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VALUATION AND DISTRIBUTION OF PENSION BENEFITS
UNDER THE FAMILY LAW ACT, 1986



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INTRODUCTION

On March 1, 1986, the Family Law Act, 1986, came into force. The preamble of this Act provides, in part, as follows:

"Whereas...it is necessary to recognize the equal position of spouses as individuals within the marriage as a form of partnership; and whereas in support of such recognition it is necessary to provide in law for the orderly and equitable settlement of the affairs of the spouses upon the breakdown of the partnership..."¹

In the context of spousal property rights, the aforementioned "orderly and equitable" settlement is effected by way of an equalization payment. Essentially, a spouse whose net family property is the lesser of the two is entitled to an equalization payment from the other spouse in an amount equal to one half the difference between them.

The value of a spouse's pension interest is included in that spouse's net family property determination.²

There are difficulties in attributing a fixed value to the pension interest. It is unlike most other assets in that it has no

1. S.O. 1986, c. 4 as amended by S.O. 1986, c. 35.
2. Ibid., section 4.

market value. A determination of value is generally attempted through the use of certain assumptions and projections. As the true value of the interest cannot be fully realized until all pension payments have been made, these projections and assumptions may not hold true.

The entitlement envisioned under the Family Law Act is to that of an equalization payment, not to a share in any asset owned by the other spouse. The Family Law Act provides for the division of property values and not the division of specific assets.

Equalization of the spousal net family properties by way of an immediate cash payment may be ideal as it helps to sever the financial ties between the spouses. However, in many instances the pension interest will be one of the most valuable assets a spouse owns. Many will not have the financial means available to offset the value of this interest in making the equalization payment.

Attempts have therefore been made to isolate this interest from other interests and to secure a portion of its value to the entitled spouse. The effectiveness of such judicial distribution within the parameters of the Family Law Act, 1986 is still not settled.

In addition, one must consider competing pension legislation at both the federal and provincial levels. The federal Pension

Benefits Standards Act, 1985³ and the Ontario Pension Benefits Act, 1987⁴ have recently been enacted in an attempt to accommodate the inclusion of the value of the pension interest in a spouse's net family property. Other federal and provincial pension legislation is in the process of being amended in order to accommodate the inclusion of the value of the pension interest under the Family Law Act, 1986 and to reconcile such pension legislation with the provisions of the Ontario Pension Benefits Act, 1987 and the federal Pension Benefits Standards Act, 1985, as the case may be.⁵

As will be discussed, the argument that it is beyond the constitutional power of the province to deal with a federally regulated pension has recently been put to rest by the Supreme Court of Canada.⁶ However, the Family Law Act provides for an equalization of value and current pension legislation provides for an in specie distribution of the pension asset. In view of this, the question of whether the Family Law Act can be reconciled with the provisions of such pension legislation warrants consideration.

In the final analysis, it may be that the pension interest cannot be dealt with equitably under the current provisions of the

3. S.C. 1985, c. 40.

4. S.O. 1987, c. 35.

5. Discussions with persons at the Ontario Pension Commission, Queen's Park, Toronto, and at the federal Treasury Board, Pensions Group, Ottawa.

6. Clarke v. Clarke (1990), 28 R.F.L. (3d) 113 (S.C.C.), infra, page 6.

Family Law Act, 1986. Legislative amendments may be required in order to more effectively deal with the value and distribution of the pension interest.

This thesis is restricted to the valuation and distribution of the pension interest under the Family Law Act, 1986. References to pension legislation are not intended to be comprehensive. They only serve to provide the reader with an overview of the real and potential conflicts between the matrimonial property regime in Ontario and contemporaneous federal and provincial pension legislation.

I. PENSION LEGISLATION

1. Legislative Authority

A pension scheme, depending upon the source it is derived from, may fall within either federal or provincial jurisdiction.

Pursuant to Section 92(13) of the Constitution Act, 1867,⁷ the provincial legislatures have exclusive power with respect to property and civil rights within the provinces. Accordingly, private pension schemes of provincial concern as well as provincial public pension schemes fall within provincial legislative power.

However, section 91(8) of the Constitution Act, 1867, reserves the fixing of and providing for salaries and allowances of civil and other officers of the federal government to Parliament. Accordingly, federal public pensions, as well as private pensions concerning those matters which fall within federal constitutional power, fall under federal legislative jurisdiction.

Through constitutional amendment, section 94A extends certain other powers to the federal Parliament. It extends power to the

7. 30 & 31 Vict. c. 3(U.K.); R.S.C. 1970 App. II No. 5.

federal Parliament to make laws in relation to old age pensions and supplementary benefits, including survivors and disability benefits. This provides jurisdiction to administer the Canada Pension Plan and the Old Age Security Plan.

Since the provincial legislatures and the federal Parliament have exclusive authority with respect to those matters which fall within their respective jurisdictions, until recently the argument did exist as to whether the provincial legislature, through the Family Law Act, 1986, has the authority to deal with federally administered pensions.

However, it has now been determined by the Supreme Court of Canada in Clarke v. Clarke⁸ that there is no constitutional conflict. As the provincial legislature has authority over matters of family property and the federal legislature has authority over pensions which arise from employment in the federal sphere, there is no conflict between any federal and provincial laws.

8. (1990), 28 R.F.L. (3d) 113 (S.C.C.).

2. The Pension Network

As both the federal Parliament and the provincial legislatures have constitutional power with respect to pension schemes concerning employment within their respective jurisdictions, there is an extensive statutory network of pension legislation at both the federal and provincial levels.

As a starting point, the Ontario Pension Benefits Act, 1987, applies to every pension plan that is provided for persons employed in Ontario.⁹ As the Act provides for minimum standards, it permits the alternative registration and administration of a pension fund which provides more advantageous benefits to its members.

