



**ONTARIO
BAR ASSOCIATION**
A Branch of the CANADIAN BAR ASSOCIATION

OBA Submission
on
**Bill 133 the Family Statute Law
Amendment Act, 2009**

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Executive Summary

The OBA welcomes the opportunity to provide comments on amendments to the *Children's Law Reform Act*, *Family Law Act* and *Pension Benefits Act* proposed in Bill 133. We note that we have already engaged in extensive discussions with representatives of the government and have appreciated the positive dialogue that has taken place. These discussions have been ongoing regarding the issues now addressed by Bill 133 as well as other related issues ever since the creation of the Attorney General's Working Group on Family Law in 2004.

Part 1 – Amendments to the *Children's Law Reform Act*

The Family Law Section appreciates that the Bill attempts to protect those who are most vulnerable in our society by addressing the process related to custody applications. The requirement for an affidavit including a plan of care when bringing an application for custody is a positive step. The effort made to address the need for an investigation into a custody application by non parents is laudable.

However, there are some concerns, some of which admittedly are very difficult to address in legislation. These include the following:

1. The intended purpose of the amendments (to protect children where the applicant is not a parent in a consent custody application) may not be achieved, as those individuals who have serious criminal and child protection histories will most likely not apply for custody once they learn that they must provide a criminal record check and sign a release to all child protection agencies in the region where they apply. Consequently, those children who are most vulnerable may remain 'under the radar' and may not be protected except through child welfare agencies. Frankly, we do not know of any way to address this issue except through the Children's Aid Societies and child welfare legislation.
2. Many non-parent consent custody applications are cases that involve children who are sent here from other countries and placed, mainly with relatives or close family friends for the purpose of attending school in Canada. English is not the primary language of many of these applicants who seek these orders. The overall number anecdotally is approximately 1,400 or so per year in Ontario, according to duty counsel. There will need to be educational programs available at the courthouses to assist parties who are self represented in making such applications.
3. It is not clear how the information from the Children's Aid Society or regarding criminal records will be sought and obtained. The delay involved in providing this information needs to be addressed perhaps by regulation and some time requirements should also be included to prevent serious delay.
4. The information provided through the Children's Aid Societies needs to contain some detail to assist the court. The legislation does not appear to set out what

information is to be provided and how it is to be used by the Court. Perhaps this can be addressed by Regulation.

Despite these concerns, we believe that the Bill does address an area that required attention. More assistance for the court in making these decisions is a worthwhile goal.

Part 2 – Amendments to the *Family Law Act* (unrelated to pensions)

The OBA is pleased to see that the Bill contemplates the implementation of child support recalculation service and we look forward to the regulation establishing it. We agree with the proposed amendments regarding all other aspects of the Bill as it relates to amendments to The Family Law Act.

We are also in general agreement with the other proposed amendments. We have been in discussion with the Ministry regarding these.

Part 3 – Amendments to the *Pension Benefits Act* and *Family Law Act* (related to pensions)

The Ontario Bar Association supports the principles underlying the proposed amendments to the *Pension Benefits Act* and the *Family Law Act* for they contemplate an equitable division of pension assets while reducing the costs and uncertainties that are associated with division of pensions under the current system. This is particularly important given the increase of self-represented parties. We also applaud the harmonization of pension values in section 4 of the *Family Law Act* with the limits in subsection 67.3 (5) and subsection 67.4(5) of the *Pension Benefits Act*.

As the OBA advocated in its submissions to the Law Commission of Ontario,

“Ideally, there should be one clear prescribed method for valuing the pension that includes prescribed assumptions for variables such as the retirement date of the plan member and life expectancy. If clear valuation rules are prescribed, the parties will not have to hire competing experts to prepare valuations. Under the current regime, situations arise where the cost of valuing and dividing a pension on marriage breakdown approaches or exceeds the value of the pension itself. Reform of pension division on marriage breakdown should focus on substantially reducing the likelihood that such situations will occur.”

