



**Ministry of Attorney General
Justice Services Branch
Civil and Family Law Policy Office**

Family Relations Act Review

**Chapter 3
Division of Pensions**

Discussion Paper

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This paper is one of several discussion papers developed for the review of the *Family Relations Act*. The paper does not reflect a position or decision of government and is intended to generate discussion and feedback. The discussion paper is not intended to constitute legal advice. Any description of the *Family Relations Act* or other laws is provided solely for the purposes of the discussion paper and should not be relied on as legal advice or a statement of the law for any other purpose. Individuals with questions regarding the legal effect of provisions of the *Family Relations Act* should seek legal advice from a lawyer.

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RECONSIDERING SOME ASPECTS OF DIVISION OF PENSION ENTITLEMENT

In 1995, British Columbia enacted pension division legislation. This law is contained in Part 6 of the *Family Relations Act* (FRA). On its 10th anniversary, the Attorney General asked the British Columbia Law Institute (BCLI) to review how Part 6 is working. The BCLI concluded that the legislation works well, but some amendments are called for. Many of these were technical, housekeeping changes. But there were also a few issues that the BCLI flagged as being extremely important.

This paper highlights some of the most important changes that the BCLI proposed in its report, [*Pension Division on Marriage Breakdown: A Ten Year Review of Part 6 of the Family Relations Act*](#).

DISCUSSION**Background**

When married spouses end their relationship, the FRA provides for the division of assets between them. Entitlement does not depend on whose name the asset is in. Legislation defines various assets to be “family assets” and the general rule is that each spouse has a right to half of the family assets, unless that would be unfair.

The definition of “family asset” includes pension benefits. In many cases, a pension will be one of the most valuable assets owned by the spouses.

Obviously, the rules for dealing with an asset this valuable must work for everyone involved. That means not only the spouses, but also the pension plan that must administer the pension division.

What are the current rules?

Part 6 of the FRA has different rules for pension division depending on the kind of pension plan, and whether the pension is matured. (A pension that is being paid is said to be “matured”. Until it is being paid, it is referred to as “unmatured.”)

There are basically two types of plans.

- One type determines the benefits by a formula, usually tied to the pension plan member’s years of service and often also based on salary levels. This type of plan is called a “defined benefit plan”.
- The other type is similar to an RRSP. Its value is equal to the contributions made to the pension plan, plus investment returns on those contributions. When the member retires, the funds in the account are usually used to purchase an annuity for the member. This type of plan is called a “defined contribution plan”.

Summary of British Columbia’s current pension division rules.

Type of Plan	Unmatured	Matured
Defined Benefit Plan	<p>The division is deferred. The spouse becomes a kind of member of the pension plan (called a “limited member”) and has two options:</p> <p>(a) When the member is eligible to begin receiving pension payments, the spouse may take a lump sum. This is transferred to a prescribed plan, such as an RRSP, or</p> <p>(b) When the member begins receiving pension payments, the spouse may take his or her share by a separate pension payable for his or her lifetime.</p> <p>If the member dies before the pension is divided, the pension is replaced by a death benefit and the limited member receives a share of the death benefit instead of a share of the pension.</p>	<p>The spouse becomes a limited member of the pension plan.</p> <p>The plan divides each monthly pension cheque between the limited member and member (after making separate withholdings for tax).</p> <p>If the limited member dies first, the full amount of the pension payments are then made to the member.</p> <p>If the member dies first, the limited member receives the survivorship benefits, if there are any.</p> <p>There may not be any survivorship benefits. It depends on the form of pension that the member chose at retirement.</p>
Defined Contribution Plan	<p>The spouse’s share is transferred immediately in a lump sum to a prescribed plan, such as an RRSP.</p>	<p>The rules set out above for a defined benefit plan also apply to a defined contribution plan.</p>

What changes are proposed?

This summary lists only some of the most important changes proposed, and the discussion of these changes focuses on the main issues. To review all of the recommendations in detail, see the [BCLI report](#).