The federal Pension Benefits Standards Act, 1985,¹⁰ is the federal counterpart to the Ontario Pension Benefits Act, 1987. The federal Act, in general, provides for the registration and administration of pension plans for persons employed in any works, undertakings or businesses within the legislative authority of the Parliament of Canada. Such employment includes navigation,

9. S.O. 1987, c. 35, section 3. However, this does not apply to federal employees as the fixing of and providing for allowances of federal employees is a power reserved to federal jurisdiction.

10. S.C. 1985, c. 40.

shipping, railways, canals, ferries, telecommunications, airports and air transportation, radio broadcasting, provincial businesses for the general advantage of Canada or for two or more provinces and any other "works" outside the exclusive legislative authority of the provinces.¹¹

However, the Federal Pension Benefits Standards Act, 1985, excepts from its jurisdiction certain pension coverage. It expressly excepts pension plans provided for federal civil servants.¹² In addition, pension plans in respect of certain other employment may be excepted by regulation.¹³ Exception is further permitted for employment by agents of the federal government¹⁴ and for employment other than that included under the Federal Pension Benefits Standards Act, 1985, if alternative pension coverage is made and the plan is required to be registered under provincial law.¹⁵ Employment may also be excepted if the exception is warranted having regard to the safeguards in existence to protect employment benefits that are or may become payable.¹⁶ Each of these exceptions falls within a legislative scheme of its own.

11. Ibid., section 4(4).
12. Ibid., section 4(5)(a).
13. Ibid., section 4(5)(b).
14. Ibid., section 4(6)(a).
15. Ibid., section 4(6)(b)(i).
16. Ibid., section 4(6)(b)(ii).

Accordingly, plans not registered under the Ontario Pension Benefits Act, 1987, or the Federal Pension Benefits Standards Act, 1985, fall within any one of many federal or provincial legislative schemes. There is a proliferation of legislation in this regard. Current amendments to these two statutes have paved the way for corresponding changes in other federal and provincial statutes.

The following references do not purport to identify all federal and provincial statutory schemes. They serve only to indicate the legislative maze of federal and provincial pension networks.

(i) Provincial Pension Statutes (Ontario).

The Public Service Superannuation Act,¹⁷ provides for the registration and administration of pension plans for provincial public servants. It applies to sheriffs,¹⁸ persons engaged in the administration of justice,¹⁹ land registrars,²⁰ full-time provincial court judges and masters of the Supreme Court [now the Ontario Court of Justice (General Division)], ministerial staff and to staff of the members of the legislative assembly and caucus.²¹

17. R.S.O. 1980, c. 419 as amended.

18. Ibid., section 24(1) (a).

19. Ibid., section 24(1) (b).

20. Ibid., section 25.

21. Ibid., section 26.

Pension plans for teachers and for other persons defined as being "employed in education" are governed by the Teachers' Superannuation Act.²²

The Ontario Municipal Employees Retirement System Act,²³ provides pension plan regulation in respect of employment of those municipal employees who do not contribute to a plan under either the Public Service Superannuation Act or the Teachers' Superannuation Act.

In addition, the Superannuation Adjustment Benefits Act²⁴ provides for post-retirement adjustments. This covers indexing of pensions for both teachers²⁵ and provincial public servants.²⁶

(ii) Federal Pension Statutes²⁷

For persons employed within the federal public service alone, the statutory network is extensive. The Public Service

22. S.O. 1983, c. 84, as amended.

23. R.S.O. 1980, c. 348, as amended.

24. R.S.O. 1980, c. 490.

26. R.R.O. 1980, Reg. 922.

26. R.R.O. 1980, Reg 924.

27. For a detailed discussion on federal Public Service legislation, see Joanne Lee. "Notes on Federal Public Service Pension Plans", Pension Group, Treasury Board Secretariat, Ottawa, Ontario, May, 1986 (unpublished).

Superannuation Act²⁸ covers persons employed within the public service generally. Included employment is defined to mean "...the several positions in or under any department or portion of the executive government of Canada, and for the purposes of this part, of the Senate and House of Commons of Canada, the Library of Parliament and any board, commission, corporation or portion of the public service of Canada specified in Schedule "A".²⁹

The Canadian Forces Superannuation Act³⁰ provides for the pension arrangements of members of the regular force of the Canadian Forces. The Royal Canadian Mounted Police Superannuation Act³¹ applies to members of the Royal Canadian Mounted Police, both regular and civilian.

In addition, the Members of Parliament Retiring Allowances Act³² applies to pension plans for senators and for members of the House of Commons. The Judges Act³³ provides pension arrangements for federally appointed judges. Other legislative provisions regulating the pensions of federal public servants are found under

28. R.S.C. 1970, c. P-36, as amended.

29. Ibid., section 2.

30. R.S.C. 1970, c. C-9, as amended.

31. R.S.C. 1970, c. R-11.

32. R.S.C. 1970, c. M-10, as amended.

33. R.S.C. 1970, c. J-1, as amended.

the Diplomatic Service (Special) Superannuation Act,³⁴ the Lieutenant Governor's Superannuation Act³⁵ and the Governor General's Retiring Annuity Act.³⁶

Applicable to all federal public service pension plans is the Supplementary Retirement Benefits Act.³⁷ This statute provides authority for the indexation of federal public service pensions. In addition to these pensions are the Canada Pension Plan and the Old Age Security Plan. These plans evolve from the Canada Pension Plan Act³⁸ and the Old Age Security Act³⁹ respectively.