We believe the amendments set out in Bill 133 substantially meet the goals set out in the above submission. It will be particularly helpful to separating spouses that Bill 133 provides for a single valuation method, with valuations to be performed by the plan administrator. This is likely to result in fewer disputes, lower costs and fairer outcomes

for separating spouses, many of whom are unrepresented by counsel and/or do not obtain the services of a pension valuator.

There are, however, a number of provisions that need to be clarified, either by an amendment to Bill 133 or in the accompanying regulations.

1. Calculation of Net Family Law Value

Section 10.1¹ of the *Family Law Act* states that the net family law value of a spouse's interest in a pension plan is determined in accordance with section 67.2² of the *Pension Benefits Act*. Section 67.2 of the *Pension Benefits Act* derives the net family law value from a preliminary value which is adjusted for ancillary benefits and other entitlements, in accordance with the regulations. We look forward to reviewing the details of how the preliminary value of the member/former member's pension benefits is calculated and in particular the extent to which ancillary benefits and other entitlements are included.

The regulations should prescribe the necessary information required to calculate the preliminary value of the benefit for both active and retired members, including:

- a) Mortality table
- b) Economic assumptions such as inflation and the discount rate
- c) Valuation of early retirement subsidies
- d) Valuation of a spouse's interest in a vested spousal survivor pension in cases where the valuation date occurs after the first instalment of the plan member's pension was due.
- e) A method of valuing inflation adjustments where the pension benefit is not indexed at 100% of the Consumer Price Index. There are some plan designs and plan features that require special attention, including hybrid plans that offer money purchase with a defined benefit minimum, target benefit plans and grow-in due to full or partial plan wind up.

While the Ontario Bar Association agrees with the valuation approach in subsection 67.2(2) of the *Pension Benefits Act*, we submit that the prescribed valuation method should not require that the value of ancillary benefits be itemized separately from the pension value.

2. Adjustments to Net Family Law Value or to the Equalization Payment

The Family Law Bar accepts that the new scheme will create values for pensions which will, in some cases be more advantageous to a member spouse and in some cases more advantageous to a non member spouse, depending on how the assumptions that are made realize in the course of time in each individual fact situation. There still is a concern,

¹ Section references to the *Family Law Act* and the *Pension Benefits Act* refer to existing sections in these statutes as well as those proposed by Bill 133.

² *Ibid.*

however, that there may be a minority of cases in which the calculation of Net Family Law Value works a such hardship that there should be some residual discretion on the part of a judge hearing a family law matter to either adjust the Net Family Law Value or the equalization payment in the interests of fairness.

Such an exception should be fairly narrowly defined, and should entail little, if any, administrative burden on the part of the pension administrator. It should be no more difficult than, for example, the triggering of the exceptions contained in the Child Support Guidelines. The Child Support Guidelines rules are largely rigidly applied, but do contain some flexibility (such as in cases of undue hardship).

Under our present law, the value of a person's pension can be discounted to take into account a significant health issue that is likely to shorten that person's life. This is because it does not seem fair for a person with, for example, terminal cancer to have to pay a large equalization payment on account of a pension when that value is likely to be substantially reduced by the shortened life expectancy. However, even without a diagnosis of a terminal illness, a health problem can significantly impair the value of a pension interest.

Currently, S. 5(6) of the Family Law Act states:

“The court may award a spouse an amount that is more or less than half of the difference between the net family properties if the court is of the opinion that equalizing the net family properties would be unconscionable, having regard to...”

S. 5(6) then proceeds to list eight circumstances which qualify for consideration. The Family Law Bar is concerned that the issue of pension valuation is such a change, that there will be uncertainty as to whether S. 5(6) is to be available as a remedy to address serious concerns over the fairness of an equalization payment affected by the value of a pension.

