement Accounts and Life Income Funds

### Introduction

With this chapter, the focus shifts from fine-tuning the existing provisions of part 6 to a potential addition to part 6. Court decisions have consistently held that, when locked-in retirement accounts and life income funds are family property, they are divisible under part 5 of the *Family Law Act*, and not under part 6. This chapter examines whether part 6 should be amended to provide for their division under that part.

### Background Information on Locked-In Retirement Accounts and Life Income Funds

#### Meaning of “locked-in”

In everyday speech and informal writing, *locked-in* is a term with a diffuse meaning, which dictionaries define in a circular fashion. (“[t]hat is or has been locked in (in various senses of the verb).”)<sup>253</sup> The phrase turns on the meaning of its constituent verb *lock*, a word that has been defined as having a vast number of distinct senses.<sup>254</sup> For this chapter, the most relevant definition of the term would carry the senses of “[t]o hold or fix firmly or irrevocably”<sup>255</sup> and “[t]o keep securely or render inaccessible; to confine.”<sup>256</sup>

#### Locked-in retirement accounts in pension law

Pension law takes this broad conception of being locked-in and deploys it against a specific legal arrangement. This arrangement is a locked-in retirement account, which is a creature of provincial pension legislation.<sup>257</sup> British Columbia’s *Pension*

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253. See John Simpson et al, eds, *The Oxford English Dictionary*, 3rd ed (December 2015), online: <www.oed.com> sub verbo “locked-in” (adj 1).

254. See *ibid*, sub verbo “lock” (listing 35 definitions of *lock* as a verb).

255. *Ibid*, sub verbo “lock” (v 4c).

256. *Ibid*, sub verbo “lock” (v 5).

257. See Stephen Stuart, “Locked-In RRSPs” (1991) 10:4 Est & Tr J 385 at 385 (“unlike a regular RRSP, the locked-in RRSP is a creation of pension legislation and not the Income Tax Act” [footnote omitted]).

*Benefits Standards Act* defines *locked-in retirement account* to mean “an RRSP that is prescribed to be a locked-in retirement account.”<sup>258</sup> The regulation completes this definition by adding that “an RRSP is a locked-in retirement account if the RRSP includes locked-in money.”<sup>259</sup>

Locked-in retirement accounts are commonly created when an employee, who was a member of an employer’s pension plan, ceases to be employed by that employer, for whatever reason, after the plan vests.<sup>260</sup> Locked-in retirement accounts were “designed to facilitate the portability of vested pension benefits.”<sup>261</sup> As a result, “[t]he locked-in RRSP is more restrictive than the ordinary RRSP and does not allow withdrawals prior to retirement.”<sup>262</sup>

Pension benefits that flow from a locked-in retirement account “must be used to provide lifetime retirement income for the owner.”<sup>263</sup> There is an extensive legal

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258. *Supra* note 25, s 1 (1) “locked-in retirement account.” The act defines *RRSP* to mean “a registered retirement savings plan within the meaning of the *Income Tax Act* (Canada)” (*ibid*, s 1 (1) “RRSP”). That act defines *registered retirement savings plan* to mean “a retirement savings plan accepted by the Minister for registration for the purposes of this Act as complying with the requirements of this section” (RSC 1985, c 1 (5th Supp), s 146 (1) “registered retirement savings plan”).

259. *Pension Benefits Standards Regulation*, *supra* note 203, s 96. See also *ibid*, s 1 (1) “locked-in money” (“means (a) money the withdrawal, surrender or receipt of which is restricted under section 68 of the Act, (b) money to which paragraph (a) applies that has been transferred out of a pension plan (i) to one or more locked-in vehicles, and any interest on that money, or (ii) to an insurance company to purchase an annuity that is permitted under the Act, (c) money in a locked-in retirement account that was deposited into the locked-in retirement account under section 105 (1) of this regulation or paid to the locked-in retirement account issuer under section 105 (2) or (3) (b), and (d) money in a life income fund that was deposited into the life income fund under section 124 (1) of this regulation or paid to the life income fund issuer under section 124 (2) or (3) (b).”).

260. See Stuart, *supra* note 257 at 386 (“For the most part, locking-in of pension benefits occurs at the same time as vesting. Simply stated, vesting occurs when a pension plan member is entitled to the pension provided by the employer’s contributions. If an employee leaves an employer before the pension benefits become vested, there would be no entitlement to pension benefits from the employer’s contributions. He or she would be entitled only to his or her own contributions to the pension plan, if any, plus interest. However, once vesting occurs, and the employee’s entitlement to pension benefits attributable to the employer’s contributions becomes absolute, all employer’s and employee’s required contributions will be locked-in and will not be available to the employee until normal retirement age, or an earlier age if he or she takes early retirement and is within 10 years of normal retirement age.” [footnote omitted]).

261. *Ibid* at 385.

262. *Ibid*.

263. BCLI Q&A, *supra* note 26 at § 10.4 (“‘Locked-in’ benefits must be used to provide lifetime re-

framework that's dedicated to achieving this result and managing its consequences. The *Pension Benefits Standards Act*<sup>264</sup> and the *Pension Benefits Standards Regulation*<sup>265</sup> contain detailed provisions on locking-in—and unlocking—benefits.<sup>266</sup>

## Life income funds

A life income fund is analogous to a locked-in retirement account, as a registered retirement income fund is analogous to a registered retirement savings plan. Whereas locked-in retirement accounts hold locked-in money for retirement savings, life income funds hold locked-in (pension) money that will eventually be paid out as retirement income.

The *Pension Benefits Standards Act* defines life income fund to mean “a RRIF that is prescribed to be a life income fund.”<sup>267</sup> Under the *Pension Benefits Standards Regulation*, “a RRIF is a life income fund if the RRIF includes locked-in money.”<sup>268</sup> The regulation contains extensive provisions relating to life income funds.<sup>269</sup>

## Dividing locked-in retirement accounts and life income funds

The expression *locked-in retirement account* appears only once in part 6, as part of an extended definition of *benefit* for the purposes of a section stating the rule that a spouse has no further entitlement to pension benefits after their division under part 6.<sup>270</sup> The expression *life income fund* doesn't appear in the *Family Law Act*.

Nevertheless, it is clear that locked-in retirement accounts and life income funds are family property.<sup>271</sup> This point raises the question whether locked-in retirement ac-

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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.”).

264. *Supra* note 25, ss 68 (locking in commuted value of benefits), 69 (exceptions to locking in commuted value of benefits).

265. *Supra* note 203, ss 96–111.

266. See BCLI Q&A, *supra* note 26 at para 1.18 (“It is the locking-in rules that transform RRSPs into LIRAs.”).

267. *Supra* note 25, s 1 (1) “life income fund.”

268. *Supra* note 203, s 113.

269. See *ibid*, ss 112–130.

270. See *supra* note 1, s 145 (5) (“In this section, “**benefit**” includes (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*” [emphasis in original]).

271. See *ibid*, s 84 (2) (e) (“family property includes the following: . . . a spouse’s entitlement under an

counts and life income funds, which partake of many of the features of pensions, can be divided under the part of the *Family Law Act* that is dedicated to division of pensions, part 6.

Since the advent of the *Family Law Act*, the courts have consistently answered this question with a *no*. Locked-in retirement accounts and life income funds are divisible as family property under part 5 of the act.

The leading case is *Lade v Perreault*.<sup>272</sup> In this case, the court sought to answer “whether the LIRA [at issue] is divided pursuant to Part 5 or Part 6 of the *FLA*.”<sup>273</sup> The court concluded that the locked-in retirement account couldn’t be divided under part 6 because “[i]n order for a pension [to] be divided pursuant to Part 6 of the *FLA*, there must be a pension plan to which the person is a member, and to whom a pension will be paid or is being paid.”<sup>274</sup> But there was “no administrator” of the locked-in retirement account at issue in this case.<sup>275</sup> Instead, “[t]he respondent makes decisions relating to where the LIRA is located, how the LIRA is invested subject to certain restrictions contained in the Regulations of the *PBSA*.”<sup>276</sup> The court concluded that since the locked-in retirement account “is a[n] RRSP or a[n] RSP . . . it is divisible under Part 5 and not Part 6 of the *FLA*.”<sup>277</sup>

As the court noted, its decision wasn’t merely a matter of academic classification with no real-world implications. There were financial consequences that turned on its decision.<sup>278</sup> In essence, it meant the difference between not dividing the locked-in retirement account at all (the result that would have followed from the application of part 6 to the facts of this case) and what actually occurred, which was that “the

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annuity, a pension plan, a retirement savings plan or an income plan” [emphasis added]). See also BCLI Q&A, *supra* note 26 at paras 1.18–1.19.

272. 2016 BCSC 535.

273. *Ibid* at para 19, Hyslop J. The court also framed the issue in these terms: “[i]s this LIRA owned by the respondent a pension defined pursuant to Part 6 of the *FLA* or is it an asset as described in Part 5 of the *FLA*?” (*Ibid* at para 6.)

274. *Ibid* at para 21.

275. *Ibid*.

276. *Ibid*.

277. *Ibid* at para 23.

278. See *ibid* at para 19 (“If [the locked-in retirement account] were divided [pursuant to] Part 6 of the *FLA*, the LIRA would not be divided and the entire LIRA would belong to the respondent. This is based on the period of service that the respondent had when he received the \$174,494.46. If it were divided under Part 5 of the *FLA*, the respondent would rollover to the claimant, \$54,575.50, to reflect one-half of the growth in the LIRA, which is a family asset.”).

spouse was entitled to one-half of the increase in value of the initial lump sum transfer from the pension plan to the LIRA.”<sup>279</sup>

Three recent cases have followed *Lade v Perreault*: *P.R. v M.R.*,<sup>280</sup> *Collins v Lindahl*,<sup>281</sup> and *N.H. v M.H.*<sup>282</sup>

## Issue for Reform

### Should the Family Law Act be amended to provide that locked-in retirement accounts and life income funds should be divided under part 6?

#### *Brief description of the issue*

Since the advent of the *Family Law Act*, case law has consistently held that locked-in retirement accounts and life income funds should be divided under part 5 of the act. Should the act be amended to change this conclusion, by providing that locked-in retirement accounts and life income funds should be divided under part 6?

#### *Discussion of options for reform*

This issue is essentially a choice between proposing amendments to part 6 or deciding to remain with the status quo.

The main argument in favour of amending part 6 to embrace locked-in retirement accounts and life income funds is that they are closely connected with pensions. The funds used to purchase them derive from a pension. Part 6 contains a suite of sophisticated rules that apply to the division of pensions, which can be extended to cover locked-in retirement accounts and life income funds.

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279. *Family Law Sourcebook*, *supra* note 33 at § 5.17.

280. 2019 BCSC 102 at para 87, Tammen J (“Based on the decision of *Lade v. Perreault*, 2016 BCSC 535 (CanLII), I find that the LIRA is an RRSP, subject to division in accordance with Part 5 of the *FLA*. Section 87(b)(ii) of the *FLA* states that the value of family property and family debt must be determined as of the date of the hearing. I am also guided by the decision in *Wilson v. Wilson*, (1997) 1997 CanLII 2777 (BC CA), 31 B.C.L.R. (3d) 332 at para. 22 (C.A.) where, Lambert J.A. held that growth attributed to investment or market forces between the date of separation and the date of trial should be shared between the parties, but growth caused by additional contributions should not be shared.”).

281. 2018 BCSC 1344 at paras 66–70, MacKenzie J.

282. 2018 BCSC 921 at paras 191–192, Marzari J.

On the other hand, there may be advantages to the status quo. It has been said that relying on part 5 “presents no practical problem for dividing benefits in these types of plans.”<sup>283</sup> Moving to division under part 6 might create administrative burdens for providers of locked-in retirement accounts and life income funds.

*The committee’s tentative recommendations for reform*

The committee favours bringing division of locked-in retirement accounts and life income funds into part 6. In its view, part 6 contains a more comprehensive set of rules and will likely provide for a fairer result in most cases.

The committee tentatively recommends:

*12. Funds in a locked-in retirement account or life income fund should be divisible under part 6 of the Family Law Act.*

Moving division of locked-in retirement accounts and life income funds to part 6 naturally raises the question of which of the part’s rules will apply to that division. In the committee’s view, the principle that should guide the answer to this question is to apply the rules that would have applied to the pension benefits that were transferred to fund the locked-in retirement account or life income fund.