CANADA PENSION PLAN ACT

The Canada Pension Plan provides pension benefits to any contributors to the plan who have reached the age of sixty.⁴⁰ A contributor is a person who has made an employee's contribution or a contribution in respect of self-employed earnings.⁴¹ Both the

34. R.S.C. 1970, c. D-5, as amended.

35. S.C. 1974-75-76, c. 73, as amended.

36. R.S.C. 1970, c. G-15, as amended.

37. R.S.C. 1970, c. 43 as amended.

38. R.S.C. 1970, c. C-5, as amended.

39. R.S.C. 1970, c. O-6, as amended.

40. Supra, footnote 38, section 44(1)(a).

41. Ibid., section 2.

employee and employer are required to contribute to the plan in respect of all pensionable employment.⁴² Pensionable employment is any employment that is not expressly excepted.⁴³ Such exceptions include, but are not limited to, certain seasonal employment where the remuneration is less than \$250.00 per year or where the employment is for a period of less than twenty five days in the year, casual employment otherwise than for the purpose of the employer's trade and employment where there is no cash remuneration if the person employed is the child of or is maintained by the employer.⁴⁴ In addition, employment in the provincial public service as well as in the Canadian Forces or the Royal Canadian Mounted Police, is also excepted from pensionable employment under this Act.⁴⁵

OLD AGE SECURITY ACT

While pensions under the Canada Pension Plan are provided to those who have contributed through their employment, a pension under the Old Age Security Act is not employment related. Old age security benefits are available to every person who is a

42. Ibid., section 8, 9 & 10.

43. Ibid., section 6.

44. Ibid.

45. Ibid.

pensioner.⁴⁶ Generally, to qualify for a full pension, a person must reach the age of sixty-five and must have resided in Canada for ten years preceding the date on which the application was approved or have resided in Canada, after reaching the age of eighteen, for an aggregate period of at least forty years.⁴⁷ In addition to the monthly pension, a pensioner without other or insufficient financial resources may be eligible for an income supplement as provision is made to guarantee pensioners a minimum income.⁴⁸

46. Supra, footnote 39, section 3.

47. Ibid.

48. Ibid., section 10 (1.6).

II. BASIC TYPES OF PLANS⁴⁹

A pension plan may be contributory or non-contributory. A contributory plan is one in which the plan member is required to contribute to the plan. A non-contributory plan is one in which the plan member is not required to contribute.

1. Defined Contribution Plan

This type of plan is also commonly referred to as a money purchase plan. The essential feature of this type of plan is that the employee's pension is the annuity which can be purchased at retirement by the accumulated funds credited to the employee's pension account. The fund is maintained like a bank account on behalf of the plan member. Employer and employee contributions are allocated to each individual account. The employee bears the risk of any poor investment of the pension funds. He or she has to choose both the type of annuity and the appropriate time at which to purchase it, taking into account prevailing interest rates and annuity prices at the time of purchase.

49. See generally, D.S. Rudd, F.S.A. "Pension Plans and the Family Law Act", included in the materials prepared for the Law Society of Upper Canada, Bar Admission Course, Family Law Section, 1987-88; See also Institute of Law Research and Reform. "Matrimonial Property: Division of Pension Benefits Upon Marriage Breakdown", Edmonton Alberta, Report for Discussion, No. 2, May, 1985.

2. Defined Benefit Plan

Under a defined benefit plan, the benefit is defined in terms of years of service. It does not necessarily relate to the contributions paid into the plan. A pension benefit is promised in accordance with the terms of the plan. It is up to the employer to adopt a funding policy to meet that end. With this type of plan, the uncertainty and monetary risk associated with prevailing interest rates and annuity prices flows to the employer.

Defined benefit plans generally take one of several forms:

(i) Final or Best Average Earnings

Under this type of plan, the pension entitlement is related to the final or best average earnings of an employee over a certain number of years. A percentage unit of benefit or credited service is specified within the plan. For example, a 2% plan for an employee retiring after thirty years of service would provide a pension payable upon retirement which equals $.02 \times 30 \times$ final or best average earnings over a specified period of time.

(ii) Career Average Earnings

As the name suggests, this pension is related to the average earnings over the career span, as opposed to only the earnings in the final or best years. Using the same example as above, if

during the thirty years of employment the member's salary ranged from \$3,000.00 to \$60,000.00 per annum, with an average annual salary of \$25,000.00, the pension benefit payable upon retirement would be the product of $30 \times .02 \times \$25,000.00$. The total pension would, therefore, be \$15,000.00 per year.

(iii) Flat Benefit Plan

This simply provides for a flat benefit amount for each year of credited service. The pension amount is that specified number of dollars multiplied by the years of credited service.

3. Terminology⁵⁰

The employee's interest in a deferred annuity does not crystallize upon the commencement of employment. The right to pension benefits is only acquired after the employee has satisfied the statutory conditions provided in the applicable pension legislation. The following summary outlines the relevant criteria for the coming into existence of the employee's right to a future pension.

(i) Vesting

Vesting refers to the coming into force of the right of an employee to the benefits under the pension plan that are attributable to the employer's contributions. However, these benefits are not payable until retirement or termination of employment or membership in the plan.

Prior to 1965 there was no governing pension legislation. Pension plan provisions determined when vesting occurred. On January 1, 1965, the first federal and provincial pension legislation came into force. Vesting occurred under this

50. Ibid., "Pension Plans and the Family Law Act".

legislation after the plan member attained the age of forty-five and had been employed for a continuous period of at least ten years.⁵¹ Pension legislation currently in force prescribes vesting after membership in the plan for a continuous period of at least twenty-four months, with no concurrent age requirement, for employment commenced on or after January 1, 1987.⁵²

As no retroactivity is provided in the statutory vesting rules, more than one vesting period may apply to the pension rights earned by a single pension plan member. Current federal and provincial pension legislation does not deal with this hybrid situation.⁵³

(ii) Locking In

"Locking in" means that the employee cannot withdraw any of the contributions he or she has made to the pension fund nor any

51. Pension Benefits Act, R.S.O. 1980, c. 373 as amended section 20 (Ontario) and Pension Benefits Standards Act, S.C. 1966-67, c. 92, Section 10.

52. Pension Benefits Act, 1987, S.O. 1987, c. 35, Section 38(2) (Ontario) and Pension Benefits Standards Act, 1985, S.O. 1985, c. 40, Section 17.

53. See generally, Susan Rowland "Pension Update: The New Ontario Legislation", Pension Commission of Ontario, prepared for the Canadian Bar Association of Ontario, Continuing Legal Education, March 4 and 5, 1988.

vested contributions made by the employer. The employee must wait to take the benefit in the form of a deferred annuity at retirement, termination of employment or termination of membership in the plan. Depending upon the particular legislation, the accumulated funds may or may not be transferable to another plan upon the termination of employment.