Recommendations:

2.1 A new Section be added to the Family Law Act giving the court the power to adjust the Net Family Law Value, in cases where a spouse holding an interest in a pension will be unlikely to realize its presumed value.

2.2 Alternatively, S. 5(6) of the FLA could be amended to add a new subsection (i), which might state that:

“ any circumstance related to the determination of value of a spouse's pension interest or the spouse's ability to realize that value”

The use of S. 5(6) would result in greater certainty due to the need to meet the threshold of unconscionability.

2.3 Subsection 67.2(4) of the *Pension Benefits Act* appears to state that the period of pension accrual that is subject to valuation starts with the date of marriage for married spouses. The regulations that accompany subsection 67.2(4)(b) should clarify whether or not it will be possible for married spouses who lived as common law spouses before the date of marriage to value and divide the pre-marriage pension accrual, and from what point.

Subsection 67.2(1) of the *Pension Benefits Act* should be amended to include the valuation of a spouse's vested survivor pension, in cases where the valuation date occurs after retirement:

“The preliminary value, for family law purposes, of a member's pension benefits or a former member's deferred pension or pension under a pension plan is determined in accordance with the regulations and as of the family law valuation date of the member or former member and his or her spouse.

The preliminary value, for family law purposes, of a spouse's survivor pension benefits under section 44 of the *Pension Benefits Act* that irrevocably vested in the spouse on the date the first instalment of the plan member's pension was due, is determined in accordance with the regulation and as of the family law valuation date of the member or former member and his or her spouse. This paragraph applies only if the first instalment of the plan member's pension was due on or before the family law valuation date and the spouse did not waive his or her entitlement in accordance with section 46 of the *Pension Benefits Act*.”

3. *Calculation of Net Family Value of Any Other Pension Plan*

The reference to “any other pension plan” in section 10.1(2) of the *Family Law Act* could be interpreted to include a supplementary pension plan that is not registered under any Canadian pension legislation or a plan whose members are not governed by the *Pension Benefits Act*. Either the regulations or the legislation should clarify that plan administrators will not be required to provide valuations in respect of pension entitlements, not governed by the *Pension Benefits Act*.

4. *Restriction on Transfer of Disproportionate Share*

Subsection 10.1(4) of the *Family Law Act* restricts the amount that can be transferred as a lump sum from the plan member's pension plan in satisfaction of an equalization obligation. The restriction is calculated using the formula $A \times B/C$ where:

“A” is the equalization payment to one spouse under section 5 (*which the draft would suggest is subject to variation in section 5(6)*),

“B” is the other spouse’s share of the pension value as per 67.2 of the *Pension Benefits Act* (a question arises as to whether this value is pre-tax or net of tax), and

“C” is the value of all property, except excluded property held by the other spouse on valuation date.

The effect is to limit the amount available for lump sum transfer to the non-pension spouse (“Wife”) to the same percentage that the pension makes up within the assets of the pension-holding spouse (“Husband”) on date of valuation.³ The Ontario Bar Association makes the following observations regarding the operation of the formula in subsection 10.1(4) of the *Family Law Act*:

- The formula does not work when the pension holder has debt or premarriage assets because the definition for “C” does not take these assets into account.
- The formula also doesn’t work well if the equalization “A” is low because the Wife holds assets close in value to the Husband’s holdings. The amount available for transfer is further reduced, although one might presume that as the amount available for transfer reduces, it becomes easier for the Husband to fund the payment from debt or savings, without recourse to a pension transfer.
- The proviso to the formula is that both parties can consent otherwise, but the need for consent gives the non-pension holding spouse a powerful “veto” which too often translates into bully bargaining.
- The formula does work where the only significant asset of a marriage is a pension, which may often be the case.
- The formula limits the flexibility which a court might wish to exercise in arriving at a fair payment method. For example, a spouse might have interests in several pensions, and it may be appropriate for 100% of one of them to be transferred to the non member spouse.