1. Protecting the pension plan administrator

Current law	Proposal
<p>When their relationship ends, spouses don't always take the necessary steps to protect their rights to property.</p> <p>Under B.C. law, the end of a relationship usually vests rights in pensions in the member's spouse.</p> <p>What should pension plan administrators do if they receive a direction from the member after they know a member's marriage has ended, but have received no order or agreement formally recording the spouse's interest in the pension?</p> <p>There is some concern that the plan administrator may be liable to the member's spouse because of "constructive notice" of the spouse's rights.</p>	<p>A plan administrator who thinks a former spouse may have acquired an interest in the pension should be able to protect the plan from liability.</p> <p>Pension plan administrators should not be liable if they do one or more of the following:</p> <ul style="list-style-type: none"> (i) require the member to register the former spouse as a limited member, (ii) require the member to produce satisfactory evidence that the spouse has no interest in the pension, or (iii) send the spouse a notice with the reasonable expectation it will be received. <p>Recommendation 1 of the full report has more detail on this proposal.</p>

2. What part of the pension is divided?

Current law	Proposal
<p>The spouse is entitled to a share of the pension that accrues between the date of marriage, and the spouse's "entitlement date".</p> <p>(The "entitlement date" is usually the earliest of the date when the spouses make a separation agreement; or when a judge makes an order of divorce or annulment, or a declaration that the spouses have no possibility of reconciling.)</p> <p>These dates can be changed by agreement or court order.</p>	<p>If part of the pension accrued during cohabitation before marriage that portion should also be divided (unless the spouses agree, or a judge orders, that it be excluded from division).</p> <p>Recommendation 5 of the full report has more detail on this proposal.</p>

3. Unmarried spouses

Current law	Proposal
<p>The FRA provides for the division of assets at the end of a relationship between married spouses only.</p> <p>Unmarried spouses may agree to have the property division rules apply.</p> <p>There is some question whether judges can order that the property division rules apply to unmarried spouses who do not agree. The discussion paper on division of family property looks at property division between unmarried spouses.</p>	<p>The FRA should clarify that a judge may order that, if a pension is to be divided between unmarried spouses, the pension division rules are available to them.</p> <p>Recommendation 18 of the full report has more detail on this proposal.</p>

4. Death before retirement

Current law	Proposal
<p>If the member dies before retirement, the pension is replaced by a death benefit.</p> <p>The British Columbia <i>Pension Benefits Standards Act</i> says that the death benefit must be at least 60% of the value of the pension, but some plans provide a more generous death benefit.</p> <p>If the pension has not yet been divided when the member dies, the limited member receives a share of the death benefit instead of the pension.</p> <p>If the death benefit has the same value as the pension and the spouses are not aware of that, their agreement or court order may give the limited member more than if the pension were divided. Or, if the death benefit is worth substantially less than the pension, the limited member may get less than if the pension were divided.</p>	<p>When a member dies before retirement, the share the limited member receives should be the same, whether the pension or death benefit is divided.</p> <p>Recommendation 6 of the full report has more detail on this proposal.</p>

5. Share of unmaturred pension in a defined benefit plan

Current law	Proposal
<p>If the pension is in a defined benefit plan, and not yet being paid, the limited member has two options:</p> <p>(a) A lump sum may be transferred to a prescribed plan (such as an RRSP) at any time after the member becomes eligible to retire, even if the member decides to wait and retire later, or</p> <p>(b) The limited member may wait until the member retires, and receive a separate pension, which would be payable for the limited member’s lifetime.</p>	<p>As under the current law, the limited member should be able to choose to receive the share at any time after the member becomes eligible to retire.</p> <p>The change would be to permit the limited member to receive a separate pension at that time, or choose among any of the other options available to the member.</p> <p>The lump sum transfer option would be available only if that option is available to plan members.</p> <p>Recommendation 7 of the full report has more detail on this proposal.</p>

6. Value of spouse’s share of a defined benefit plan

Current law	Proposal
<p>The limited member’s share of a pension in a defined benefit plan is based on the value of the member’s pension at the date of division. The valuation assumes the member chooses to have the pension begin at that date.</p> <p>Plan administrators say that valuing the limited member’s share on this basis is unfair to them, and substantially undercuts the pension funding assumptions they have made. This is because many plans subsidize early retirement pensions. This richer pension is offset by income the employer would otherwise have had to pay the member.</p>	<p>Pension division should be neutral from the plan’s perspective and not cost the plan more than if the pension were not divided.</p> <p>If the limited member chooses to take the pension before the member does, the share should be determined based on the value the pension would have if the member were the average age of retirement for plan members.</p> <p>For example, if the member is 55, but the average age of retirement for the plan is 62, the limited member’s share would be based on the value of the pension if it began when the member was 62.</p> <p>This means the amount paid by the plan will be based directly on the plan’s funding assumptions.</p> <p>Recommendation 8 of the full report has more detail on this proposal.</p>

7. Beneficiary designation

Current law	Proposal
<p>If the limited member is the designated beneficiary of the pension,</p> <p>(i) the member cannot change that designation without the limited member’s consent or a court order, and</p> <p>(ii) the limited member is entitled to all of the death benefit, even the part that accrues after the relationship ended.</p>	<p>The member should be allowed to designate a new beneficiary (as permitted by law and the plan) for the portion of the death benefit above the limited member’s share.</p> <p>Recommendation 9 of the full report has more detail on this proposal.</p>