The committee tentatively recommends:

*13. The rules applicable to the benefits under the transferring pension plan should apply to the division of the locked-in retirement account or life income fund.*

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283. BCLI Q&A, *supra* note 26 at para 1.18.



## Chapter 9. Death of Spouse Before Becoming Limited Member

### Introduction

This chapter deals with another potential addition to part 6, this time to address a potential, emerging issue. The issue concerns a scenario in which a spouse dies part of the way through the process of becoming a limited member. The question is whether part 6 should be amended to make it clear that the spouse's personal representative may complete this process.

### Background Information on Death of Spouse Before Becoming Limited Member

#### **The scenario: timing and the interaction of family law with wills-and-estates law**

In brief, this chapter concerns a scenario in which a spouse dies after separation but before becoming a limited member of a plan under part 6.<sup>284</sup> Part 6 doesn't directly address this scenario, but the scenario does point to a legal issue that could (likely will) emerge in the future. Because there is no existing provision addressing this scenario, the chapter will spend some time analyzing it from first principles.

At the start, it's worth noting that the scenario turns on a couple of things: (1) a timing issue; and (2) the interaction of family law with wills-and-estates law.

When spouses separate, family law gives the spouses rights to family property. These rights arise on separation.<sup>285</sup> But asserting these rights in relation to specific items of property can take time. Pensions serve as an example of this phenomenon. A spouse's right to a share of the other spouse's pension arises on separation, under

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284. See, above, at 27 (for more information on becoming a limited member of a pension plan).

285. The sequence of events in the scenario is important because "the word 'separation' in the *FLA* does not include death": *Gibbons v Livingston*, 2018 BCCA 443 at para 74, Smith JA. Rights arise under the *Family Law Act* in this scenario because there has been a separation for the purposes of that act before a spouse dies. If such a separation hadn't occurred before the death of the spouse, then the analysis of the legal issues would be taken in a completely different direction. See, above, at 12–13 (for more information on separation as a triggering event for division of family property).

part 5 of the *Family Law Act*. But dividing pensions isn't a simple and straightforward matter. In British Columbia, it's addressed by a detailed legislative framework, found in part 6 of the *Family Law Act* and the *Division of Pensions Regulation*.

Under this legal framework, further steps are called for to perfect the right that arises on separation. Examples of these steps include (1) the need to negotiate an agreement or to obtain a court order and (2) the filing of forms with a plan administrator, to effect the terms of the agreement or court order. The time that necessarily is going to elapse between the right arising and the right being perfected opens up the possibility of something going wrong. That's what happens in the scenario: after the right to a share in the pension arises, the spouse dies. Now the spouse can't personally take the steps needed to perfect the right.

This scenario describes an unusual situation in the sense that neither part 6 of the *Family Law Act* and the *Division of Pensions Regulation* nor the case law has directly considered what to do in these circumstances. But if you strip away the specific details of this scenario and instead look at it in the broadest possible terms, you end up with a common occurrence. No one ever dies with all their property, rights, and affairs neatly wrapped up and settled. And the law has long taken this point into account.

In the corner of the law dealing with wills and estates, it's the job of the deceased's personal representative to deal with outstanding issues arising from the deceased's property, rights, and affairs. (A personal representative is typically going to be either the executor of the deceased's will or, if the deceased didn't have a will, the administrator of the deceased's estate.)<sup>286</sup> So the first question to consider is whether the deceased spouse's personal representative might be able to take the steps needed to perfect the spouse's right to a share of the pension.<sup>287</sup>

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286. The actual legislative definition of *personal representative* is more complex than the text makes it out to be. See *Interpretation Act*, RSBC 1996, c 238, s 29 "personal representative" ("includes an executor of a will and an administrator with or without will annexed of an estate, and, if a personal representative is also a trustee of part or all of the estate, includes the personal representative and trustee"). This complex, open-ended definition is needed to cover off exceptional cases, such as an administrator with will annexed. These exceptional cases are important for wills-and-estates law, but they don't have much of a bearing on the subject of this chapter. For what follows, it's perfectly acceptable to just think of executors and administrators as comprising the whole of the category of personal representatives.

287. Resulting in the deceased spouse's estate benefiting from that right.

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## What is the general authority of a personal representative?

The general provisions of wills-and-estates law in British Columbia are spelled out in the *Wills, Estates and Succession Act*.<sup>288</sup> This act provides that personal representatives have “the same authority over the estate in respect of which the personal representative is appointed as the deceased person would have if living.”<sup>289</sup>

This provision is new to the *Wills, Estates and Succession Act*, which came into force on 31 March 2014. It was intended to replace a number of earlier provisions that variously gave powers to executors and administrators and resulted in them having different powers. The goal of section 142 was to move beyond “[t]his piecemeal approach” and articulate a clear rule that applies equally to executors and administrators: “[a] personal representative will now have, by default, the same authority over the estate as the deceased had when living.”<sup>290</sup>

Because section 142 is a new provision, it hasn’t received much judicial consideration. It has only been considered in one case.<sup>291</sup> This case involved an application to court to determine “whether the plaintiff [the personal representative] is entitled to a copy of the [deceased’s] solicitor’s file [containing information on an estate-planning consultation],” which was being resisted by the solicitor “based upon advice she has received from a practi[c]e advisor with the Law Society of British Columbia that the file is or may be protected by solicitor-client privilege.”<sup>292</sup> The court “conclude[d] that the plaintiff has the legal authority to waive privilege over the so-

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288. SBC 2009, c 13.

289. *Ibid*, s 142 (1). The section goes on to provide how a personal representative has to use this authority: “A personal representative must exercise authority to (a) administer and distribute the estate in respect of which the personal representative is appointed, (b) account to beneficiaries, creditors and others to whom the personal representative has at law a duty to account, and (c) perform any other duties imposed on the personal representative by the will of the deceased person or by law.” (*Ibid*, s 142 (2).)

290. Continuing Legal Education Society of British Columbia, *Wills, Estates and Succession Act Transition Guide* (Vancouver: Continuing Legal Education Society of British Columbia, 2010) (loose-leaf 2014 update) at § 3.142 (“Section 142 replaces ss. 4, 65, and 67 of the [*Estate Administration Act*]. The former legislation gave executors a collection of powers which supplemented the various powers they had to administer estates under the common law, and not all of these powers were shared by administrators. This piecemeal approach has been abolished. A personal representative will now have, by default, the same authority over the estate as the deceased had when living, in order to carry out the duties enumerated in s. 142(2), *unless* the will or any enactment provides otherwise. Administrators have the same powers as executors.” [emphasis in original]).

291. *Stapleton v Doe*, 2017 BCSC 12 [*Stapleton*]. Section 142 has also been cited (but not discussed) in *Chapman v Haley Estate*, 2017 BCSC 2057.

292. *Stapleton*, *supra* note 291 at para 3, Master Wilson.

licitor's file, and that the file should be produced to the plaintiff.”<sup>293</sup> The court came to this conclusion because, as the master hearing the application put it, “[a]s I read s. 142(1) of the *Wills, Estates and Succession Act*, no distinction can be drawn between the ability of Mr. Haas [the deceased] to waive privilege when he was alive and the plaintiff's ability to do so now, unless either of the exceptions under subparagraphs (a) or (b) apply.”<sup>294</sup>

This is a pretty expansive interpretation of a personal representative's general authority. But it's qualified by the concluding clause in the quotation, which points to two statutory exceptions that make the general authority a default rule.

First, this default rule can be displaced by “a contrary intention appearing in the will of the deceased person.”<sup>295</sup> A given spouse's will could provide that the spouse's personal representative doesn't have the authority to perfect a spouse's rights under the *Family Law Act*, but that's probably only going to occur in a very rare case.

The other statutory exception to the default rule is the one that is more relevant for the issue at hand. It provides that the default rule can be displaced by the *Wills, Estates and Succession Act* “or any other enactment.”<sup>296</sup> This second qualifier is more important because it opens up the possibility that something in the *Family Law Act* or the *Division of Pensions Regulation* may have displaced a personal representative's general authority when it comes to the scenario that is the subject of this discussion.

## What are a spouse's rights to a share of a pension on separation?

The *Family Law Act* establishes the guiding principle here, which it describes as “equal entitlement and responsibility.”<sup>297</sup> This principle provides that:

- “spouses are both entitled to family property and responsible for family debt, regardless of their respective use or contribution,”<sup>298</sup> and

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293. *Ibid* at para 17.

294. *Ibid* at para 21 [emphasis added].

295. *Wills, Estates and Succession Act*, *supra* note 288, s 142 (1) (a).

296. *Ibid*, s 142 (1) (b).

297. *Supra* note 1, s 81. This general principle is expressly “[s]ubject to an agreement or order that provides otherwise and except as set out in this Part [i.e., part 5 of the *Family Law Act*] and Part 6” (*ibid*, s 81).

298. *Ibid*, s 81 (a).

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- “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.”<sup>299</sup>

*Family property*, for the purposes of the *Family Law Act*, includes “a spouse’s entitlement under an annuity, a pension plan, a retirement savings plan or an income plan.”<sup>300</sup>

But this guiding principle is also a default rule. It’s subject to part 6.<sup>301</sup> Part 6 provides that “[i]f 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.”<sup>302</sup> This means that a requirement set out in part 6 (or in its regulation, the *Division of Pensions Regulation*) could restrict the general authority of a personal representative.

## How does a spouse become a limited member of a pension plan?

Under part 6, “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.”<sup>303</sup> The starting place for cases involving pension division is typically the negotiation of an agreement.<sup>304</sup> If the spouses can’t reach an agreement, they typically turn to the courts to settle disputes.

Part 6 sets out a variety of ways to divide pensions, which are geared to specific kinds of pensions. A common way to effect a division of pension benefits is to make a

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299. *Ibid*, s 81 (b).

300. *Ibid*, s 84 (2) (e). See, above, at 10–12 (for more information on family property).

301. See *supra* note 1, s 81.

302. *Ibid*, s 111 (1) [bracketed text in original]. See also *ibid*, s 110 “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”).

303. *Ibid*, s 111 (1).

304. Note that “[f]or 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” (*ibid*, s 111 (2)).

spouse a limited member of a pension plan. According to part 6, this should occur whenever benefits:

- are under a local plan or under a supplemental plan to a local plan, and
- 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).<sup>305</sup>

The section goes on to provide that “[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.”<sup>306</sup> Section 136 provides that this notice “must be given to the administrator in the prescribed form and manner.”<sup>307</sup> The *Division of Pensions Regulation* provides that this notice must be given in a specific form, called a Form P2 (Request for Designation as Limited Member).<sup>308</sup>

None of these provisions says that a personal representative is unable to take the steps required to perfect the division of a pension by becoming a limited member, by negotiating an agreement, obtaining court order, or filing the Form P2. On the other hand, none of them specifically enables personal representatives to do these things. But this latter point might not be enough to displace the default rule found in section 142 of the *Wills, Estates and Succession Act*.

## What other provisions in part 6 could have an impact on this scenario?

While part 6 might not contain any provisions that would prevent a personal representative from completing the steps required for a deceased spouse to become a limited member, it does contain provisions that limit the range of the legal issue.

These provisions in part 6 concern division of pension benefits in a local plan after the pension commences.<sup>309</sup> In this case, after the Form P2 is given to the plan administrator, the “spouse is entitled . . . to receive a proportionate share of benefits payable under the plan during the member’s lifetime until the earlier of”:

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305. *Ibid*, s 113 (1). See, above, at 23–24 (for more information on local plans).

306. *Supra* note 1, s 113 (2).

307. *Ibid*, s 136.

308. See *supra* note 28, s 4 (b).

309. See *supra* note 1, s 117.

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- *the death of the spouse, and*
- the termination of benefits under the plan.<sup>310</sup>

This provision applies to cases in which the pension has commenced and “the benefits to be divided (i) are under a local plan, and (ii) are not in a defined contribution account.”<sup>311</sup> In these cases, a personal representative could complete the steps required for a spouse to become a limited member, but it would amount to an empty gesture. Because the spouse is already dead, “the member resumes receiving all the benefits.”<sup>312</sup>

Similar language appears in provisions relating to division of disability benefits<sup>313</sup> and benefits paid under an extraprovincial plan.<sup>314</sup> So in these circumstances too there would be little practical effect arising from a personal representative completing the steps required to make a spouse a limited member, because a policy choice has been made to end the spouse’s entitlement to a share of the pension benefits as of the date of the spouse’s death.