³ Using an actual case, here under the alias of Mr. and Mrs. Bush:

- if the equalization payment was \$78,600 payable by Mr. Bush who is the pension holder, and
- his pension was valued (net of tax) at \$151,784, and
- his total property (without deduction for his debts and premarriage property) was \$496,590

then using the formula $A \times B/C$ the most that could be transferred from his pension would be \$23,997. ($\$78,600 \times 151,784 / 496,590$) This result leaves \$54,603 payable from his assets. If he was permitted to transfer 50% of his pension, then all but \$2,708 of the equalization obligation could be satisfied by the transfer alone. If the calculation of C were reduced by his debts held on date of separation and his premarriage values, (in other words use his net family property value) the figure of \$496,590 would instead be \$245,000. Thus the formula would be $\$78,600 \times \$151,784 / \$245,000$ resulting in \$48,695 available for transfer instead of \$23,997.

- There is an interplay in family law matters between property and spousal support issues which becomes particularly evident where pensions are involved, since they are assets which are at times treated as property, and at other times as income for support purposes.
- There exists no clear recognition that a court may and should take into account the future tax consequences to a recipient of a transfer payment from a spouse's pension plan.
- Under Part I as it presently stands, equalization payments are to be made in cash, and any discretion conferred by S. 9(1)(d) has always been narrowly confined by the case law. Bill 133 is now introducing a new means of payment, and there are many competing factors that will affect the views of an individual member or non member as to whether that form of payment will or will not be desirable. We see great potential for conflict as to the method of payment, and judges will be asked to rule on the matter.

Recommendations

4.1 That the formula be dispensed with and there be no limit to the amount available for transfer.

(We note that subsection 67.3(5) of the Pension Benefits Act continues to limit the amount of pension available for transfer to 50% of the applicable net family law value of the pension.)

Further, instead of the provisions of S 10.1(4), a new section should be drafted to provide:

“unless the parties consent, a court shall determine what portion of an equalization payment shall be made by means of the transfer from or division of an interest in a pension plan, taking into account the following factors:

1. the nature of the assets available to each spouse at the time of hearing
2. the resources available to the parties to meet their needs in retirement and the desirability of encouraging the maintenance of such resources
3. the tax consequences of any proposed form of payment

4.2 If the formula remains, that the Bill be amended to provide that “C” is the value of all property, except excluded property held on valuation date *less debts held on date of valuation and the value of property held on the date of marriage.*

(i.e. a spouse's net family property as defined in subsection 4(1) of the Family Law Act.)

4.3 If the formula remains, that either the Bill or the accompanying regulations clarify that the pension plan administrator is not responsible for ensuring compliance with subsection 10.1(4) of the *Family Law Act*.

5. Transition Provisions – Pension Valuations

There appears to be a discrepancy between the key transition dates for pension valuations under the new regime in the *Family Law Act* and the *Pension Benefits Act*:

- Subsection 10.1(7) of the *Family Law Act* states that the new sections governing the calculation of net family law value will apply in all cases, with the exception of orders that are “*made before the date on which this section comes into force.*”
 - The key transition date under the *Family Law Act* is the date the court order was made.
- The corresponding transition provision for pension valuations in the *Pension Benefits Act* states that a spouse is not eligible to make an application for a net family law value statement if “*an order made under Part I of the Family Law Act or a domestic contract was filed with the administrator... before the date on which this section comes into force.*”⁴
 - The key transition date under the *Pension Benefits Act* is the date the order or domestic contract was filed with the administrator.

Recommendations:

5.1 The transition dates in section 10.1(7) of the *Family Law Act* and subsection 67.2(9) of the *Pension Benefits Act* should be harmonized. The Ontario Bar Association submits that the date that a court order or agreement is filed with the plan administrator may not be the most appropriate dividing line. The filing date does not have special significance in the *Pension Benefits Act*. Under the current regime, even parties who file agreements and orders with the administrator may wait many years for the pension event that will trigger the assignment of the spouse’s share from the plan. The spouse’s right to a portion of the property ‘vests’ when the agreement is executed or when the court order is issued, but that right remains a contingent one until the pension payment trigger event, namely the plan member’s retirement, termination or death.