8. Supplementary pension plans

Current law	Proposal
<p>The <i>Income Tax Act</i> sets a ceiling on the amount of pension that may be paid from a registered plan.</p> <p>For high income earners, employers often provide supplementary plans to pay benefits over those permitted under the <i>Income Tax Act</i>.</p> <p>Part 6 of the FRA provides that these plans are divided by the same rules that apply to all matured pensions (the plan must divide the monthly pension payment between the spouses). After the relationship ends, however, it is often impossible to protect a lifetime income for the former spouse. Usually the benefits will end when the member dies.</p>	<p>No division of a supplementary pension plan should take place until the member decides to begin receiving pension payments.</p> <p>At that date, however, the former spouse should be able to receive a separate pension for his or her lifetime.</p> <p>If other options are permitted plan members, those should also be available to the former spouse.</p> <p>Recommendation 17 of the full report has more detail on this proposal.</p>

9. Rights under the Pension Benefits Standards Act and under Part 6 of the FRA

Current law	Proposal
<p>The <i>Pension Benefits Standards Act</i> and the FRA both confer certain rights, with the result that in some cases, a spouse will qualify for benefits under both Acts.</p> <p>For example, under the <i>Pension Benefits Standards Act</i>, if a member dies, the spouse is entitled to receive death benefits in preference to a designated beneficiary. And a member who begins receiving pension payments must choose a survivorship benefit for his or her spouse (unless the spouse waives it).</p> <p>Part 6 of the FRA also confers rights on a former spouse. Sometimes, the spouse will qualify under both Acts. The <i>Pension Benefits Standards Act</i> provides that, in that case, rights under that Act cease in favour of those under Part 6.</p> <p>There are some questions about whether the <i>Pension Benefits Standards Act</i> applies if, instead of dividing the pension, the spouses waive division of the pension or satisfy entitlement in some other way. Also, what is to happen before Part 6 rights vest? For example, should the spouse be able to choose between the <i>Pension Benefits Standards Act</i> and Part 6 of the FRA?</p>	<p>The <i>Pension Benefits Standards Act</i> should be revised to clarify that all rights that a spouse would enjoy under that Act end once</p> <ul style="list-style-type: none"> • the relationship ends, and • there has been a division of the pension under Part 6 of the FRA. <p>This would include cases where the spouse’s share of the pension is waived, or satisfied by other means, such as receiving a greater share of other assets.</p> <p>Even if both Acts could apply, an application under Part 6 of the FRA would mean that Part 6 governs.</p> <p>Recommendation 32 of the full report has more detail on this proposal.</p>

10. Forms

Current law	Proposal
<p>If there is an agreement or order dividing a pension, specified forms must be sent to the plan administrator.</p>	<p>The forms should be revised to make them easier to use.</p> <p>They should include a simple authorization to allow the plan administrator to communicate with the spouse’s lawyer, and should warn about the importance of keeping contact information up to date.</p> <p>Recommendation 27 of the full report has more detail on this proposal.</p>

11. Administrative fees

Current law	Proposal
<p>The plan administrator can charge a fee for dividing a pension. In a defined benefit plan the fee is \$500; in a defined contribution plan, it is \$150.</p> <p>These amounts have not changed since the fees were first set in 1995.</p> <p>The fee is payable equally by the member and the spouse.</p> <p>It is not clear whether the current law would allow the fee to be paid by installments from the pension itself.</p>	<p>The fees should be increased to a maximum of \$750 for defined benefit plans and \$175 for defined contribution plans.</p> <p>The option of paying the fee by installments from the pension should be available.</p> <p>Recommendation 28 of the full report has more detail on this proposal.</p>

12. Relationship between spousal support and pensions

Current law	Proposal
<p>As a general principle, spousal support can be changed by a judge at a future date only if there is an unforeseen material change of circumstances.</p> <p>Retirement is a material change of circumstances, but it is foreseeable. If the agreement or court order deals with this, there is no problem.</p> <p>But if the agreement or court order has not addressed this situation, then in most cases judges can't intervene.</p>	<p>Legislation should specifically permit a judge to review support obligations when</p> <p>(a) the person who pays support begins receiving a pension, and</p> <p>(b) when a person receiving support becomes eligible to receive income from his or her share of the pension benefits.</p>

These are only some of the recommendations in the BCLI Report. The BCLI reviewed every aspect of pension division and made many suggestions for technical improvements. We welcome your comments on the recommendations discussed in this paper and on any of the other recommendations included in the full report.

Please provide your [feedback](#).