On the other hand, “[i]f a limited member dies before the member, before the member’s pension commences and before receiving the limited member’s proportionate share of benefits,” then part 6 provides that “the administrator must transfer to the credit of the limited member’s estate the proportionate share of the commuted value of the benefits.”<sup>315</sup>

These provisions have the effect of narrowing the relevant issues raised by the scenario to those that arise before the member’s pension commences.

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310. *Ibid*, s 117 (2) [emphasis added].

311. *Ibid*, 117 (1).

312. Ministry Transition Guide, *supra* note 40 at s 117.

313. See *Family Law Act*, *supra* note 1, s 122 (2) (c) (i).

314. See *ibid*, s 123 (2) (b) (i). See also *ibid*, s 110 “extraprovincial plan” (“subject to the regulations, means a plan that is not a local plan, and includes a supplemental plan to an extraprovincial plan”). There aren’t any regulations addressing the definition of *extraprovincial plan*.

315. *Ibid*, s 124 (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 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.” [bracketed text in original]). See also *ibid*, s 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.”).

## Issue for Reform

**Should part 6 of the Family Law Act be amended so that it addresses a scenario when a spouse after separation dies before becoming a limited member and before the pension commences?**

### *Brief description of the issue*

Even though general provisions of family law and wills-and-estates law address the powers of a personal representative in the division of family property (including pensions), there might be uncertainty about the application of those principles to a specific scenario involving the death of a spouse after separation but before becoming a limited member and before the pension commences. Should part 6 be amended to directly address this scenario and confirm the power of the personal representative to act?

### *Discussion of options for reform*

The main advantage of amending part 6 to address this scenario is that it would bring some added clarity to the law. An amendment wouldn't change part 6 so much as shine a light on an emerging legal issue that may cause confusion.

The downside of an amendment is that it shouldn't be necessary. General provisions in the *Wills, Estates and Succession Act* and the *Family Law Act* should cover this scenario, as it doesn't appear that their application has been excluded. In particular, there may be some support in the case law under the previous act for a personal representative's power to file the forms necessary for a spouse to become a limited member. (One case, in particular, dealt with the inverse of this scenario, holding that a limited member may file the relevant forms even after the member's death.)<sup>316</sup> But it shouldn't be necessary to specifically enable a power that is stated in general

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316. See *Martens v Martens*, 2009 BCSC 1477 at para 63, Gropper J ("I specifically reject the plaintiff's assertion that Dennis Martens had to file his Form 2 during Linda Martens' lifetime, in accordance with s. 74 of the *FRA*. I agree with the Pension Corporation's interpretation of s. 72 of the *FRA* that 'that section provides that a spouse *may* be designated as a limited member of a local plan' (emphasis added). It does not require that Dennis Martens deliver the notice or obtain a designation within a limited period. Further, as the Pension Corporation addressed, the *Division Regulation* does not require that the forms be submitted within a certain period of time or while the member is still alive. A temporal limitation cannot be read into the legislation to defeat Dennis Martens' entitlement to Linda Martens' preretirement survivor benefits.").

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terms, even if that power extends to negotiating an agreement or obtaining a court order.<sup>317</sup>

### *The committee's tentative recommendation for reform*

The committee was of the view that the current law likely gives personal representatives the power to act in the scenario. But it was concerned about whether this point is widely appreciated. The committee saw some value in amending part 6 to illuminate this power. Such an amendment would make the law clearer and more certain.

The committee tentatively recommends:

*14. Part 6 of the Family Law Act should be amended to clarify that, if a spouse dies before a member's pension commences and before being designated a limited member, then the personal representative of the deceased spouse may take all steps necessary to designate the deceased spouse as a limited member of the plan.*

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317. One commentator provides some support for this point by noting that a personal representative should be able to enforce rights a deceased spouse acquired before death under the *Family Law Act* by proceeding in the courts. See Continuing Legal Education Society of British Columbia, ed, *British Columbia Probate and Estate Administration Practice Manual*, 2nd ed, vol 1 (Vancouver: Continuing Legal Education Society of British Columbia, 2007) (loose-leaf 2019 update) at § 11.27 ("It appears that now, through the combined operation of the *Family Law Act* and the *WESA*, when a spouse dies after separation, an action can be commenced by either the surviving spouse against the estate of the deceased or by the estate of the deceased against the surviving spouse."—citing for support of this point *Family Law Act*, *supra* note 1, s 198, and *Wills, Estates and Succession Act*, *supra* note 288, s 150).

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## Chapter 10. Administrative Fees

### Introduction

As part of its review of part 6, the committee considered both whether to raise the administrative fees that are charged to spouses by plan administrators for pension division and whether to amend any of the substantive provisions of the legal framework governing administrative fees.

### Background Information on Administrative Fees

#### Purpose of the provisions on administrative fees

In developing the legal framework for administrative fees in part 6 and the *Division of Pensions Regulation*, two issues were considered: (1) whether to raise the levels of the maximum fees that may be charged; and (2) whether to “rationalize” the substantive provisions applicable to administrative fees.<sup>318</sup>

Fees were raised for the following two reasons: (1) fees hadn’t changed in 10 years and were seen to be “overdue for adjustment”; and (2) fees should be set “up to a level that constitutes a realistic contribution towards [expenses incurred by a plan administrator in dividing a pension], but not a complete indemnity.”<sup>319</sup> In setting the maximum fees, the goal was to find maximums that met this standard of being a realistic contribution but not a complete indemnity.

The advent of the *Family Law Act* also saw a rationalization of the provisions covering administrative fees. The goal here was to move from applying fees “based solely on the kind of pension plan involved,” to applying them “by reference to the method of pension division required.”<sup>320</sup>

#### Elements of the legal framework governing administrative fees

##### *Family Law Act*

Section 140 of the *Family Law Act* establishes the legal framework for administrative fees. First, it enables the payment of fees “[i]f the administrator requires a fee to be

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318. See BCLI 2006 Report, *supra* note 17 at 38–39.

319. *Ibid* at 38.

320. BCLI 2006 Report, *supra* note 17 at 38.

paid to offset administrative costs incurred in dividing benefits.”<sup>321</sup> Then, it allows the maximum fees to be set by regulation (“the fee may be no more than the prescribed amount”).<sup>322</sup>

Section 140 provides that “a member and spouse are each responsible for paying the fee.”<sup>323</sup> If a member or a spouse ends up paying more than half the fee (in circumstances other than those in which the member and spouse agree to some arrangement respecting fees that departs from a 50-50 split), then that member or spouse may “recover from the other the additional amount paid.”<sup>324</sup>

Finally, section 140 contains an enabling provision that allows an administrator to “deduct a fee . . . from the payment of benefits.”<sup>325</sup>

### *Division of Pensions Regulation*

Section 28 of the regulation establishes maximum fees geared to the following two methods of pension division:

- “registering the spouse as a limited member of the plan,”<sup>326</sup> and
- “transferring a proportionate share of the member’s defined contribution account to the credit of the spouse.”<sup>327</sup>

The maximum fee for the first method is \$750.<sup>328</sup> For the second, the maximum fee is \$175.<sup>329</sup> “If the benefits are in a hybrid plan,” (which is a plan in which benefits are determined by a combination of a benefit formula provision and a defined contribu-

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321. *Supra* note 1, s 140 (1).

322. *Ibid*, s 140 (1) (a). See also *ibid*, s 246 (m) (“The Lieutenant Governor in Council may make regulations respecting the division of pension benefits as follows: . . . prescribing the amount of any administrative fee.”).

323. *Ibid*, s 140 (1) (b).

324. *Ibid*, s 140 (2).

325. *Ibid*, s 140 (3).

326. *Supra* note 28, s 28 (a).

327. *Ibid*, s 28 (b).

328. *Ibid*, s 28 (a).

329. *Ibid*, s 28 (b).

tion provision) and the administrator is required to use both methods of pension division, then “the fee would be \$925.”<sup>330</sup>

## Text of the relevant provisions on administrative fees

Part 6 of the *Family Law Act* deals with administrative fees in section 140:

### Administrative costs

- 140** (1) If the administrator requires a fee to be paid to offset administrative costs incurred in dividing benefits under this Part,
- (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.<sup>331</sup>

The *Division of Pensions Regulation* sets the following administrative fees:

### 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.<sup>332</sup>

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330. BCLI Q&A, *supra* note 26 at para 15.1. See, above, at 28 (for more information on dividing pension benefits in a hybrid plan).

331. *Supra* note 1, s 140.

332. *Supra* note 28, s 28.

## Issues for Reform

### Should the Division of Pensions Regulation be amended to raise the maximum administrative fees?

#### *Brief description of the issue*

The maximum administrative fees for dividing pensions were set when the *Family Law Act* came into force. Seven years have elapsed since that time. The principle for setting the maximum fees is that they should be “a realistic contribution towards the costs of administering the pension division but not a complete indemnity.”<sup>333</sup> Has the time come to raise the maximum fees, to continue to meet this standard?

#### *Discussion of options for reform*

The options for this issue involve first whether or not to amend section 28 of the regulation. If the decision is made to amend the section, then it becomes necessary to consider further options for the new maximum fees.

Deciding on whether to amend the section turns on whether one’s view of whether it continues to set the maximum fees at a level that provides a realistic contribution toward the cost of administering the pension division. If it is seen not to meet this standard, then the maximum fees should be raised to a level that does meet it.

#### *The committee’s tentative recommendation for reform*

In the committee’s view, time has eroded the value of the current maximum fees. The committee favours raising them (1) by \$250, fee for registering the spouse as a limited member of the plan, and (2) by \$25, for transferring a proportionate share of the member’s defined contribution account to the credit of the spouse.

The committee tentatively recommends:

*15. Section 28 of the Division of Pensions Regulation should be amended (a) by raising the maximum administrative fee for registering the spouse as a limited member of the plan from \$750 to \$1 000 and (b) by raising the maximum administrative fee 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 from \$175 to \$200.*

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333. Ministry Transition Guide, *supra* note 40 at s 140.

**Should section 140 of the Family Law Act be amended to provide that the administrator must deduct administrative fees from the payment of benefits, unless the member or spouse otherwise pay the fee to the administrator?**

*Brief description of the issue*

The existence of administrative fees raises the possibility that those fees could pose a barrier for some spouses to carrying out a division of pension benefits. Section 140 of the *Family Law Act* addresses this problem by a provision that enables an administrator to deduct the fee from the payment of benefits. Should this provision be strengthened, requiring the deduction of fees, unless they are otherwise paid by the member or the spouse?

*Discussion of options for reform*

This issue calls for considering either a new approach or endorsing the status quo.

The concern underlying this issue is that failing to pay the administrative fees can cause the pension-division process to grind to a halt, unleashing a host of problems for the spouses. That administrative fees may pose a barrier to completing the division of pensions is recognized in the current act, which allows an administrator to address the problem by agreeing to deduct the fees from the payment of benefits. An argument may be made that this provision, which turns on the administrator's judgment, strikes the best balance in practice.

But it could also be argued that the current provision doesn't really strike at the root of the problem, and hasn't eliminated it. A more effective approach may be to make payment of the fees by way of deduction from benefits the baseline in each case, which one or both of the spouses may decide to depart from by directly paying the fees up front to the administrator.

*The committee's tentative recommendation for reform*

The committee has concerns that administrative fees may continue to be forming a barrier to pension division in many cases. Raising administrative fees will likely exacerbate these concerns. In view of this, the committee favours implementing a new approach to the payment of these fees.

The committee tentatively recommends:

*16. Section 140 (3) of the Family Law Act should be amended to read as follows: "An administrator must deduct a fee under subsection (1) from the payment of benefits, unless the member and/or the spouse otherwise pay the fee to the plan administrator."*



## Chapter 11. Forms

### Introduction

As part of its review of part 6 and the *Division of Pensions Regulation*, the committee has considered each of the nine prescribed forms under the regulation. These forms make up an important part of the legal framework. They are the practical means used to put agreements and court orders on pension division into effect.

This discussion of forms differs from the subjects taken up in the preceding chapters. Instead of a consideration of the strengths and weaknesses of various policy options, the focus shifts in this chapter to a consideration of language. The organization of the chapter reflects this shift in focus. In the sections that follow, each of the nine forms is reproduced, followed by the committee's proposed changes.