The OBA submits that the date that a court order is made or a domestic contract is signed is a more appropriate dividing line for the valuation transition provisions. At that point, the pension property has been valued and any equalization obligation has been calculated. For these reasons, we suggest the following amendments to section 10.1(7) of the *Family Law Act* and section 67.2(9) of the *Pension Benefits Act*:

⁴ 67.2(9) of the *Pension Benefits Act*.

10.1(7) “This section applies whether the valuation date is before, on or after the date on which this section comes into force but it does not apply to an order made or a domestic contract executed before the date on which this section comes into force.”

67.2(9) ““The spouse is not eligible to make an application under this section if an order was made under Part I of the Family Law Act or a domestic contract was executed before the date on which this section comes into force....”

5.2 Subsection 67.2(9) should be amended so that the restriction against making applications for net family law value statements applies equally to plan members and their spouses:

“The member or former member or his or her spouse is not eligible to make an application under this section....”

5.3 The Ontario Bar Association submits that an exception to subsection 67.2(9) of the *Pension Benefits Act* should be considered to assist members and spouses who wish to amend existing pension assignment provisions in their domestic contracts or court orders to avail themselves of the new pension division options offered by Bill 133. Calculation of the net family law value should be a necessary precondition to any such amendment and this exception should be permitted only if settlement of a pension assignment has not yet commenced; that is to say, before the plan member’s retirement, termination or death. We also recommend that if such an exception is created, a special application form be prescribed with a view to ensuring that the requesting parties and the plan administrator fully understand the context of the request and the contingent nature of the valuation.

6. Transition Provisions – Division of Pension Benefits

Subsection 67.5(1) of the *Pension Benefits Act* states that pension division provisions in any orders, awards or domestic contracts filed with the administrator of a pension plan on or after the effective date are limited to the two new options: lump sum transfer for separations before retirement and division of pension payments for separations after retirement.

We note that this will compel everyone with existing separation agreements not yet filed with the administrator to re-negotiate and re-write the agreements. Furthermore, any existing ‘if and when’ provisions in agreements filed with the administrator could not be amended without complying with the new provisions.

Recommendations:

6.1 The Ontario Bar Association recommends that subsection 67.5(1) be amended by changing the key transition date for family arbitration awards and domestic contract from the date those documents are filed with the administrator to the date those documents were executed by the parties. Such an amendment would afford court orders the same

transition treatment as awards and domestic contracts. All orders, awards and contracts made after this section comes into force should be subject to subsection 67.3 or subsection 67.4 of the *Pension Benefits Act*.

6.2. The Ontario Bar Association recommends that subsection 67.6(1) of the *Pension Benefits Act* be amended so that the existing pension division regime continues to apply to all domestic contracts executed before the date on which this section comes into force, and not just those domestic contracts that were filed with the administrator.

6.3. The Ontario Bar Association recommends that the transition provisions clearly state how parties who executed domestic contracts before the effective date of Bill 133 can amend those agreements if the spouse is interested in the lump sum transfer option provided by subsection 67.3(1) of the *Pension Benefits Act*.

7. *Application for Statement of Net Family Law Value*

We note that there are no preconditions for an application for a statement of the net family law value in subsection 67.2(5) of the *Pension Benefits Act*. For this reason, the Ontario Bar Association supports a reasonable application fee, which will act as a deterrent to frivolous or repetitive requests for valuations.

With respect to the duty of a plan administrator to provide a statement, the regulations that accompany subsection 67.2(8) should specify that it is not possible to request a net family law value statement for a valuation date in the future. The member and the spouse should already be separated, and not be in the process of planning their separation, when asking for the statement.