The federal Pension Benefits Standards Act, 1985⁵⁴ and the Ontario Pension Benefits Act, 1987⁵⁵ each provide for a locking in of employee contributions which mirrors the vesting requirements.

(iii) Maturity

Once an employee has satisfied the vesting requirement, he or she must still wait until the prescribed retirement age, or pension maturity, in order to receive the pension benefit. Pension maturity refers to the first opportunity of the employee to elect to receive the pension payments. Maturity ages will differ in accordance with the requirements of the various pension plans.

54. Supra, footnote 53, section 18.

55. Supra, footnote 51, section 64.

III. THE FAMILY LAW ACT, 1986

An analysis of the valuation and distribution of the pension interest must first begin with a review of the matrimonial property regime currently operating in Ontario. In order to understand the treatment of the pension interest within this system, one must first understand the system itself.

1. Application

The Family Law Act, 1986, came into force on March 1, 1986. This Act applies to applications made on or after June 4, 1985, if the matter was not adjudicated or settled prior to that date. In the instance of the death of a spouse, this Act only applies where the death occurred on or after the date this Act came into force.⁵⁶

2. Valuation, Equalization and Distribution of Net Family Property

The Family Law Act, 1986 envisages a three step process; valuation, equalization and distribution.⁵⁷ Each step in this process is separate and distinct from the others. Just as

56. S.O. 1986, c. 4, as amended, section 70(1).

57. Marsham v. Marsham (1987), 7 R.F.L. (3d) 1 (Ont. H.C.).

equalization cannot be determined until valuation has been completed, distribution cannot be effected until the equalization amount has been ascertained.

(i) Valuation

In this first phase, each spouse individually adds up the gross value of all property that he or she owns, except for certain excluded property, as of the valuation date. The value of property acquired prior to the marriage is thereafter deducted.⁵⁸

Property is widely defined to mean all interests, present or future, vested or contingent, in the real or personal property of the spouse. This includes, inter alia, "... in the case of a spouse's rights under a pension plan that have vested, the spouse's interest in the plan including contributions made by other persons".⁵⁹

The value of any interest is to be determined as of the "valuation date". This date is defined as the earliest of the following:

- (a) the date of separation where there is no reasonable prospect that the spouses will resume cohabitation;
- (b) the date of divorce;

58. Supra, footnote 56, section 4(1).

59. Ibid.

- (c) the date the marriage is declared a nullity;
- (d) the date on which one of the spouses commences an application based on improvident depletion by the other spouse if the application is subsequently granted;
- (e) the date before the date on which a spouse dies and leaves the other spouse surviving.⁶⁰

The value of certain property is specifically excluded from the calculation of a spouse's net family property. Third party gifts or inheritances acquired after marriage are excluded. Any income from such property is only excluded if the donor or testator has expressly stated that it is to be excluded from the spouse's net family property.⁶¹

Damages or a right to damages for personal injuries, nervous shock, mental distress or loss of care, guidance or companionship are also excluded from the calculation of a spouse's net family property. The proceeds of a life insurance policy payable on the

60. Ibid.

61. Ibid., Section 4(2).

death of the life insured are also excluded. Furthermore, any property into which any of the preceding exclusions can be traced and any property agreed to be excluded by domestic contract does not form part of a spouse's net family property.⁶²

Each spouse is to determine the value of all property, except for any excluded property, that he or she owns on the valuation date. There are, in essence, two separate property accounts. One account is attributable to each spouse. Each spouse then deducts from the gross amount of his or her account the following:

- (a) That spouse's debts and other liabilities, and
- (b) The value of property, other than a matrimonial home, that spouse owned on the date of marriage, after deducting that spouse's debts and other liabilities calculated as of the date of the marriage.⁶³

This determines the net family property that each spouse owns. When each spouse has performed such separate accountings of the value of his or her property interests, the valuation process is complete and the equalization phase begins.

62. Ibid.

63. Ibid.

(ii) Equalization

A spouse whose net family property is the lesser of the two becomes entitled to an equalization payment from the other spouse of an amount equal to one-half of the difference between them.⁶⁴ The court may, under certain enumerated circumstances, vary the amount of the share entitlement if the court finds that equalization would be unconscionable.⁶⁵ The right to seek equalization arises upon the earliest of the happening of one of the following events.

- (a) when a divorce is granted;
- (b) when the marriage is declared a nullity;
- (c) when the spouses are separated and there is no reasonable prospect that they will resume cohabitation together; or
- (d) when one spouse dies and the net family property of the deceased spouse exceeds the net family property of the surviving spouse.⁶⁶

In addition, if there is serious danger that one spouse may improvidently deplete his or her net family property, the other

64. Ibid., section 5(6).

65. Ibid.

66. Ibid., section 5.

spouse may apply to have the difference between the net family properties divided as if the spouses were separated.⁶⁷

The spouse with the lesser of the two net family properties becomes entitled to an amount from the other spouse that is equal to one-half of the difference between them. The entitlement is to an equalization payment. Equalization does not entitle a spouse to a share in any property of the other spouse.