### Issues for Reform

#### Should Form P1 (Claim and Request for Information and Notice) be revised?

*Text of the form*

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]*

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**To: Administrator of plan/annuity issuer**

Name of plan/annuity \_\_\_\_\_

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## Consultation Paper on Pension Division: A Review of Part 6 of the Family Law Act

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Address of administrator/annuity issuer \_\_\_\_\_

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**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 \_\_\_\_\_

Email address \_\_\_\_\_

Telephone (home) \_\_\_\_\_ (work) \_\_\_\_\_

Social Insurance or Plan Identity Number \_\_\_\_\_

Employer \_\_\_\_\_

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**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

## Consultation Paper on Pension Division: A Review of Part 6 of the Family Law Act

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(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):  
*[include name(s) and address(es) of representative(s)]*

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

This authorization expires on \_\_\_\_\_ [date].

Signed (spouse) \_\_\_\_\_

Date of Declaration \_\_\_\_\_

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.

### *The committee's tentative recommendation for reform*

The committee tentatively recommends:

*17. Form P1 (Claim and Request for Information and Notice) should be revised by making the following changes to the form:*

- (a) labelling the following fields as "required": (i) name of plan/annuity; (ii) name of spouse; (iii) address (of spouse); (iv) name of member/annuitant; (v) at least*

*one of the member's date of birth, Social Insurance Number, or plan identification number;*

- (b) labelling the following fields as "optional": (i) address of administrator/annuity issuer; (ii) address (of plan member/annuitant); (iii) email address (of plan member/annuitant); (iv) telephone (of plan member/annuitant); (v) employer (of plan member/annuitant);*
- (c) labelling the following fields with the notation "(if available)": (i) email address (of spouse); and, (ii) telephone (of spouse);*
- (d) in the telephone fields for both the spouse and the plan member/annuitant, deleting the references to "(home)" and "(work)," leaving only a single blank line for the fields;*
- (e) striking out the heading "Declaration of spouse claiming interest" and substituting "Spouse's statement" and, in the part of the form under this heading, striking out "[see below]" and "In support of that claim, I declare that (a) I began living in a marriage-like relationship with the member/annuitant on [date: y/m/d], (b) I was married to the member/annuitant on [date: y/m/d], and (c) I was separated from the member/annuitant on [date: y/m/d]";*
- (f) in the signature block for the form, striking out "Date of Declaration" and substituting "Date of Statement" and striking out the fields for a witness's signature, name, and address;*
- (g) adding the following statement to the form: "note that administrator needs to respect privacy in accordance with privacy legislation."*

## **Should Form P2 (Request for Designation as Limited Member) be revised?**

### *Text of the form*

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,

## Consultation Paper on Pension Division: A Review of Part 6 of the Family Law Act

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- 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 \_\_\_\_\_

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**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.]*

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**In relation to: Plan member/annuitant**

Name of member/annuitant \_\_\_\_\_

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## Consultation Paper on Pension Division: A Review of Part 6 of the Family Law Act

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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.

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 \_\_\_\_\_  
\_\_\_\_\_

*The committee's tentative recommendation for reform*

The committee tentatively recommends:

18. Form P2 (*Request for Designation as Limited Member*) should be revised by making the following changes to the form:

- (a) labelling the following fields as "required": (i) name of plan/annuity; (ii) name of spouse; (iii) address (of spouse); (iv) Social Insurance Number (of spouse); (v) Date of Birth (of spouse); (vi) name of member/annuitant; (vii) at least one of the member's date of birth, Social Insurance Number, or plan identification number;
- (b) labelling the following fields as "optional": (i) address of administrator/annuity issuer; (ii) address (of plan member/annuitant); (iii) email address (of plan member/annuitant); (iv) telephone (of plan member/annuitant); (v) employer (of plan member/annuitant);
- (c) labelling the following fields with the notation "(if available)": (i) email address (of spouse); and, (ii) telephone (of spouse);
- (d) in the telephone fields for both the spouse and the plan member/annuitant, deleting the references to "(home)" and "(work)," leaving only a single blank line for the fields;
- (e) in the signature block for the form, striking out the fields for a witness's signature, name, and address.

**Should Form P3 (Request for Transfer from Defined Contribution Account) be revised?**

*Text of the form*

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

## Consultation Paper on Pension Division: A Review of Part 6 of the Family Law Act

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- the spouse wants the spouse's proportionate share transferred to another plan (such as an RRSP).

*[Please print]*

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**To: Administrator of plan**

Name of plan \_\_\_\_\_

Address of administrator \_\_\_\_\_

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**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 \_\_\_\_\_

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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***The committee's tentative recommendation for reform***

The committee tentatively recommends:

*19. Form P3 (Request for Transfer from Defined Contribution Account) should be revised by making the following changes to the form:*

- (a) labelling the following fields as "required": (i) name of plan; (ii) name of spouse; (iii) address (of spouse); (iv) Social Insurance Number (of spouse); (v) name of member; (vi) at least one of the member's date of birth, Social Insurance Number, or plan identification number;*
  - (b) labelling the following fields as "optional": (i) address of administrator; (ii) address (of plan member); (iii) email address (of plan member); (iv) telephone (of plan member); (v) employer (of plan member);*
  - (c) labelling the following fields with the notation "(if available)": (i) email address (of spouse); and, (ii) telephone (of spouse);*
  - (d) in the telephone fields for both the spouse and the plan member, deleting the references to "(home)" and "(work)," leaving only a single blank line for the fields;*
-

(e) *in the signature block for the form, striking out the fields for a witness's signature, name, and address.*

## Should Form P4 (Request by Limited Member for Transfer or Separate Pension) be revised?

*Text of the form*

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 defined benefit provision if the member is not yet receiving a pension.

*[Please print]*

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**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 \_\_\_\_\_

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## Consultation Paper on Pension Division: A Review of Part 6 of the Family Law Act

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*[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.]*

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### **In relation to: Plan member**

Name of member \_\_\_\_\_

Address \_\_\_\_\_

Email address \_\_\_\_\_

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 pension 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 \_\_\_\_\_

\_\_\_\_\_

*The committee's tentative recommendation for reform*

The committee tentatively recommends:

*20. Form P4 (Request by Limited Member for Transfer or Separate Pension) should be revised by making the following changes to the form:*

- (a) labelling the following fields as "required": (i) name of plan; (ii) name of spouse; (iii) address (of spouse); (iv) Social Insurance Number (of spouse); (v) date of birth (of spouse); (vi) name of member; (vii) at least one of the member's date of birth, Social Insurance Number, or plan identification number;*
- (b) labelling the following fields as "optional": (i) address of administrator; (ii) address (of plan member); (iii) email address (of plan member); (iv) telephone (of plan member); (v) employer of member;*
- (c) labelling the following fields with the notation "(if available)": (i) email address (of spouse); and, (ii) telephone (of spouse);*
- (d) in the telephone fields for both the spouse and the plan member, deleting the references to "(home)" and "(work)," leaving only a single blank line for the fields;*
- (e) in the signature block for the form, striking out the fields for a witness's signature, name, and address.*

**Should Form P5 (Waiver of Survivor Benefits after Pension Commencement) be revised?**

*Text of the form*

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]*

## Consultation Paper on Pension Division: A Review of Part 6 of the Family Law Act

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**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 \_\_\_\_\_

Telephone (home) \_\_\_\_\_ (work) \_\_\_\_\_

Social Insurance or Plan Identity Number \_\_\_\_\_

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**Waiver:**

I confirm that I am aware of the following:

## Consultation Paper on Pension Division: A Review of Part 6 of the Family Law Act

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- (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:

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*(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*) \_\_\_\_\_

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.

*The committee's tentative recommendation for reform*

As a consequence of the committee's tentative recommendation to amend section 126 (1) (a) of the act,<sup>334</sup> Form P5 will have to be repealed.

The committee tentatively recommends:

*21. Form P5 (Waiver of Survivor Benefits after Pension Commencement) should be repealed.*

**Should Form P6 (Administrator/Annuity Issuer Response) be revised?**

*Text of the form*

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,

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334. See, above, at 53–54.

## Consultation Paper on Pension Division: A Review of Part 6 of the Family Law Act

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- advise the spouse or member/annuitant if a notice cannot be acted upon, and
- notify the spouse of a change of circumstances respecting the benefits.

*[Please print]*

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### A Plan member/annuitant

Name of plan member/annuitant \_\_\_\_\_

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### 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 a pension/annuity or the receipt of a direction from the member/annuitant *[Complete Part 3 below]*

### 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 a 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
  - ☐ you have ceased to be the beneficiary
  - ☐ you have become the beneficiary
- ☐ the member/annuitant has given the administrator/annuity issuer the following direction: \_\_\_\_\_

Date: \_\_\_\_\_

\_\_\_\_\_  
Signature of administrator/annuity issuer

## *The committee's tentative recommendation for reform*

The committee tentatively recommends:

*22. Form P6 (Administrator/Annuity Issuer Response) should be revised by making the following changes to the form:*

- (a) *in Part 1: Receipt of Notice, striking out the check box for Form P5 (Waiver of Survivor Benefits after Pension Commencement);*
- (b) *in Part 1: Receipt of Notice, adding check boxes for Form P8 (Change of Information) and Form P9 (Agreement to Have Benefits Divided under Part 6).*

## Should Form P7 (Withdrawal of Notice/Waiver of Claim) be revised?

### *Text of the form*

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 \_\_\_\_\_

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## Consultation Paper on Pension Division: A Review of Part 6 of the Family Law Act

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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.]*

---

### **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 \_\_\_\_\_ [identity document] dated \_\_\_\_\_ [date]

☐ I withdraw all forms and documents filed in connection with my claim to an interest in the member's/annuitant's

Signed \_\_\_\_\_

☐ spouse

☐ personal representative of the spouse

Date \_\_\_\_\_

Signed (witness) \_\_\_\_\_

Name of witness \_\_\_\_\_

Address of witness \_\_\_\_\_

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**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. benefits and waive my claim to any interest.

*The committee's tentative recommendation for reform*

The committee tentatively recommends:

*23. Form P7 (Withdrawal of Notice/Waiver of Claim) should be revised by making the following changes to the form:*

- (a) labelling the following fields as "required": (i) name of plan/annuity; (ii) name of spouse; (iii) address (of spouse); (iv) Social Insurance Number (of spouse); (v) date of birth (of spouse); (vi) date of spouse's death; (vii) name of spouse's personal representative; (viii) contact information for spouse's personal representative; (ix) name of member/annuitant; (x) at least one of the member's date of birth, Social Insurance Number, or plan identification number;*
- (b) labelling the following fields as "optional": (i) address of administrator/annuity issuer; (ii) address (of plan member/annuitant); (iii) email address (of plan member/annuitant); (iv) telephone (of plan member/annuitant); (v) employer (of plan member/annuitant);*
- (c) labelling the following fields with the notation "(if available)": (i) email address (of spouse); and, (ii) telephone (of spouse);*
- (d) in the signature block for the form, striking out the fields for a witness's signature, name, and address;*
- (e) making the part headed "Comments and Instructions" more prominent on the form.*

## Should Form P8 (Change of Information) be revised?

### *Text of the form*

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 \_\_\_\_\_

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**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 of any changes.]*

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**In relation to: Plan member/annuitant**

Name of member/annuitant \_\_\_\_\_

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## Consultation Paper on Pension Division: A Review of Part 6 of the Family Law Act

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Address \_\_\_\_\_

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 \_\_\_\_\_

### *The committee's tentative recommendation for reform*

The committee tentatively recommends:

*24. Form P8 (Change of Information) should be revised by making the following changes to the form:*

- (a) labelling the following fields as "required": (i) name of plan/annuity; (ii) name of spouse; (iii) address (of spouse); (iv) name of member; (v) at least one of the member's date of birth, Social Insurance Number, or plan identification number;*
- (b) labelling the following fields as "optional": (i) address of administrator/annuity issuer; (ii) Social Insurance Number (of spouse); (iii) date of birth (of spouse); (iv) address (of plan member/annuitant); (v) email address (of plan member/annuitant); (vi) telephone (of plan member/annuitant); (vii) employer (of plan member/annuitant);*
- (c) labelling the following fields with the notation "(if available)": (i) email address (of spouse); and, (ii) telephone (of spouse);*
- (d) in the telephone fields for both the spouse and the plan member/annuitant, deleting the references to "(home)" and "(work)," leaving only a single blank line for the fields;*

(e) in the signature block for the form, striking out the fields for a witness's signature, name, and address.