8. *Transfer Application*

Recommendations:

8.1 We recommend that the preamble of s.67.3(1) of the *Pension Benefits Act* be amended to as follows:

*“A spouse of a member or former member of a pension plan is eligible to apply under this section for an immediate transfer of a lump sum from the plan if the spouse demonstrates that all of the following circumstances exist:” *

8.2 The term ‘due’ in s.67.3(1) 2 requires clarification. If the intention is to coordinate with the phrase ‘first instalment due’ in section 44 of the *Pension Benefits Act*, the link should be made expressly. In *Ontario Teachers’ Pension Plan Board v. Superintendent of Financial Services*,⁵ the Tribunal noted that the *Pension Benefits Act* does not itself provide a method for determining the “due date” and that it must be determined under the terms of the relevant pension plan.

⁵ (October 14, 2003), FST File #P0217-2003 (F.S.Trib.)

8.3 We recommend that the prescribed application forms be incorporated within the family law process, such that the forms would be completed and attached to an order, award or agreement. The administrator would then need only to confirm that the formal requirements for a valid order, award or agreement exist.

8.4. The fourth criteria in s.67.3(1) 3 and s.67.3(1)4 effectively require the administrator to review and interpret orders, awards and domestic contracts. In its submission to the Law Commission of Ontario, the OBA strongly recommended “...an approach under which plan administrators are not required to interpret court orders or separation agreements. The OBA believes that this will be advantageous to all stakeholders. Specifically, we propose that prescribed forms be developed. These forms would be completed by the pension plan member and their spouse and would include all necessary information for the pension plan administrator to divide the pension, without the need to review the specific terms of a separation agreement or an order.

We therefore recommend that the wording of the fourth application criteria in s. 67.3(1)4 and s.67.4(1)4 of the *Pension Benefits Act* be amended by replacing the term “formula for calculating it” with “proportion”. The existing wording of these provisions effectively require the administrator to review and interpret orders, awards and domestic contracts and raises the possibility of contradictions between the formula drafted in the order/agreement/award and the prescribed form. We believe that it would be simpler for plan members and their lawyers to state a proportion of the pension to be assigned, instead of trying to draft a formula.

9. Transfer Options

Clause 67.3(2) 4 contemplates implementation of the transfer by leaving the money in the plan to the credit of the eligible spouse in such circumstances as may be prescribed, and only if the plan administrator agrees to it.

Recommendations:

- 9.1 We recommend that the regulations clearly outline the spouse’s rights under the pension plan and the corresponding obligations of the plan administrator if this transfer option is chosen. For example, at what point is the spouse required to commence the pension and in what form? Will the spouse be eligible for his/her own joint and survivor pension, termination options and shortened life expectancy options? Will the plan administrator be required to provide the spouse with an annual statement and or otherwise treat the spouse exactly the same as a member of the plan?
- 9.2 The menu of transfer options offered in subsection 67.3(2) should be expanded to include transfers to a spouse’s estate in the event that the spouse dies before the transfer is completed. Under income tax rules, a spouse’s estate could not obtain a transfer into a prescribed retirement savings arrangement because these arrangements cannot accept transfers after the death of the annuitant (in the case of a locked-in RRSP or RRIF) or the member (in the case of a pension plan).

We therefore recommend that a paragraph be added as follows:
In the case where the spouse has died, the personal representative of the eligible spouse may apply, in accordance with the regulations, to the administrator of the plan, to transfer the lump sum to the spouse's estate.

