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BRITISH COLUMBIA
LAW INSTITUTE PENSION DIVISION REVIEW PROJECT

Backgrounder

Legislative Fact Sheet: Report on Pension Division: A Review of Part 6 of the Family Law Act

Date: 23 March 2021

Introduction

BCLI's Pension Division Review Project Committee has published a report that makes recommendations to reform how pensions are divided between separating spouses. This backgrounder summarizes the content and rationale of the committee's recommendations that call for changes to part 6 of the *Family Law Act* and the *Division of Pensions Regulation*.

Death of a spouse

What is the current law?

- Part 6 doesn't address what happens if a spouse who has acquired a right to a share of a pension dies before taking the steps required to perfect that right.

What reforms does the report recommend?

- A provision should be added to part 6 confirming that the spouse's personal representative has the power to take any steps needed to perfect the spouse's right to a share of a pension.

Why should part 6 be changed to enact these reforms?

- A provision addressing this issue will clarify the law.

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Waiving survivor benefits after pension commencement

What is the current law?

- Part 6 provides that spouse may waive survivor benefits after a pension commences payment of benefits only by using one of two methods: (1) giving notice in Form P5; or (2) obtaining a court order that expressly refers to the relevant provision of part 6.

What reforms does the report recommend?

- Changing terminology from *waiving* to *assigning*.
- Requiring spouses to work out the legal and tax issues inherent in such an assignment in an agreement or a court order.
- Repealing Form P5.

Why should part 6 be changed to enact these reforms?

- The current rules in part 6 were intended to tighten up the law by preventing the accidental waiver of survivor benefits as part of a general settlement of pension-division issues.
- The proposed reforms would provide further safeguards by (1) changing the terminology used to emphasize that the spouse is the legal owner of the survivor benefits, (2) requiring that the parties to an assignment to expressly turn their minds to the legal and tax issues involved, and (3) eliminating a form that has become a source of confusion in practice.

Commuted value: transfer and calculation

What is the current law?

- For pensions with a benefit formula provision, a limited-member spouse may opt to have the proportionate share of the commuted value of the benefits transferred to the limited member. The only restriction on this transfer is that it may not be made earlier than the earliest date on which the member may elect to have the member's pension commence.
- Part 6 and the regulation use different language in describing the date on which the commuted value must be calculated in cases involving the death of a member.

What reforms does the report recommend?

- The limited member's options for the transfer of the commuted value should match those of the member. If the member can't opt to require the transfer the commuted value in certain circumstances, then the limited member in those circumstances shouldn't be able to require a transfer.

- Part 6 should provide that calculation of the commuted value in cases involving the death of a member should be done in accordance with the regulation.

Why should part 6 be changed to enact these reforms?

- Having the limited member's options mirror those of the member will promote fairness between the spouses and will avoid creating any incentive for a limited member to take a transfer of the commuted value instead of a separate pension.
- Having part 6 refer to the regulation in calculating the commuted value in cases involving the death of the member will resolve an anomaly in which part 6 uses more restrictive language than is found in the regulation.

Disability benefits

What is the current law?

- While part 6 does generally address division of disability benefits, it doesn't address how a member spouse receiving disability benefits affects the right of a limited-member spouse to begin receiving a share of pension benefits.

What reforms does the report recommend?

- Part 6 should expressly confirm that a limited-member spouse may begin receiving a share of the pension benefits as of the earliest date of the member spouse's eligibility, even though the member spouse may be receiving disability benefits at the time.

Why should part 6 be changed to enact these reforms?

- It would clarify the law's application to an emerging issue.
- This approach is consistent with the broader philosophy of part 6, which favours allowing a limited-member spouse to opt to receive a share of pension benefits at the earliest date of the member spouse's eligibility.

Locked-in retirement accounts and life income funds

What is the current law?

- LIRAs and LIFs are divided under the general rules for property division found in part 5.

What reforms does the report recommend?

- LIRAs and LIFs should be divided under part 6.
- The rules under part 6 that apply to a pension plan from which funds were transferred into a LIRA or LIF should govern the division of that LIRA or LIF.

Why should part 6 be changed to enact these reforms?

- The locking-in rules that apply to LIRAs and LIFs make them analogous to pensions.
- Dividing LIRAs and LIFs under part 6 will provide access to a sophisticated body of rules, which should result in a fairer division between the separating spouses.

Private annuities

What is the current law?

- Annuities that are privately purchased (as opposed to annuities purchased by the administrator of a pension plan on behalf of a plan member) are divided under part 6 in the same manner as a pension that has commenced paying benefits.

What reforms does the report recommend?

- If the annuity isn't in pay, then it should be divided under the general rules for property division found in part 5.
- If the annuity is in pay, then it should continue to be divided under part 6.

Why should part 6 be changed to enact these reforms?

- The current law relies on an analogy between private annuities and pensions that doesn't always hold true. Notably, the concept of pensionable service—that is, contributions to a pension over an extended period—may not apply to all private annuities, which can be purchased at one time. This makes it challenge in practice to apply rules developed for pensions to private annuities.
- The recommended reforms will more closely align the law with the features of private annuities and provide more guidance and clarity on how private annuities should be divided between separating spouses.

Forms

What is the current law?

- Forms have been prescribed in the regulation to assist with the administration of pension divisions.

What reforms does the report recommend?

- The report recommends numerous changes to the wording of the forms.

Why should the regulation be changed to enact these reforms?

- The recommendations address issues that have arisen in practice and are intended to make the process of pension division run more smoothly.

Administrative fees

What is the current law?

- The following maximum administrative fees may be charged: (1) up to \$750 for registering the spouse as a limited member; (2) up to \$175 for transferring a proportionate share of the member's defined contribution account to the credit of the spouse.
- An administrator is allowed to deduct the administrative fees from the payment of benefits.

What reforms does the report recommend?

- The maximum administrative fees should be raised as follows: (1) up to \$1000 for registering the spouse as a limited member; (2) up to \$200 for transferring a proportionate share of the member's defined contribution account to the credit of the spouse.
- Deducting administrative fees from the payment of benefits should be the default rule.

Why should part 6 be changed to enact these reforms?

- Administrative fees are intended to provide a realistic contribution toward the administrator's expenses in implementing division of a pension. These fees haven't changed in eight years, and with each passing year they become less and less realistic in relation to the actual costs of carrying out pension division.
- To alleviate concerns about administrative fees becoming a barrier to pension division, these fees should be deducted from the payment of benefits, unless a member or spouse wants to pay the fees in some other manner.

Transitions

What is the current law?

- The law favours transitioning pension-division cases that were begun under the old *Family Relations Act* to the new part 6 of the *Family Law Act*, except for a handful of exceptions.
- Two of these exceptions concern cases in which (1) forms prescribed under the old act were delivered to a pension administrator before the new part 6 came into force and (2) there was a consultation between an administrator and a member and spouse on how the old act would apply to dividing a pension.

What reforms does the report recommend?

- The exceptions involving forms and consultations should be repealed, transitioning cases formerly covered by them to the new part 6.

Why should part 6 be changed to enact these reforms?

- What were intended as narrowly tailored exceptions are often in practice being interpreted expansively, keeping separating spouses under the old act.
- The changes support the general approach to transitions, which is to favour transitioning cases to the improved legal framework found in the new part 6.