(iii) Distribution

Once the amount of the equalization payment has been ascertained, the distribution phase begins. In order to effect distribution section 9 of the Act provides the court with certain powers. It may order:

- "(a) that one spouse pay to the other spouse the amount to which the court finds that spouse to be entitled under this Part;
- (b) that security, including a charge on property, be given for the performance of an obligation imposed by the order;

67. Ibid., section 5(3).

- (c) that, if necessary to avoid hardship, an amount referred to in clause (a) be paid in installments during a period not exceeding ten years or that payment of all or part of the amount be delayed for a period not exceeding ten years; and
- (d) that, if appropriate to satisfy an obligation imposed by the order,
 - (i) property be transferred to or in trust for or vested in a spouse, whether absolutely, for life or for a term of years, or
 - (ii) any property be partitioned or sold."⁶⁸

If the court is satisfied that there has been a material change of circumstances of the spouse who has the obligation to make installment or delayed payments, the court may vary the distribution order. However, it does not have the power to vary the amount to which the other spouse has been found to be entitled to.⁶⁹

Time extensions provided for in the Act do not permit the court to postpone payment of the entitlement beyond the ten year period.⁷⁰

68. Ibid., section 9.

69. Ibid., section 9(3).

70. Ibid., section 9(4).

To summarize, the Family Law Act, 1986 provides a process for the settlement of the property affairs of the spouses upon breakdown of the marriage. Each spouse calculates the net value of all property he or she owns as of the determined valuation date. The spouse whose net family property value is the lesser of the two is entitled an amount equal to one-half the difference between them from the other spouse. The amount to which a spouse is entitled may be varied by the court, if equalization is found to be unconscionable, having regard to the factors provided in the Act. Once the entitlement amount is ascertained, it is then distributed to the entitled spouse pursuant to the powers of distribution available to the court.

It has been suggested that the court has no discretion to deviate from this process. In the words of Galligan J.:

"As I read the Family Law Act, 1986, it leaves the Court with no discretion to decide spouses' affairs in accordance with a particular Court's sense of fairness. Subject to a discretion if it finds unconscionability, under section 5(6), the Courts must decide the rights of separating spouses in strict compliance with the terms of the Act, even if, in an individual case, a judge may feel that the result does not appear fair according to that particular judge's sense of fairness. I think that the legislature has clearly expressed its intent to remove

judicial discretion from property disputes between separating spouses.

In this case certain suggestions were put to the court about how this dispute could be resolved by transferring assets to discharge corresponding liabilities. In my view, that is the stuff of settlement. Separating spouses can settle their differences as they see fit but if they do not settle them and decide to come to trial, they are entitled to, and should expect to get adjudication, not mediation. I think that any remnants of 'Palm Tree Justice' have now disappeared from Ontario.

I intend to decide this case, and other cases, strictly according to the Family Law Act, as I interpret it. The chips will fall where they may."⁷¹

71. Skrlj v. Skrlj (1986), 2 R.F.L. (2d) 305, 309 (Ont. H.C.); see also Humphreys v. Humphreys (1987), 7 R.F.L. (3d) 113 (Ont. H.C.).

IV. THE PENSION AS PROPERTY

1. The Extent of the Interest

"Property" is defined to mean, "...any interest, present or future, vested or contingent, in real or personal property and includes...(c) in the case of a spouse's rights under a pension plan that have vested, the spouse's interest in the plan including contributions made by other persons."⁷²

It may be argued that paragraph (c) impliedly excludes an unvested pension from the definition of "property".⁷³ However, the word "includes", when used in the body of a definition, is normally accepted as enlarging the general definition.⁷⁴ As both vested and contingent interests are treated as property, an unvested pension interest is conceivably captured within the general definition of "property". This seems reasonable as there is a value, albeit contingent, to this unvested right. Determining the value of the unvested interest may, however, cause concern.

72. S.O. 1986, c. 4, as amended, section 4.

73. Inclusio unius exclusio alterius.

74. Elmer A. Driedger, Construction of Statutes, 2d Ed., Butterworths; Toronto, 1984 pp. 18-21.

In Nix v. Nix,⁷⁵ it was held that, at least in the instance of a defined benefit plan, the gross value of the unvested interest is that of employee contributions only together with any investment yield. It was further determined that if the employee does not contribute to the plan, the employee's interest in the plan prior to vesting has no value for equalization purposes.

However, subsequent decisions have held that the non-contributory, non-vested pension entitlement does have a value, which is based upon the probability of the interest vesting.⁷⁶

Under a strict reading of the Family Law Act, 1986, the interest is to be valued according to the facts as they exist on the valuation date. Circumstances arising thereafter are not to be considered.⁷⁷ This has been somewhat relaxed in instances where the future occurrence was likely to occur, based upon the balance of probabilities.⁷⁸ This approach seems to be more in accord with the

75. (1987), 11 R.F.L. (3d) 9 (Ont. H.C.).

76. Ward v. Ward (1988), 13 R.F.L. (3d) 259 (Ont. H.C.);
Lovegrove v. Lovegrove (1988), 16 R.F.L. (3d) 159 (Ont. H.C.);
Flynn v. Flynn (1989), 68 O.R. (2d) 129 (Ont. Dist. Ct.).

77. Marsham v. Marsham (1987), 7 R.F.L. (3d) 1 (Ont. H.C.);

78. Harris v. Harris (1989), 19 R.F.L. (3d) 27 (Ont. H.C.);
Menage v. Menage (1987), 8 R.F.L. (3d) 225 (Ont. U.F.C.).

objectives of the Act. In the extreme instance where vesting would occur one day after the valuation date, it seems unfair to the other spouse to say that no value can be attributed to employer contributions.

In practical terms, it may not be economically reasonable for the spouses to each retain the service of an actuary to value the unvested pension interest. Under the federal Pension Benefits Standards Act and the Ontario Pension Benefits Act, vesting requirements have been significantly reduced for employment on or after January 1, 1987.⁷⁹ In many instances, the cost of valuation may not be warranted, given the value of the benefit as reflected over this time frame.

79. Pension Benefits Act, 1987 S.O. 1987, c. 35 and Pension Benefits Standards Act, 1985, S.C. 1985, c. 40, vesting requirements are detailed in sections 38 and 17 respectively.

2. Income or Property

A pension in receipt constitutes income in the hands of the recipient. As income, it may be the subject of a claim for support. Accordingly, should the capitalized value of this income stream be included in a spouse's net family property determination in light of the potential for the duplication of benefits by the other spouse?

The relationship between support and property was considered by the Saskatchewan Court of Appeal in the decision of Tataryn v Tataryn.⁸⁰ The court concluded as follows:

"...the term 'maintenance asset' has no place in determining property... Nor can a pension entitlement, if it constitutes matrimonial property, be excluded from distribution on the footing it is a source of income from which alimony or maintenance obligations can be paid.