10. Death of Plan Member before Completion of Transfer

a) Death of Plan Member before Retirement

We note that subsection 48(13) of the *Pension Benefits Act* has been slightly amended, and will continue to ensure that a former spouse's interest in the plan member's pension benefits provided in a domestic contract or an order made under Part 1 of the Family Law Act will be preserved in the event of the plan member's death before retirement.

b) Death of Plan Member after Retirement

The proposed legislation should also address the following situation:

- The plan member separates before retirement, executes an agreement in which a portion of his/her retirement pension is to be transferred to the spouse but the spouse delays his/her transfer application under subsection 67.3(4).
- During that period of delay, the plan member retires with a new spouse (whose rights to a spousal survivor pension vested on first instalment due pursuant to subsection 44(1) of the *Pension Benefits Act*) and then dies.
- By the time the first spouse applies for a transfer under 67.3(2), no retirement benefits are payable. Instead, the pension property has now vested in the new spouse by operation of subsection 44(1) of the *Pension Benefits Act* and the plan administrator will not be able to administer the transfer application in respect of the first spouse.

Currently, a plan administrator is discharged upon making the pension payments in accordance with the information provided at the time the benefit is to be paid. We are not recommending an alteration to the discharge provision in section 45 of the *Pension Benefits Act*, but we do point out the need to encourage spouses to proceed with the transfer as soon as possible before the property vests in another person and is no longer available for transfer. We recommend that the net family law value statement warn the spouse about the risks of delaying the transfer application.

11. Interest

We recommend that the calculation of the amount to be transferred as a lump sum from the plan include an interest component, calculated from the valuation date to the date of payment. This element of the calculation should be addressed in the regulation, and should be consistent with other interest accrual provisions in the *Pension Benefits Act*.

12. Application for Division of Pension Payments

Subsection 67.4(1) of the *Pension Benefits Act* outlines the eligibility criteria for a pension division at source where the pension is in pay at the valuation date. With the exception of the second, all of the criteria are identical to those listed in s.67.3(1) and we reiterate our concerns with those criteria as expressed above in section 7.

Subsection 67.4(2) states that spouses can apply to the administrator for division of the former member's pension payment and payment of the spouse's share. The regulations should clarify whether this is a separate pension based on the spouse's life and whether or not full payments already made to the pensioner between the valuation date and the date when the division is implemented are to be factored into the division.

Subsection 67.4(4) of the *Pension Benefits Act* requires the administrator to revalue the member's share in the "prescribed manner". This provision is very similar to the current subsection 51(4) of the *Pension Benefits Act* and we note that the revaluation method has never been prescribed. We hope that this gap will be remedied in new regulations. The treatment of any existing survivor rights of the spouse should also be addressed in the regulations.

Subsection 67.4(5) of the *Pension Benefits Act* limits the spouse's share of the pension to 50% of the net family law value of the pension. If there must continue to be such a limitation, the Ontario Bar Association recognizes the value of this amendment for it removes the discrepancy between the limit in section 51(2) of the *Pension Benefits Act*, which is based on the termination method of valuation as prescribed by section 56 of the regulations to the *Pension Benefits Act*, and the amount the parties wish to assign, which is usually based on external pension valuation, using a retirement method of valuation.

The Family Law Bar believes that there should be no such limitation, or that, if one is retained, that there be a power reserved to a court to override it in deserving circumstances. For example, where a payor with multiple family law responsibilities absconds from the jurisdiction, taking all assets except a pension held in this province, and where that pension is only a small component of either the pensioner's total net worth or income and is the only source of funds for the abandoned family, the spouse should be able to seek a remedy from the court. Currently, the existing laws leaves a confusing patchwork of remedies, called "stacking orders" due to the fact that a spouse can seek up to 50% of a pension to recover a support entitlement and a further 50% to recover a property entitlement.

In a meritorious case, a court should be able to award 100% of a spouse's pension to a former spouse, regardless of whether the basis for entitlement is in property, support or a combination of the two. We acknowledge that in such cases, it is not possible to pay out any more than 100% of the commuted value of the pension as a lump sum, regardless of the method of valuation used to calculate the family law value of the pension asset.

The protection from garnishment does not logically bar collection by a spouse since the government policy underlying such a provision was to preserve family income in retirement. The spouse and children are part of the family and deserve protection as well.