## Should Form P9 (Agreement to Have Benefits Divided under Part 6) be revised?

*Text of the form*

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]*

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**To: Administrator of plan/annuity issuer**

Name of plan/annuity \_\_\_\_\_

Address of administrator/annuity issuer \_\_\_\_\_

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**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 \_\_\_\_\_

## Consultation Paper on Pension Division: A Review of Part 6 of the Family Law Act

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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.]*

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### **In relation to: Plan member/annuitant**

Name of member/annuitant \_\_\_\_\_

Address \_\_\_\_\_

Email address \_\_\_\_\_

Telephone (home) \_\_\_\_\_ (work) \_\_\_\_\_

Social Insurance or Plan Identity Number \_\_\_\_\_

Employer \_\_\_\_\_

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### **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 benefit is important to each of us, particularly with respect to providing us with income in old age;
- (d) each of us has read this form and understands it;
- (e) no one has put any pressure on either of us to sign this form;
- (f) each of us realizes that



## Consultation Paper on Pension Division: A Review of Part 6 of the Family Law Act

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- (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;
- (g) there may be tax implications to this agreement that should be addressed;
- (h) 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;
- (i) we must provide further documents or evidence of entitlement as reasonably requested by the administrator/ annuity issuer;
- (j) each of us is entitled to a copy of this form.

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**Each of us is signing this form to have the benefits divided under Part 6 of the *Family Law Act*.**

Signed \_\_\_\_\_  
(member/annuitant)

Date \_\_\_\_\_

Signed \_\_\_\_\_  
(witness)

Name of witness \_\_\_\_\_

Address of witness \_\_\_\_\_

Signed \_\_\_\_\_  
(spouse)

Date \_\_\_\_\_

Signed \_\_\_\_\_  
(witness)

Name of witness \_\_\_\_\_

Address of witness \_\_\_\_\_

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### 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.

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*The committee's tentative recommendation for reform*

The committee tentatively recommends:

*25. Form P9 (Agreement to Have Benefits Divided under Part 6) should be revised by making the following changes to the form:*

- (a) labelling the following fields as "required": (i) name of plan/annuity; (ii) name of spouse; (iii) address (of spouse); (iv) Social Insurance Number (of spouse); (v) date of birth (of spouse); (vi) name of member/annuitant; (vii) address (of plan member/annuitant); (viii) the commencement date; (ix) the entitlement date; (x) at least one of the member's date of birth, Social Insurance Number, or plan identification number;*
- (b) labelling the following fields as "optional": (i) address of administrator/annuity issuer; (ii) email address (of plan member/annuitant); (iii) telephone (of plan member/annuitant); (iv) employer (of plan member/annuitant);*
- (c) label the following fields with the notation "(if available)": (i) email address (of spouse); and, (ii) telephone (of spouse);*
- (d) in the telephone fields for both the spouse and the plan member/annuitant, deleting the references to "(home)" and "(work)," leaving only a single blank line for the fields;*
- (e) in the fields for both the commencement date and entitlement date, striking out "[date]" and substituting "[date: y/m/d]".*

## Chapter 12. Extension of the Rule Providing for No Further Entitlement after Division of Benefits

### Introduction

Section 145 of the *Family Law Act* sets out a rule that prevents a spouse from claiming a further share of pension benefits after the pension has been divided under part 6. Making more than one claim was possible because a spouse may be entitled to certain benefits under the *Pension Benefits Standards Act*. Spousal status under that act did not necessarily come to an end if the spousal relationship broke down. So it was possible for a spouse to double dip—taking a share of the benefits first on division of the pension under part 6, and then later claiming further benefits from the pension on the basis of being within the definition of *spouse* in the *Pension Benefits Standards Act*. Section 145 prevents this result from occurring.

Section 145 is limited to pensions regulated under British Columbia legislation.<sup>335</sup> It doesn't apply to pensions regulated under the federal *Pension Benefits Standards Act, 1985*<sup>336</sup> or under the act of another province.<sup>337</sup> In these cases, it may be possible for a spouse to obtain further benefits after pension division under part 6.

In the committee's view, there is the potential for unfairness to arise out of this limitation on the reach of section 145. While there is a law-reform issue to be considered here, the committee has come to the conclusion that it isn't able to address this issue. The committee's mandate is to consider and recommend changes to part 6 of the *Family Law Act*. In the committee's view, amendments to part 6 will not be effective to solve this problem.

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335. See *supra* note 1, s 145 (1) (a) (restricting the application of the section to pensions regulated under the *Pension Benefits Standards Act*, *supra* note 25, and the *Pooled Registered Pension Plans Act*, SBC 2014, c 17).

336. RSC 1985, c 32 (2nd Supp).

337. See Alberta: *Employment Pension Plans Act*, SA 2012, c E-8.1; Saskatchewan: *The Pension Benefits Act*, 1992, SS 1992, c P-6.001; Manitoba: *The Pension Benefits Act*, RSM 1987, c P32, CCSM c P32; Ontario: *Pension Benefits Act*, RSO 1990, c P.8; Québec: *Supplemental Pension Plans Act*, CQLR c R-15.1; New Brunswick: *Pension Benefits Act*, SNB 1987, c P-5.1; Nova Scotia: *Pension Benefits Act*, SNS 2011, c 41; Newfoundland and Labrador: *Pension Benefits Act*, 1997, SNL 1996, c P-4.01. Prince Edward Island doesn't have pension-standards legislation. The federal act applies to the territories: see *Pension Benefits Standards Act, 1985*, *supra* note 336, s 4 (4).

Even though the committee hasn't made a tentative recommendation on this subject, it has included this chapter in the consultation paper for two reasons. First, it wishes to raise awareness of this issue, which does have the potential to affect pension division in British Columbia. Second, it wishes to go on the record calling for organizations with a mandate to consider reforms to federal pension standards legislation and pension standards legislation enacted in other provinces to take action to address this issue.

## Background Information on the Rule Providing for No Further Entitlement after Division of Benefits

### Scenarios

As a concrete way of considering the legal issues, here are three scenarios involving spouses with pension benefits in a federally regulated plan and in a plan regulated by another province.

#### *Spouse becomes limited member of federally regulated defined benefit plan before the pension commences*

This scenario concerns a spouse who has become a limited member of a federally regulated defined benefit pension plan *before the pension commences*.<sup>338</sup> As a limited member, the spouse receives his or her full share in accordance with the proportionate-share calculation in the British Columbia's *Division of Pensions Regulation*.<sup>339</sup> Then, if the parties are still legally married, and the member dies before retirement, the spouse would also be entitled to the pre-retirement survivor benefits. The reason is that on the date of the member's death, the spouse is still a "spouse" for the purposes of the federal *Pension Benefits Standards Act, 1985*.<sup>340</sup>

To align with British Columbia law (under section 145), the deceased member's share of the pension should go to the member's designated beneficiary or estate, and not to the spouse. Importantly, if the member has a common-law partner (at least

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338. See, above, at 18–19 (for more information on defined benefit plans), 25–26 (for more information on dividing a pension before and after pension commencement under part 6 of the *Family Law Act*), 27 (for more information on becoming a limited member under part 6 of the *Family Law Act*).

339. See *supra* note 28, s 17. See also 28 (for more information on calculating a proportionate share of pension benefits under British Columbia law).

340. See *supra* note 336, s 2 (1) "spouse" ("in relation to an individual, includes a person who is party to a void or, in Quebec, null marriage with the individual").

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one-year cohabitation)<sup>341</sup> on his or her date of death, then the common-law partner and not the limited member should receive the pre-retirement death benefit.

*Spouse becomes limited member of federally regulated defined benefit plan after the pension commences*

The same issue arises on pension commencement as well. The limited member, if he or she still qualifies as a spouse when the member applies to commence a pension, has to be named as the beneficiary of a joint-and-survivor pension.<sup>342</sup> The limited member can waive, but that is a unilateral decision and the member cannot make that decision for the limited member. In this scenario, the limited member will receive his or her full proportionate share, and then also be the irrevocable beneficiary of survivor benefits. By being forced to elect a joint-and-survivor pension, the member suffers an actuarial reduction in his or her monthly benefits.

*British Columbia member of a plan regulated under Ontario law*

A person resident in British Columbia is a member of a pension plan for a large national retailer. The pension plan is registered with the Ontario regulator<sup>343</sup> and regulated under the laws of Ontario.<sup>344</sup>

If this person's spousal relationship breaks down, then the *Family Law Act* would apply to the legal issues that arise from the breakdown. This would include division of the pension under part 6 of the *Family Law Act*.

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341. See *ibid*, s 2 (1) "common-law partner" ("in relation to an individual, means a person who is cohabiting with the individual in a conjugal relationship, having so cohabited for a period of at least one year").

342. See *ibid*, ss 2 (1) "joint and survivor pension benefit" ("means an immediate pension benefit that continues at least until the death of the member or former member or the death of the survivor of the member or former member, whichever occurs later"), 22 (2) ("A pension benefit that commences to be paid on or after January 1, 1987 to a member or former member of a pension plan who has a spouse or common-law partner at the time the pension benefit commences to be paid shall be in the form of a joint and survivor pension benefit, subject to subsection 25 (7)."). Section 25 (7) deals with "splitting of joint and survivor pension benefit": "[a] pension plan may provide that, where, pursuant to this section, all or part of a pension benefit of a member or former member is required to be distributed to that person's spouse, former spouse or former common-law partner under a court order or agreement, a joint and survivor pension benefit may be adjusted so that it becomes payable as two separate pensions, one to the member or former member and the other to that person's spouse, former spouse or former common-law partner, if the aggregate of the actuarial present values of the two pensions is not less than the actuarial present value of the joint and survivor pension benefit" (*ibid*, s 25 (7)).

343. The Financial Services Regulatory Authority of Ontario.

344. See *Pension Benefits Act*, *supra* note 337.

In all likelihood, the same issues in applying section 145 that were discussed in the previous two scenarios (involving federal law) would arise in this scenario (involving Ontario law). But there are two wrinkles worth considering for this scenario.

First, it should be noted that plan rules will set out default rules that apply in the pension plan. Rules documents for pension plans that have members in more than one jurisdiction typically contain appendixes. A large national plan like the one described in this scenario will have an appendix for each province. So, for the purposes of this scenario, there will be an appendix for British Columbia. The appendix will deal with matters such as the definition of *spouse*. This will typically be done by incorporating the definition found in British Columbia legislation.<sup>345</sup> The question to consider is whether incorporating British Columbia legislation in an appendix brings the plan within section 145's application provision, which says that the section applies "to benefits regulated under the *Pension Benefits Standards Act* or the *Pooled Registered Pension Plans Act*."<sup>346</sup>

Second, it's worth considering the effect of the "2016 Agreement Respecting Multi-jurisdictional Pension Plans [which] came into effect on July 1, 2016, between British Columbia, Nova Scotia, Ontario, Quebec and Saskatchewan."<sup>347</sup> A recital to this agreement gives a good indication of its goals:

Pension plans that are subject to the pension legislation of more than one jurisdiction play a significant role in providing retirement income to many Canadians. To establish an efficient and transparent regulatory environment for such plans, the parties to this Agreement deem it desirable to specify the rules that apply to such plans and allow, to the extent provided for in this Agreement, a single pension supervisory authority to exercise with respect to any such pension plan all of the supervisory and regulatory powers to which such plan is subject.<sup>348</sup>

The agreement doesn't mention pension division or family-law legislation. Its section on "applicable pension legislation" provides that "[w]hile a pension supervisory authority is the major authority for a pension plan in accordance with this Agreement: the provisions of the pension legislation of the major authority's jurisdiction

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345. See *Pension Benefits Standards Act*, *supra* note 25, s 1 (1) "spouse" and s 1 (3); *Pooled Registered Pension Plans Act*, *supra* note 335, s 1 (1) "spouse" and s 1 (2).

346. *Supra*, note 1, s 145 (1).

347. "Multilateral Agreement Committee—Multi-jurisdictional Pension Plans" (last visited 10 October 2019), online: *Canadian Association of Pension Supervisory Authorities* <[www.capsa-acor.org/MultilateralAgreementCommittee-Multi-jurisdictionalPensionPlans](http://www.capsa-acor.org/MultilateralAgreementCommittee-Multi-jurisdictionalPensionPlans)>.