A matrimonial property right is not to be confused with a right to alimony or maintenance. The two differ fundamentally. Not only do they depend on their existence on different enactments and spring from

80. (1984), 38 R.F.L. (2d) 272, at 285 - 286 (Sask. C.A.).

different assumptions, their legal character is wholly dissimilar; the first is proprietary in nature, and concerns capital and its division: the other is personal, and involves income and the support of one spouse by the other.

All of this is not say that the two rights are altogether unrelated, for obviously they are not, but ...they have to be kept separate when determining whether a given thing is or is not matrimonial property".

The issue of whether a pension in payment is property subject to the equalization process or income subject to support obligations came before the Ontario Supreme Court in the case of Abate v Abate.⁸¹ The court made no comment as to the support issue but clearly stated that a right or interest in a vested pension plan, whether in payment or expectation of payment, is property within the meaning of the Ontario Act.

The issue of whether a pension in payment is income or property has now been put to rest by the Supreme Court of Canada in Clarke v. Clarke.⁸²

81. (1988), 16 R.F.L. (3d) 251 (Ont. H.C.), affirmed on appeal, unreported, October 4, 1989 (Ont. C.A.)

82. (1990), 28 R.F.L. (3d) 113 (S.C.C.).

In Clarke, the parties were married in August, 1955 and separated in July, 1980. At the commencement of the marriage both parties were employed by the Royal Canadian Air Force. During the course of the marriage, Mrs. Clarke remained in the home and was the primary care giver for the five children. When the youngest child reached the age of five years, she began occasional work outside the home in addition to her usual household duties. Mr. Clarke continued his employment in the Royal Canadian Air Force.

Mr. Clarke retired in 1976. At that time he was entitled to receive either a cash settlement or monthly pension payments. He elected to receive a monthly payment which, at the time this case was before the Supreme Court of Canada, amounted to \$564.21 per month.

When the parties separated, Mrs. Clarke moved to Ontario and Mr. Clarke remained in Nova Scotia. Neither party had a significant income. At trial, Mrs. Clarke was unemployed and received \$860.00 per month in unemployment insurance. Mr. Clarke was employed at a lumber company and earned \$7.50 per hour. This was in addition to his monthly pension benefit.

The matrimonial home was jointly owned and had a net equity of approximately \$38,000.00. Excluding the pension benefit, the remaining matrimonial assets amounted to approximately \$40,000.00.

At trial, the Supreme Court of Nova Scotia awarded Mrs. Clarke

one-half of the value of the pension payment received by Mr. Clarke from the date of separation to the date of trial. It was further ordered that Mr. Clarke pay to Mrs. Clarke one half of the monthly pension payments received by Mr. Clarke thereafter.

Mr. Clarke appealed and the Appeal Division of the Supreme Court of Nova Scotia allowed the appeal. The court varied the order by deleting from it that the monthly pension payments and the value of the payments received by Mr. Clarke be paid to Mrs. Clarke. Mrs. Clarke was granted leave to appeal to the Supreme Court of Canada.

Mrs. Clarke submitted that the pension benefit is property and subject to equal division. Mr. Clarke argued that the pension benefits being received are income rather than property and are not subject to division.

Wilson, J., for the court, agreed with the classification of the pension benefit as matrimonial property. She reasoned that pension benefits are not "income" in the traditional sense, such as payments for present work. They are benefits earned throughout the period of the employment. At pension maturity, the earning period is past.

Wilson, J., further recognized the fact that in many Canadian families the pension is the only substantial asset. Recognition of the partner's equal contribution to the acquisition of matrimonial

property could only be maintained by treating the pension benefit as matrimonial property, subject to equal sharing under the relevant provincial property regime.

This issue, in respect to a right to income in general, was considered by the Ontario Court of Appeal in the decision of Brinkos v. Brinkos.⁸³ The court in this case considered the argument of double recovery in the event that the pension income is treated as property and is later subject to a claim for support.

In Brinkos, the parties had been married for seventeen years. Prior to the marriage the wife's father had opened a bank account, in trust, for his daughter. Prior to and during the marriage, the father periodically deposited money into the account. Prior to separation, the daughter settled the account by transferring the assets of the account into a trust in which she, as sole beneficiary, was entitled to the income generated. The central issue was whether the wife's interest in the trust, being a right to future income, constituted property within the meaning of the Ontario Family Law Act.

At trial, a narrow interpretation was applied to the definition of "property" and it was determined that the wife's

83. (1986), 69 O.R. (2d) 255 (Ont. C.A.).

right to future income was not captured within the equalization scheme. The reason for this was, in part, that the future stream of income ought to be kept available for spousal support, if needed. It was determined unlikely that the legislature intended that a spouse make an equalization payment to the other spouse based on the value of money not yet received, which when received, could be the subject of a claim for spousal support.⁸⁴

An appeal was allowed. The Court of Appeal accepted that the definition of property firmly embraced a present interest in future income from the corpus of the trust. In obiter, the court noted the similarity between a pension entitlement and an interest under a trust and suggested that one might be ejusdem generis with the other.⁸⁵

The argument that this interpretation of the definition of "property" would invite a duplication of benefits was taken to relate to the consequences flowing from the interpretation and not to the interpretation itself. In considering this, the court reasoned that if income is not part of net family property and remains with the entitled spouse, it presents a larger asset pool for justifying future support payments to the other spouse.

84. Brinkos v. Brinkos (1986), 4 R.F.L. (3d) 381 (Ont. H.C.).

85. Supra, footnote 83.

However, if divided, it would diminish the justification for any such application. The Court of Appeal went on to say that any court analyzing such an application for support would see the whole picture and exercise its discretion by being even handed and fair in the treatment of the spouses, thus making double recovery obvious and difficult to justify.⁸⁶

This issue was again addressed in Veres v Veres.⁸⁷ In this case the court went so far as to hold that following an equalization of property which included the value of the pension interest, the court could not subsequently equalize the pension income through an award of support.