The corresponding regulations should clarify how the new limit is to be applied. Will the plan administrator be required to keep track of monthly payments to the spouse until 50% of the applicable net family law value of the pension is paid, applicable in cases where the spouse does not receive a separate pension based on the spouse's life? Or will the calculation of the spouse's monthly payment be recalculated as a lifetime benefit, the present value of which is no more than 50% of the applicable net family law value of the pension? We recommend the latter approach.

Subsection 67.4(6) of the *Pension Benefits Act* states that the administrator is discharged on revaluing the former member's pension and making the payments to the eligible spouse in accordance with the application and this section. The Ontario Bar Association is concerned with the inclusion of clause 67.4(1)4 of the eligibility criteria and is therefore concerned with the requirement to make payments in accordance with 'this section'. The fourth eligibility criterion is a requirement that "the amount of each pension payment to be paid to the spouse, or the formula for calculating it, is specified in the order, award or contract". It is very possible to have a conflict between the pension division provision in the order, award or agreement and the prescribed application form. To avoid this, the Ontario Bar Association recommends that the administrator be discharged after complying with information provided and directions given on the prescribed application forms. In the alternative, the Ontario Bar Association recommends the removal of clause 67.4(1)4 of the *Pension Benefits Act*.

13. Support

While the pension property is considered family property, it is also considered an income source and may be subject to support deductions. Proposed subsection 67.3(10) of the *Pension Benefits Act* clearly states that the transfer of spouse's share of the pension benefit in a lump sum in satisfaction of the plan member's equalization obligation does not affect the spouse's claim for support. This means that the portion of the member's pension that remains in the pension plan can be subject to support deduction.

We note that that there is no parallel provision in proposed section 67.4 of the *Pension Benefits Act*, which deals with the division of pensions in pay. The absence of such a parallel provision may be interpreted as an attempt by the legislature to stop the stacking of equalization and support orders which can result in the payment of 100% of the member's pension benefits to the spouse, 50% as equalization and 50% as support. The Ontario Bar Association is not taking a position on whether this is appropriate. Rather,

we wish to clarify whether the member's remaining pension payments can be assigned or seized for support. If that is the case, the Ontario Bar Association makes the following recommendation:

Recommendation

13.1 We recommend that a parallel provision be added to section 67.4 of the *Pension Benefits Act*, to clarify that the member's portion of the pension can be subject to support deductions, regardless of whether the pension is divided as a lump sum or as a pension in pay:

"Subsection (5) does not affect the eligible spouse's claim, if any, under an order for support enforceable in Ontario."

14. Valuation and Division of Defined Contribution Pension Plans

Valuation

The Ontario Bar Association recommends that specific regulations be drafted on the calculation of the net family law value of a pension asset in a defined contributions pension plan. In Quebec, the legislation provides that if an administrator has information relative to the sum accumulated at the date of marriage, then the value is the difference between the account value accumulated on the date of institution of proceedings (which is typically the valuation date in Quebec) and the account value accumulated at the date of marriage, increased by interest for the period between the date of marriage and the date of institution of action. Where the administrator does not have information relative to the amount accumulated at the date of marriage, then a pro rata approach is used as follows:

Portion available for partition = account value accumulated during the relationship = total account value x (MM ÷ MP)

"MM" is the number of months of participation, from the initial entry date to the valuation date, included in the period of marriage or conjugal relationship. Each part month counts as one. This period may be measured in days instead of months if the plan so stipulates.

"MP" is the total number of months of participation, from the initial entry date to the valuation date. Again, each part month counts as one. This period may be measured in days instead of months if the plan so stipulates.

"total account value" is the value of the vested member's account accumulated at the valuation date.

The regulations should also provide special rules where: (a) benefits or assets have been transferred from another plan; or (b) benefits have already been divided or transferred to a former spouse.

Division

The Ontario Bar Association recommends that the wording of subsection 67.3(1) 2 be clarified to permit the transfer of a lump sum from a defined contribution pension plan.

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