348. *2016 Agreement Respecting Multi-Jurisdictional Pension Plans*, online: <[www.capsa-acor.org/Documents/View/106](http://www.capsa-acor.org/Documents/View/106)>, recital III.

in respect of matters referred to in Schedule B apply to the plan instead of those of the corresponding provisions of the pension legislation of any minor authority's jurisdiction that would apply to the plan if this Agreement did not exist."<sup>349</sup> (A "major authority" is the "pension supervisory authority" in "the jurisdiction with the plurality of active members of the plan.")<sup>350</sup> *Pension legislation* is a defined term;<sup>351</sup> for British Columbia, it is the *Pension Benefits Standards Act*.<sup>352</sup> The "matters referred to in Schedule B" are registration of pension plans, registration of pension-plan amendments, pension-plan administrators, pension-plan administrators' duties, pension-plan records, funding of ongoing pension plans, pension-fund investments, pension-fund assets, provision of information, plan membership, and appointment of pension-plan administrator.<sup>353</sup> The question to consider is whether this agreement changes the analysis on the application of section 145 in a way that would set this scenario apart from the first two (which involved the federal legislation).

### Purpose of section 145 of the Family Law Act

As the BCLI Q&A noted, the "policy underlying" section 145 "is to ensure that a former spouse does not benefit from the member's pension benefits twice (once under the [Family Law Act], and then secondly under the [Pension Benefits Standards Act])."<sup>354</sup> The section was enacted in part 6 to "clarif[y] the general policy that, after having received the share of the member's benefits, a spouse or limited member has no further entitlement to any share of those benefits," "consolidat[ing]" a "principle" derived from provisions found in an earlier version of the *Pension Benefits Standards Act*.<sup>355</sup>

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349. *Ibid*, s 6 (1).

350. *Ibid*, s 3 ("(1) One pension supervisory authority having jurisdiction over a pension plan shall be the major authority for the plan. (2) Except as provided in sections 5 and 26, the major authority for a pension plan shall be the pension supervisory authority of the jurisdiction with the plurality of active members of the plan, as determined in accordance with subsection (3) and considering only those jurisdictions whose pension legislation would, if this Agreement and any other agreement respecting the supervision of pension plans did not exist, require the plan to be registered with the pension supervisory authority of that jurisdiction.").

351. See *ibid*, s 1 (1) "pension legislation" ("means, in relation to a jurisdiction, the legislation identified in Schedule A in respect of that jurisdiction and any subordinate legislation made under that legislation, all as amended or substituted from time to time").

352. See *ibid*, Schedule A. For Ontario, it is the *Pension Benefits Act*, *supra* note 337 (see *supra* note 348, Schedule A).

353. See *ibid*, Schedule B.

354. BCLI Q&A, *supra* note 26 at para 8.15.

355. Ministry Transition Guide, *supra* note 40, s 145.

## Elements of section 145 of the Family Law Act

The section begins by clearly setting out its reach. It is limited “to benefits regulated under the *Pension Benefits Standards Act* or the *Pooled Registered Pension Plans Act*.”<sup>356</sup> Then, the section states its core rule: if a spouse has become a limited member under part 6 or under the previous legislation, or an agreement or order provides for the division of benefits under part 6 or the previous legislation, then “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.”<sup>357</sup>

Section 145 also provides that an agreement or order that states that a spouse has no share of the benefits or that the spouse’s share is satisfied by some other means than pension division under part 6 or the previous legislation comes within the scope of the section’s core rule, “unless the agreement or order provides otherwise.”<sup>358</sup>

The section closes with an expanded definition of the word *benefits*.<sup>359</sup>

It should also be noted that the *Pension Benefits Standards Act* contains a series of references to section 145 of the *Family Law Act*. These references are meant to manage potential conflicts between the two acts, by providing rules that spell out which act applies in various circumstances, including the allocation of excess contributions for funding a pension under a benefit formula provision,<sup>360</sup> exceptions to locking in

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356. *Supra* note 1, s 145 (1) (a).

357. *Ibid*, s 145 (2).

358. *Ibid*, s 145 (4).

359. See *ibid*, s 145 (5).

360. See *supra* note 25, s 57 (6) (“If a member to whom the excess referred to in subsection (2) is to be allocated or distributed dies before reaching his or her pension commencement date, the excess must be allocated or distributed as follows: (a) if there is a surviving spouse and both of the following apply: (i) the spouse had not provided a waiver under section 79 (1) (b) before the member’s death; (ii) *section 145 of the Family Law Act does not apply to the spouse*, the excess must be allocated or distributed in whichever of the manners referred to in subsection (4) (a) to (e) of this section that the spouse elects; (b) if there is a surviving spouse to whom paragraph (a) of this subsection does not apply, or if there is no surviving spouse, the excess must be provided (i) to the designated beneficiary, or (ii) if there is no designated beneficiary living, to the personal representative of the member’s estate.” [emphasis added]).



the commuted value of benefits,<sup>361</sup> survivor's benefits if a member dies before pension commencement,<sup>362</sup> and survivor's benefits if a retired member dies after pension commencement.<sup>363</sup>

There are also 30 references to section 145 in the *Pension Benefits Standards Regulation*,<sup>364</sup> each requiring in specific circumstances "confirmation, in a form and manner satisfactory to the [administrator or equivalent], that section 145 of the *Family Law Act* applies."<sup>365</sup>

## The full text of section 145 of the Family Law Act

### No further entitlement after division of benefits

- 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

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361. See *ibid*, s 69 (6) ("In the event of a conflict between this section and section 145 of the *Family Law Act*, section 145 of the *Family Law Act* applies.").

362. See *ibid*, s 79 (5) ("In the event of a conflict between this section and section 145 of the *Family Law Act*, section 145 of the *Family Law Act* applies.").

363. See *ibid*, s 80 (4) (b) ("A member may elect to receive a pension that does not comply with this section by providing to the administrator . . . confirmation, in a form and manner satisfactory to the administrator, that section 145 of the *Family Law Act* applies"), 80 (5)–(6) ("(5) A spouse who has validly signed a statement under subsection (4) (a) is deemed to be the sole designated beneficiary of the member despite any actual designation of beneficiary and any other law relating to such an actual designation. (6) Subsection (5) does not apply if the administrator received (a) a statement in the prescribed form by the spouse that (i) states that the spouse is aware of his or her entitlement under subsection (5), (ii) waives that entitlement, and (iii) was signed by the spouse, before the member's death, in the presence of a witness and outside the presence of the member, or (b) confirmation, in a form and manner satisfactory to the administrator, that section 145 of the *Family Law Act* applies."), 80 (9) ("In the event of a conflict between this section and section 145 of the *Family Law Act*, section 145 of the *Family Law Act* applies.").

364. *Supra* note 203.

365. See *ibid*, ss 37 (6) (b), 38 (6) (b), 74 (3) (b), 74 (8) (a) (ii), 74 (11) (b), 81 (1) (b) (ii), 81 (2) (b), 83 (3) (b) (ii) (B), 83 (3) (d) (ii), 83 (3) (e) (ii), 83 (4) (a) (ii), 103 (2) (c) (ii), 103 (4) (d) (ii) (B), 106 (2) (b) (ii), 111 (b), 121 (1) (b) (ii) (B), 121 (3) (c) (ii) (B), 125 (2) (b) (ii), 130 (b); Schedule 1, ss 6 (2) (b) (ii), 6 (3) (d) (ii) (B), 7 (2) (b) (ii), 11 (1) (b) (ii), 12 (1) (b) (ii), 13 (1) (b) (ii); Schedule 2, ss 7 (1) (d) (ii) (B), 8 (2) (b) (ii), 12 (1) (b) (ii), 13 (1) (b) (ii), 14 (1) (b) (ii).

- (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

- (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.<sup>366</sup>

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366. *Supra* note 1, s 145 [emphasis in original; bracketed text in original]. Subsection (3) was repealed by *Pension Benefits Standards Act*, *supra* note 25, s 155 [in force 30 September 2015]. Before it was repealed, the subsection read as follows: "If a spouse qualifies as a spouse under the *Pension Benefits Standards Act*, a member is not required to choose postretirement survivor benefits with the spouse or have the spouse waive the benefits if (a) an agreement or order provides that a division of benefits with the spouse is to be in accordance with this Part, or (b) the spouse is a limited member, regardless of whether benefits have been divided."). Concurrent with the repeal of subsection (3) (and the coming into force of the *Pension Benefits Standards Act*), the other provisions of section 145 (except for subsection (1)) were substantively revised.

## Issue for Discussion

### **Should British Columbia's rule providing for no further entitlement after division of benefits be extended to pensions regulated under federal legislation and legislation in force in other provinces?**

A case could be made that the policy underlying section 145 is sound and should be given greater reach. The section helps to promote fairness between separating spouses by ensuring that a spouse doesn't receive a windfall. The prospect of such a windfall would arise in the absence of a provision such as section 145 (and corresponding references to that provision in the *Pension Benefits Standards Act*). Without section 145, there would be a failure to coordinate the *Family Law Act* and the *Pension Benefits Standards Act*, which could allow a spouse to receive a benefit first under one act and then under the other. Such a provision could help in cases in which the pension at issue is registered in a jurisdiction outside British Columbia.

The disadvantages of extending section 145 have less to do with policy and more to do with finding a practically effective method of making this principle apply to pensions that are regulated at the federal level or by other provinces. The concern arises from Canada's constitutional makeup.

British Columbia derives its authority to pass legislation concerning division of property on the breakdown of a spousal relationship and pensions from its power to make laws respecting "property and civil rights in the province."<sup>367</sup> The last three words in this quotation set a limit on this power that is crucial to the consideration of this issue for reform.<sup>368</sup>

In interpreting this section of the constitution, the courts have struck down provincial laws that were directly intended to be extraterritorial in nature. But they have upheld provincial laws with a core purpose of addressing issues within a province, even if those laws have some incidental extraterritorial effect. As a leading case has put it, in the language of constitutional law:

Where the validity of provincial legislation is challenged on the basis that it violates territorial limitations on provincial legislative competence, the analysis centres on the pith

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367. *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 92 (13), reprinted in RSC 1985, Appendix II, No 5.

368. Note also that section 92 begins its enumeration of the "exclusive powers of provincial legislatures" with the words "in each province," which further underscores the limited territorial reach of provincial legislation.

and substance of the legislation. If its pith and substance is in relation to matters falling within the field of provincial legislative competence, the legislation is valid. Incidental or ancillary extra-provincial aspects of such legislation are irrelevant to its validity.<sup>369</sup>

The “pith and substance of legislation” is “its essential character or dominant feature.”<sup>370</sup>

After considering the matter, the committee wasn’t confident that the essential character or dominant feature of any recommendation to amend section 145 to directly address this issue for discussion would meet this test. There is a very real risk that such an amendment could be struck down.

The committee also considered possible amendments to part 6 that could indirectly address the issue for discussion. In the end, the committee decided that such an approach would be ineffective in practice, letting too many cases slip through.

Ultimately, the committee decided that this is a law-reform issue that needs to be taken up by organizations with mandates that go beyond the committee’s mandate, which has directed the committee to consider only amendments to part 6 of the *Family Law Act* and the *Division of Pensions Regulation*. There are organizations that consider federal legislation, as well as organizations that have a mandate to consider reform of legislation in other provinces. In the committee’s view, these organizations would be in a better position to recommend changes to their jurisdictions’ equivalents to part 6 and the *Pension Benefits Standards Act*. The committee urges these organizations to consider this issue for future law reform.

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369. *British Columbia v Imperial Tobacco Canada Ltd*, 2005 SCC 49 at para 28, Major J.

370. *Ibid* at para 29.

## Chapter 13. Conclusion

This consultation paper was born out of a comprehensive review of part 6 of the *Family Law Act*, the *Division of Pensions Regulation*, and the forms prescribed under the regulation. This legal framework for pension division upon the breakdown of a spousal relationship has been in force for seven years. As a general point, the committee has tentatively concluded that it has held up well and that it is functioning effectively. The committee is also of the view that it could benefit from some revision and fine-tuning.

The committee has identified nine areas that call for improvement. The committee's tentative recommendations in this consultation paper addressed these nine areas, which range from changes to existing provisions of part 6 to proposed additions to part 6 to practical issues with administrative fees and forms.

Among revisions to part 6, the committee tentatively recommended amending transitional provisions, to promote transition from the repealed *Family Relations Act* to the *Family Law Act*. The committee tentatively recommended a new approach to private annuities and extending the provision applying to disability benefits to cover an emerging issue. Finally, the committee tentatively recommended to clarify the operation of provisions relating to the transfer of the commuted value of a pension benefit and the calculation of commuted value.

The committee has also proposed adding a few new provisions to part 6. These tentative recommendations involved amending part 6 to have it deal, for the first time, with locked-in retirement accounts and life income funds and amending part 6 to address an emerging issue, in which a spouse dies before becoming a limited member.