The reasoning in Veres is not in accord with well-established support principles. Support is determined on the basis of need and the means of the spouses. Need and means is assessed subsequent to the property settlement.⁸⁸

However, although the inclusion of the value of the pension income in the equalization payment may affect the needs and means

86. Ibid.

87. (1987), 9 R.F.L. (3d) 447 (Ont. H.C.).

88. Moog v. Moog (1985), 50 O.R. (2d) 113, 44 R.F.L. (2d) 201; 17 D.L.R. (4th) 172, 8 O.A.C. 200 (Ont. C.A.).

of the respective spouses, the potential for duplication of benefits remains. Consider the following example:

<u>INTEREST</u>	<u>VALUE</u>	
	Husband	Wife
Capitalized value of pension	\$200,000.00	
Matrimonial Home		\$150,000.00

Assumption 1. There are no other assets.

Assumption 2. The husband receives \$2,000.00 net, per month, on account of pension income.

Assumption 3. The husband and wife have no other source of income.

In this situation the husband owes the wife an equalization payment of \$25,000.00. If the husband borrows the amount to effect the equalization payment and repays the loan with interest at the rate of 13 per cent per annum, amortized over a ten year period, the husband's net monthly income is reduced by \$368.30 to \$1,631.70. If the wife invests her \$25,000.00 at 10 per cent per annum, she only has a monthly income of \$208.33. The husband's pension income in this situation would undoubtedly be subject to a claim for support.

It may be argued that this type of situation could be addressed by rearranging the assets of the spouses. Clearly, a

more practical and equitable solution to the above would be to sell the matrimonial home, giving each spouse \$75,000.00 to provide for other accommodation, and have each spouse share in the pension income, as received. However, such a rearrangement may not be possible under the framework of the Ontario Act unless the spouses settle the arrangement on their own. Given the decision of Galligan J. in Skrlj v Skrlj⁸⁹ to this effect the court may lack jurisdiction to order this sort of an arrangement.

It is clear that the pension interest, whether in payment or in expectation of payment, is property and ought to be treated as such. However, the equalization payment may not have any significant impact on the needs of one spouse and the ability of the other to pay support. To alleviate the situation of double recovery and to provide that the spouses walk away from the relationship on equal financial footing, courts need to be provided with more flexibility and with a broader jurisdiction to distribute property value in a fair and equitable manner.

3. Other Benefits

Survivor benefits, disability benefits and severance entitlements, although each may form part of the pension package,

89. (1986), 2 R.F.L. (3d) 305 (Ont. H.C.).

warrant separate discussion from the pension interest itself because of the specific characteristics attributable to each of these interests.

(i) Survivor Benefits

It has been held, on occasion, that a spouse was entitled to an interest in the survivor benefits attaching to the pension interest of the other spouse.⁹⁰ Generally, however, the value of the survivor benefits ought not to be included as part of the value of a spouse's pension interest.⁹¹ Survivor benefits do not benefit the pension holder. They benefit the spouse of the pension holder upon the death of the latter.

As the survivor benefit accrues to the spouse of the pension holder, it may be argued that the value of this interest ought to be attributed to the net family property value of the non-pension holder spouse. The difficulty presented by this argument is that the non-pension holder spouse may not be awarded this benefit, in whole or in part, at the time of the pension holder's death. It may be that the non-pension holder spouse is no longer a spouse of

90. Porter v. Porter (1986), 1 R.F.L. (3d) 12 (Ont. Dist. Ct.); Storms v. Storms (1988), 14 R.F.L. (3d) 317 (Ont. Dist. Ct.).

91. Marsham v. Marsham (1987), 7 R.F.L. (3d) 1 (Ont. H.C.); Miller v. Miller (1987), 8 R.F.L. (3d) 113 (Ont. Dist. Ct.)

the pension holder at the time of this latter person's death. In addition, a third person may acquire a right to all or part of this benefit which might compete with or supersede any right of this non-pension holder. If, in instances such as these, a value for survivor benefits is attributed to the net family property value of the non-pension holder spouse, then he or she could make or receive an equalization payment based upon an inflated value of his or her net family property.

For example, with respect to pensions administered pursuant to the federal Pension Benefits Standards Act, 1985, payments on account of any pension benefits are only payable while the non-pension holder is a spouse of a member or former member of the pension plan.⁹² As "spouse" has the same definition as in the applicable provincial property legislation, any rights of the non-pension holder to any interest in the member's plan cease upon divorce because they are no longer spouses.⁹³

With pensions administered pursuant to the Pension Benefits Act, 1987, certain other issues arise. In the event that a plan member dies prior to retirement, the pre-retirement death benefit

92. Pension Benefits Standards Act, 1985, S.C. 1985, c. 40, section 25(5).

93. Family Law Act, 1986 S.O. 1986, c. 4 as amended, section 2.

is limited to the benefits earned by the plan member spouse after January 1, 1987. Furthermore, this applies only to benefits which have vested.⁹⁴ In most instances, it is unlikely that the pre-retirement death benefit will have a very substantial value for some time to come. Competing interests may limit the value of the post-retirement death benefit. A plan member may have two or more spouses during his or her lifetime. If the plan member dies after retirement and leaves a second or other subsequent spouse surviving, a joint and survivor pension benefit is only available to the spouse living with the member spouse on the date the first pension instalment is due.

In the decision of Humphreys v Humphreys,⁹⁵ it was determined that for value of the death benefit to attach to the non-pension holder spouse it must be shown that it would be probable that the spouses would still be married to one another at the time of the pension holder's death.

This reasoning assumes a retirement method of valuation⁹⁶ as it takes into account facts and events which happen subsequent to the valuation date. The Family Law Act, 1986, supports the

94. Pension Benefits Act, 1987, S.O. 1987, c. 35, section 49(1) refers to section 38 which speaks of vested interests.
95. (1987), R.F.L. (3d) 113 (Ont. H.C.).
96. Infra, page 56.

termination method of valuation whereby these facts and events are not taken into account.⁹⁷

In any event, if this sort of reasoning is to be taken into account as being determinative, then there will be very few instances in which any value will attach to the survivor benefit in the non-member's calculation of net family property.