The committee examined the framework for charging administrative fees. The committee tentatively recommended raising the maximum level of fees set out in the regulation and providing, as a baseline position, that these fees be paid out of pension benefits.

The committee reviewed in detail the prescribed form set out in the regulation and tentatively recommended a number of improvements to the language of these forms.

Finally, the committee considered a potential extension of an existing rule in part 6, which prevents a spouse from claiming further benefits after the division of pensions under part 6. This useful rule helps to coordinate British Columbia's pension-division and pension standards regulation to ensure that a spouse doesn't receive a

windfall. But it doesn't apply when pension standards legislation enacted at the federal level or in another province comes into play. Ultimately, the committee determined that it couldn't address this issue within its mandate, which is focused on part 6 of the *Family Law Act*. But it wishes to highlight this issue, both as a potential concern in practice and as a law-reform issue that may be taken up by organizations with mandates to consider legislation at the federal level or legislation enacted by another province.

The committee hopes to receive a wide range of responses to its tentative recommendations. Public comment is an integral part of the process of developing law-reform recommendations. Final recommendations are often shaped by input received at the consultation stage. To ensure that the committee is able to consider your response to this consultation paper, BCLI must receive it by **15 September 2020**.

## APPENDIX A

### *List of Tentative Recommendations*

#### **Transitional provisions**

- 1. A spouse who has only filed a prescribed form under the Family Relations Act should be transitioned to the Family Law Act. (33–35)*
- 2. The special transitional provision that kept spouses under the Family Relations Act if they had received a consultation from a plan administrator should no longer apply, so that the Family Law Act will apply to the division of the pension. (35–37)*
- 3. The tentative recommendation to transition parties who have received a consultation should not affect entitlement dates. (37–38)*
- 4. The plan administrator should be required to annually notify a limited member who has not yet received benefits of the earliest date of the limited member's pension eligibility. (38–39)*

#### **Private annuities**

- 5. The Family Law Act should be amended to make the following changes to the treatment of private annuities:*
  - (a) for annuities that have been purchased but are not in pay then*
    - (i) the drafting of the provisions should be clarified such that it's clear that the legislation applies to the purchase of an annuity by each spouse and part 5 applies, and*
    - (ii) division should be 50-50 to each spouse, subject to a different share by agreement or court order;*
  - (b) if the annuity is in pay, then part 6 applies, and the income stream should be divided 50-50 to each spouse, subject to a different share by agreement or court order, and a spouse is entitled, by giving notice in accordance with section 136 of the act, to receive a share of the benefits payable under the annuity during the annuitant's lifetime until the earlier of*
    - (i) the death of the spouse, and*

(ii) the termination of benefits under the annuity. (45–47)

## **Disability benefits**

6. If an agreement or order dividing benefits is silent on entitlement to disability benefits, all of a member's disability benefits should be allocated to the member and the limited member should have all the rights under the Family Law Act, including timing to commence the limited member's share of the pension benefits. (52–53)

## **Waiving survivor benefits after pension commencement**

7. Section 126 (2) (a) of the Family Law Act should be amended to read as follows: "the spouse assigns his or her entitlement by entering into an agreement that requires the spouse to pay all or part of the survivor benefits received by the spouse from a plan to a person other than the spouse, or". (59–60)

8. Section 126 (2) (b) of the Family Law Act should be amended to read as follows: "the Supreme Court orders the spouse to pay all or part of the survivor benefits received by the spouse from a plan to a person other than the spouse." (61)

9. Section 126 (3) of the Family Law Act should be repealed. (62)

## **Commuted value: transfer and calculation**

10. The Family Law Act should be amended to make the limited member's options with respect to commuted-value transfer mirror those of the member. (69–71)

11. Section 23 (3) (c) of the Division of Pensions Regulation should be amended so that commuted value is calculated on the day before the death of the member. (71–72)

## **Locked-in retirement accounts and life income funds**

12. Funds in a locked-in retirement account or life income fund should be divisible under part 6 of the Family Law Act. (77–78)

13. The rules applicable to the benefits under the transferring pension plan should apply to the division of the locked-in retirement account or life income fund. (77–78)

## **Death of spouse before becoming limited member**

14. Part 6 of the Family Law Act should be amended to clarify that, if a spouse dies before a member's pension commences and before being designated a limited member,



*then the personal representative of the deceased spouse may take all steps necessary to designate the deceased spouse as a limited member of the plan. (86–87)*

## **Administrative fees**

*15. Section 28 of the Division of Pensions Regulation should be amended (a) by raising the maximum administrative fee for registering the spouse as a limited member of the plan from \$750 to \$1 000 and (b) by raising the maximum administrative fee 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 from \$175 to \$200. (92)*

*16. Section 140 (3) of the Family Law Act should be amended to read as follows: "An administrator must deduct a fee under subsection (1) from the payment of benefits, unless the member and/or the spouse otherwise pay the fee to the plan administrator." (93–94)*

## **Forms**

*17. Form P1 (Claim and Request for Information and Notice) should be revised by making the following changes to the form:*

- (a) labelling the following fields as "required": (i) name of plan/annuity; (ii) name of spouse; (iii) address (of spouse); (iv) name of member/annuitant; (v) at least one of the member's date of birth, Social Insurance Number, or plan identification number;*
- (b) labelling the following fields as "optional": (i) address of administrator/annuity issuer; (ii) address (of plan member/annuitant); (iii) email address (of plan member/annuitant); (iv) telephone (of plan member/annuitant); (v) employer (of plan member/annuitant);*
- (c) labelling the following fields with the notation "(if available)": (i) email address (of spouse); and, (ii) telephone (of spouse);*
- (d) in the telephone fields for both the spouse and the plan member/annuitant, deleting the references to "(home)" and "(work)," leaving only a single blank line for the fields;*
- (e) striking out the heading "Declaration of spouse claiming interest" and substituting "Spouse's statement" and, in the part of the form under this heading, striking out "[see below]" and "In support of that claim, I declare that (a) I began living in a marriage-like relationship with the member/annuitant on [date: y/m/d], (b) I was married to the member/annuitant on [date: y/m/d], and (c) I was separated from the member/annuitant on [date: y/m/d]";*

- (f) *in the signature block for the form, striking out “Date of Declaration” and substituting “Date of Statement” and striking out the fields for a witness’s signature, name, and address;*
- (g) *adding the following statement to the form: “note that administrator needs to respect privacy in accordance with privacy legislation.”* **(95–98)**

18. *Form P2 (Request for Designation as Limited Member) should be revised by making the following changes to the form:*

- (a) *labelling the following fields as “required”: (i) name of plan/annuity; (ii) name of spouse; (iii) address (of spouse); (iv) Social Insurance Number (of spouse); (v) Date of Birth (of spouse); (vi) name of member/annuitant; (vii) at least one of the member’s date of birth, Social Insurance Number, or plan identification number;*
- (b) *labelling the following fields as “optional”: (i) address of administrator/annuity issuer; (ii) address (of plan member/annuitant); (iii) email address (of plan member/annuitant); (iv) telephone (of plan member/annuitant); (v) employer (of plan member/annuitant);*
- (c) *labelling the following fields with the notation “(if available)”: (i) email address (of spouse); and, (ii) telephone (of spouse);*
- (d) *in the telephone fields for both the spouse and the plan member/annuitant, deleting the references to “(home)” and “(work),” leaving only a single blank line for the fields;*
- (e) *in the signature block for the form, striking out the fields for a witness’s signature, name, and address.* **(98–101)**

19. *Form P3 (Request for Transfer from Defined Contribution Account) should be revised by making the following changes to the form:*

- (a) *labelling the following fields as “required”: (i) name of plan; (ii) name of spouse; (iii) address (of spouse); (iv) Social Insurance Number (of spouse); (v) name of member; (vi) at least one of the member’s date of birth, Social Insurance Number, or plan identification number;*
- (b) *labelling the following fields as “optional”: (i) address of administrator; (ii) address (of plan member); (iii) email address (of plan member); (iv) telephone (of plan member); (v) employer (of plan member);*
- (c) *labelling the following fields with the notation “(if available)”: (i) email address (of spouse); and, (ii) telephone (of spouse);*

- (d) in the telephone fields for both the spouse and the plan member, deleting the references to “(home)” and “(work),” leaving only a single blank line for the fields;
- (e) in the signature block for the form, striking out the fields for a witness’s signature, name, and address. **(101–104)**

20. Form P4 (*Request by Limited Member for Transfer or Separate Pension*) should be revised by making the following changes to the form:

- (a) labelling the following fields as “required”: (i) name of plan; (ii) name of spouse; (iii) address (of spouse); (iv) Social Insurance Number (of spouse); (v) date of birth (of spouse); (vi) name of member; (vii) at least one of the member’s date of birth, Social Insurance Number, or plan identification number;
- (b) labelling the following fields as “optional”: (i) address of administrator; (ii) address (of plan member); (iii) email address (of plan member); (iv) telephone (of plan member); (v) employer of member;
- (c) labelling the following fields with the notation “(if available)”: (i) email address (of spouse); and, (ii) telephone (of spouse);
- (d) in the telephone fields for both the spouse and the plan member, deleting the references to “(home)” and “(work),” leaving only a single blank line for the fields;
- (e) in the signature block for the form, striking out the fields for a witness’s signature, name, and address. **(104–106)**

21. Form P5 (*Waiver of Survivor Benefits after Pension Commencement*) should be repealed. **(106–109)**

22. Form P6 (*Administrator/Annuity Issuer Response*) should be revised by making the following changes to the form:

- (a) in Part 1: Receipt of Notice, striking out the check box for Form P5 (*Waiver of Survivor Benefits after Pension Commencement*);
- (b) in Part 1: Receipt of Notice, adding check boxes for Form P8 (*Change of Information*) and Form P9 (*Agreement to Have Benefits Divided under Part 6*). **(109–112)**

23. Form P7 (*Withdrawal of Notice/Waiver of Claim*) should be revised by making the following changes to the form:

- (a) labelling the following fields as “required”: (i) name of plan/annuity; (ii) name of spouse; (iii) address (of spouse); (iv) Social Insurance Number (of spouse); (v) date of birth (of spouse); (vi) date of spouse’s death; (vii) name of spouse’s personal representative; (viii) contact information for spouse’s personal representative; (ix) name of member/annuitant; (x) at least one of the member’s date of birth, Social Insurance Number, or plan identification number;*
- (b) labelling the following fields as “optional”: (i) address of administrator/annuity issuer; (ii) address (of plan member/annuitant); (iii) email address (of plan member/annuitant); (iv) telephone (of plan member/annuitant); (v) employer (of plan member/annuitant);*
- (c) labelling the following fields with the notation “(if available)”: (i) email address (of spouse); and, (ii) telephone (of spouse);*
- (d) in the signature block for the form, striking out the fields for a witness’s signature, name, and address;*
- (e) making the part headed “Comments and Instructions” more prominent on the form. **(112–114)***

*24. Form P8 (Change of Information) should be revised by making the following changes to the form:*

- (a) labelling the following fields as “required”: (i) name of plan/annuity; (ii) name of spouse; (iii) address (of spouse); (iv) name of member; (v) at least one of the member’s date of birth, Social Insurance Number, or plan identification number;*
- (b) labelling the following fields as “optional”: (i) address of administrator/annuity issuer; (ii) Social Insurance Number (of spouse); (iii) date of birth (of spouse); (iv) address (of plan member/annuitant); (v) email address (of plan member/annuitant); (vi) telephone (of plan member/annuitant); (vii) employer (of plan member/annuitant);*
- (c) labelling the following fields with the notation “(if available)”: (i) email address (of spouse); and, (ii) telephone (of spouse);*
- (d) in the telephone fields for both the spouse and the plan member/annuitant, deleting the references to “(home)” and “(work),” leaving only a single blank line for the fields;*
- (e) in the signature block for the form, striking out the fields for a witness’s signature, name, and address. **(115–117)***

25. Form P9 (*Agreement to Have Benefits Divided under Part 6*) should be revised by making the following changes to the form:

- (a) labelling the following fields as “required”: (i) name of plan/annuity; (ii) name of spouse; (iii) address (of spouse); (iv) Social Insurance Number (of spouse); (v) date of birth (of spouse); (vi) name of member/annuitant; (vii) address (of plan member/annuitant); (viii) the commencement date; (ix) the entitlement date; (x) at least one of the member’s date of birth, Social Insurance Number, or plan identification number;
- (b) labelling the following fields as “optional”: (i) address of administrator/annuity issuer; (ii) email address (of plan member/annuitant); (iii) telephone (of plan member/annuitant); (iv) employer (of plan member/annuitant);
- (c) label the following fields with the notation “(if available)”: (i) email address (of spouse); and, (ii) telephone (of spouse);
- (d) in the telephone fields for both the spouse and the plan member/annuitant, deleting the references to “(home)” and “(work),” leaving only a single blank line for the fields;
- (e) in the fields for both the commencement date and entitlement date, striking out “[date]” and substituting “[date: y/m/d]”. **(117–120)**



## APPENDIX B

### *Biographies of Project-Committee Members*

**Colin Galinski (committee chair)**, of Galinski Pension and Benefits Law, provides pension and benefits legal services to plan sponsors, administrators, labour and employment counsel, and individuals. In addition, he practises extensively in the area of pension division on relationship breakdown, where he is retained by family lawyers, mediators, and individuals to draft and implement pension-division arrangements.

Prior to establishing Galinski Pension and Benefits Law, Colin practised in the Vancouver office of a large international law firm. Colin enjoys being active in the legal community, in particular speaking and writing for the Continuing Legal Education Society of British Columbia, and presenting to various associations across British Columbia and the Yukon territory. He is the Past Chair of the Pension and Benefits Law Section of the Canadian Bar Association (BC Branch).

**Cynthia Callahan-Maureen** is a director with the Financial and Corporate Sector Policy Branch of the BC Ministry of Finance, with responsibility for policy and legislative development for the *Pension Benefits Standards Act*, the *Personal Property Security Act*, and the ministry's commercial lien statutes. She has worked in these areas since shortly after joining the Branch in 2008.

Cynthia participated in the joint rewrite of BC's and AB's pension standards legislation based on recommendations of a joint expert panel, from 2010 to 2015. She also participated in the development of BC's *Pooled Registered Pension Plans Act* and acted as instructing official for the drafting of the new Act, which was enacted in 2014. Both pension statutes involved consequential amendments to Part 6 of the *Family Law Act*, prepared in consultation with the Ministry of Attorney General and Thomas G. Anderson, QC, who assisted in preparing the BCLI's *Questions and Answers About Pension Division on the Breakdown of a Relationship in British Columbia*.

Before joining the Ministry of Finance, Cynthia was the Manager of Legislation for the Ministry of Children and Family Development, playing a lead role in the development of legislation to establish Community Living British Columbia and to establish the Representative for Children and Youth.

Cynthia is a non-practising lawyer who was called to the Bar of BC in 2003, and to the Bar of Yukon in 2007 prior to spending a year practising as a legislative drafter in Whitehorse. In 2013 she completed a Post-Baccalaureate Diploma in Legislative Drafting from Athabasca University; her thesis was the implementation of the BCLI's 2003 recommendation to adopt the *Uniform Liens Act* prepared by the Uniform Law Conference of Canada to govern repairers', storers', and common carriers' liens in BC. She completed her law degree at the University of Victoria.

**Stephen Cheng** is a senior consulting actuary and the managing director of West-coast Actuaries Inc. He is a Fellow of both the Canadian Institute of Actuaries and the Society of Actuaries with over 35 years of pension and actuarial consulting experience. He holds a Bachelor of Science degree as well as a Master of Business Administration degree from the University of British Columbia. He was the 1981 winner of the Lorraine Schwartz Prize which is awarded annually for distinctions in the fields of statistics and probability at UBC.

Mr. Cheng is a qualified expert in the Supreme Court of BC. He has served on many task forces and committees at both the Canadian Institute of Actuaries and the Society of Actuaries. He is a member of the Canadian Pension & Benefits Institute and the Estate Planning Council of Vancouver. He has presented to the Department of Finance and professional organizations on pension issues and contributed to books and journals on actuarial matters. He is among the leading experts on Individual Pension Plan (IPP) in Canada and actuarial and administration issues on pension division upon relationship breakdown in BC.

**Pierre-Luc Chénier** is assistant director of policy at the BC Pension Corporation. Pierre-Luc leads a team of analysts charged with advising the British Columbia public-sector pension plans and corporate clients on legislative compliance matters, and ensures proper liaison with external stakeholders (including regulators, legal counsels, actuaries, employers, etc.) on such matters. Pierre-Luc has a master's degree in political science from the University of Ottawa.

**Stephanie Griffith** is the Executive Vice President of Bilsland Griffith Benefit Administrators. She is responsible for providing high level administration consulting services to negotiated cost multi-employer pension and benefit plans operating across British Columbia. Stephanie led the transition of the administration services for three large multi-employer pension and benefit plans to BG from a service provider who administered the plans for more than 40 years. Prior to starting the operations of BG, Stephanie was a Principal at the Vancouver office of a global pension and benefits consulting firm for 13 years. Stephanie graduated from McMaster University and has been in the pension and benefits industry for more than 22 years. Stephanie is a member of the International Foundation of Employee Benefit Plans



(IFEBP) and the Canadian Pension and Benefits Institute (CPBI). She has also been a speaker at seminars for CPBI, IFEBP, and Pacific Business and Law Institute.

**Darryl Hrenyk** is a Legal Counsel within the Family Policy, Legislation and Transformation Office (FPLT), Justice Services Branch, Ministry of Attorney General. FPLT has responsibility for the policy underlying most private family-law legislation in British Columbia including the *Family Law Act*. Darryl began with FPLT as a Senior Policy Analyst in November 2006 and became a Legal Counsel in March 2009. He was part of the team that worked on the repeal of the *Family Relations Act* and its replacement with the *Family Law Act* in 2013. He spent his first four years in government (2001–2005) as a Family Justice Counsellor; initially in Prince George and later in Nanaimo. As a Family Justice Counsellor he provided individuals with legal information and mediation services related to issues such as parenting arrangements and support.

Darryl is a practising member of the Law Society of British Columbia and holds a Bachelor of Laws degree from the University of Saskatchewan obtained in 1991. He was called to the Saskatchewan Bar in 1992 and the British Columbia Bar in 1994. Before joining government he was in private practice, primarily in the areas of family law and family-law mediation.

**Gail Johnson** has, since September 2018, been employed as a Pension Analyst with the BC Financial Institutions Commission. For the preceding three years she worked independently as a Pension / Benefit Consultant and also as a consultant with Greg Hurst and Associates.

From 2005 to 2015 Gail served as the Administrator of the Teamsters' National Benefit Plan and Pension Plan. The Benefit Plan covered approximately 2500 members and the Pension Plan membership was approximately 2200 active members and 1500 retirees. As Plan Administrator, Gail reported directly to the Boards of Trustees for both plans and was responsible for all aspects of the administration of the 2 plans.

With the exception of Group Life insurance, the Benefit Plan self-insured their members' benefits. The Plan's office was responsible for adjudication of all claims including health, dental, short-term disability and long-term disability. Administration of the Pension Plan encompassed all governance matters, regulatory reporting, calculation of commuted values, division of pension matters, member communication and preparation of data for actuarial valuations and annual audits.

Prior to her role as Plan Administrator, Gail worked at the Plan's office in both the Benefit and Pension Plan areas. It was during this time that she pursued the educa-

tional programs offered jointly through the International Foundation of Employee Benefit Plans (IFEBP) and Dalhousie University. In 2002 she acquired the Retirement Plans Associate (RPA) designation, in 2004 the Group Benefits Associate (GBA) designation and in 2005 the Certified Employee Benefit Specialist (CEBS) designation.

Gail has served on the BC Regional Council of the Association of Canadian Pension Managers (ACPM). She also served on the BC / Alberta Joint Advisory Group (JAG) which assisted in implementing changes to Pension legislation in the two provinces.

Prior working in Pension and Benefits, Gail worked in retail management at Smithbooks, Chapters/Indigo and for 17 years in a family owned and operated retail business.

**Hon. Peter Leask, QC**, is a retired Justice of the Supreme Court of British Columbia and Life Bencher of the Law Society. He was called to the British Columbia Bar in 1969; was an assistant professor at the UBC Law School from 1971 to 1974 and continued to lecture at the Law School from 1974 to 1981. He was a Governor of the Law Foundation from 1975 to 1979. He was elected as a Bencher of the Law Society from 1984 to 1992 and Treasurer in 1992. Mr. Leask has been active in the affairs of the legal profession before, during and after his service as a Bencher and a Judge. He continues to participate actively in matters concerning legal aid and various CBA subsections including family law and criminal law.

**Margaret H. Mason, QC**, leads the Charities and Tax-Exempt Organizations practice at Norton Rose Fulbright LLP. Her practice spans a broad range of issues which affect charities and not-for-profits including tax-exempt status, governance, political activities, and social enterprise. Margaret represents organizations across the sector including religious, environmental, sport, healthcare, social services, education, and research organizations, as well as family and corporate foundations.

Margaret also advises donors with respect to their philanthropic planning and has extensive experience with trust and estate related matters including all aspects of estate planning and the administration of estates and trusts, both within Canada and elsewhere.

Margaret currently serves on the board of directors of Imagine Canada and the Canadian Sport Institute—Pacific and is the Past-Chair of the National Charities and Not-for-Profit Organizations section of the Canadian Bar Association and a member of the Canada Revenue Agency Charities Directorate's Technical Issues Working Group.

**Beatrice McCutcheon** is associate counsel with the Victoria law firm Cook Roberts LLP. Bea has practiced exclusively in the area of family law for over 15 years. Bea's practice includes advising both clients and other counsel on the division of pensions on marriage breakdown. She has a particular interest in the proper construction of agreements, as well as other forms of documenting a settlement. Bea is a frequent presenter and author in these areas and a member of the Editorial Board for the CLEBC's *Family Law Agreements Annotated Precedents*. She is also a member of Victoria's Collaborative Family Separation Professionals and has served as an elected member of Provincial Council for the Canadian Bar Association, British Columbia Branch.

**Jacqueline G. McQueen** practises family law and is a partner at Aaron Gordon Daykin Nordlinger LLP, a boutique family-law firm in Vancouver. A native of British Columbia, Jacqui completed her BA at York University and her LLB at Osgoode Hall in 1993. She was called to the bar in Ontario in 1995, BC in 1996, and New Zealand in 2001. Jacqui also practises as a family-law mediator.

Jacqui has been an active volunteer in the legal profession and community: in a variety of CBA Vancouver sections, including at the executive level; as a mentor through the CBA Women Lawyers Forum; at CLEBC as a contributing author to the *Annotated Family Practice* and as a course presenter; as a moot court judge in PLTC; and in pro-bono legal advice programs. Elected a Benchler of the Law Society of British Columbia for 2019, Jacqui is a member of the Practice Standards Committee, Unauthorized Practice Committee, and Access to Legal Services Advisory Committee.

She has also been a board member on community organizations, including 365give, a registered not-for-profit that encourages children to give back every day.

**Michael J. Peters** was appointed VP and Deputy Superintendent of Pensions when the BC Financial Services Authority replaced FICOM as the regulator of BC's financial-services sector on 1 November 2019. Michael served as Acting Superintendent of Pensions from July 2016 to 2019. Before his appointment he was Deputy Superintendent of Pensions, having assumed that role in 2004.

Michael is responsible for operational and strategic policies related to administration and enforcement of the British Columbia *Pension Benefits Standards Act*. He is also responsible for the development and implementation of a risk-based regulatory framework for oversight of pension plans registered in British Columbia. He has briefed cabinet ministers and the Executive Council of British Columbia on pension matters.

Michael represents British Columbia at the Canadian Association of Pension Supervisory Authorities (CAPSA) and oversees British Columbia's involvement in furthering CAPSA's strategic plan. Michael is currently Chair of the CAPSA Cybersecurity Committee and sits on several other CAPSA Committees, including the Multi-lateral Agreement Committee and the Strategic Planning Committee.

Michael actively participated in the drafting of the *Pension Benefits Standards Act* and associated regulations, which came into force in September 2015. He joined the Pension Standards Branch of the Ministry of Labour for British Columbia in May 1994 as a Pension Officer, and oversaw a portfolio of defined benefit and defined contribution pension plans. Michael joined the Office of the Superintendent of Pensions in 1994, after working with the Registered Plans Division of the Canada Revenue Agency since 1988.

## PRINCIPAL FUNDERS IN 2019

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- British Columbia Securities Commission
- Scotia Wealth Management
- Alzheimer Society British Columbia
- CARP (formerly Canadian Association of Retired Persons)
- BC Notaries
- Goddard Gamage LLP
- Norton Rose Fulbright