(ii) Severance Entitlement

Severance benefits are often included in a "pension package" offered by the employer. The nature and timing of the severance entitlement is determinative of whether this interest constitutes property within the meaning of the Family Law Act, 1986.

An entitlement based upon remuneration for a period of past employment service, which service was performed during the term of the marriage, has been considered to be property.⁹⁸

However, an entitlement based upon compensation in lieu of notice, which is tied to a loss of future wages, may not be construed as property within the meaning of the Family Law Act.

97 Infra, page 55.

98 Marsham v. Marsham, (1987) 7 R.F.L. (3d) 1 (Ont. H.C.).

If the entitlement is vested prior to separation, it becomes a present interest in future income. This would be caught within the definition of property under the Family Law Act.⁹⁹

If the entitlement does not vest prior to separation, it is suggested that it would not be caught within the definition of property under the Ontario Act. While it was held in Clarke v. Clarke¹⁰⁰ that pension benefits in receipt constitute property, an entitlement based upon the loss of future wages can be distinguished. The determination in Clarke was based, in part, on the fact that the pension benefit is fully earned prior to the actual receipt. It is wholly tied to past earnings. An entitlement based upon loss of future wages is not.

(iii) Disability Benefits

Whether the disability benefit is vested or not prior to separation, it is doubtful that the value of this benefit would require inclusion in a spouse's net family property.

In the case of disability benefits, the potential exclusion would be that of "...damages or a right to damages for personal

99. Brinkos v. Brinkos (1989), 69 O.R. (2d) 225 (Ont. C.A.).

100. (1990), 28 R.F.L. (3d) 113 (S.C.C.).

injuries, nervous shock, mental distress or loss of guidance, care and companionship, or the part of a settlement that represents those damages."¹⁰¹ Therefore, the basis upon which the disability benefit rests will be determinative with respect to the inclusion or exclusion of the value of the interest.

Workers' Compensation benefits have been excluded on the basis that they are tantamount to damages for personal injury when the payments represent compensation for the injury itself as opposed to being compensation for loss of earning power.¹⁰²

Canada Pension Plan disability benefits, on the other hand, may not fit within the definition of excluded property. In the Manitoba decision of Follock v Pollock,¹⁰³ the Canada Pension Plan disability benefit was held to flow from an inability to work, rather than from the injury itself. If such a determination is made in Ontario, then this benefit would not fit within the

101. The Family Law Act, 1986, S.O. 1986, c. 4 as amended, section 4(2).

102. Kelly v. Kelly (1987), 8 R.F.L. (3d) 212 (Ont. H.C.) (In the alternative, the court may invoke subsection 5(6) of the Family Law Act); Young v. Young (1986), 5 R.F.L. (3d) 337 (B.C.S.C.); Douglas v. Douglas (1984), R.F.L. (2d) 262 (B.C.S.C.).

103. Pollock v. Pollock (1985), 37 Man. R. (2d) 161.

exclusion as "... damages or right to damages for personal injuries ... or the part of a settlement that represents those damages..."¹⁰⁴ and the value of the benefit would thus be subject to inclusion in a spouse's determination of family property.

104. Supra, footnote 101, section 4.

V. VALUATION

Valuation is the first phase in a three phase process envisaged by Part I of the Act. The second and third phases are equalization and distribution respectively.

The valuation process requires that value be attributed to all property that a spouse owns on the valuation date.¹⁰⁵ Although a definitive time has been established for value to be set, value itself has not been defined in the Act. No guidelines have been given to assist in determining its meaning.

A pension interest cannot be valued like a tangible asset. The value of most types of property can be determined by the market conditions. A pension interest has no value in the open market.

Lack of any definition of value may well have been the result of conscious omission on the part of the legislature because differing concepts of value may be needed to reflect the particular asset being valued. A flexible definition of value is essential in determining the value of a pension.

105. Ibid., section 4.

1. Contribution or Benefit

In order to attribute value, it must first be determined what is to be valued. Does the pension interest consist of the contributions to the plan or does it consist of benefits payable by the plan?

(i) Other Jurisdictions

In Alberta, the value of a pension was initially based upon employee and employer contributions to the pension plan. The Alberta Court of Appeal subsequently rejected this approach on the reasoning that it was both unrealistic and economically unsound as the employee spouse would have to terminate employment to achieve this realization. In rejecting pension contributions as a definitive measure of the value of the pension interest, the court accepted that the value ought to be based upon the benefit payable. Although the court acknowledged the current value of the deferred benefit as being the appropriate value of the pension interest, it declined to attribute any specific value. It stated that there was no reason why the parties should be visited with the fruits of uncertainty, in light of the somewhat speculative manner in which such a value would be attributed, when it was within the capacity of the court to ensure otherwise. In this instance, valuation was

rejected and the court ordered a division of the benefits as they became payable.¹⁰⁶

The same issue was addressed in the 1984 Saskatchewan Court of Appeal decision of Tataryn v. Tataryn.¹⁰⁷ It determined that when a spouse has a contractual right to receive a periodic sum for life, on retirement, he or she has a vested, although not matured, entitlement to a pension. The matrimonial property, entitlement is "... the contractual right to receive a periodic payment in accordance with the terms of the contract", which value might, in certain circumstances, be more or less than the value of the contributions to the plan.¹⁰⁸

(ii) Ontario

In Ontario, the issue of whether value ought to be attached to the contribution or to the benefit has not been definitively resolved. Initially, it was determined appropriate to tie the value of the pension to the contributions of the employee spouse, along with any vested contributions on the part of the employer.¹⁰⁹

106. Moravcik v. Moravcik (1983), 37 R.F.L. (2d) (Alta. C.A.).

107. Tataryn v. Tataryn (1984), 38 R.F.L. (2d) 272 (Sask C.A.).

108. Ibid., page 109.

109. Hodgins v. Hodgins (1986), 50 R.F.L. (2d) 456 (Ont. Dist. Ct.).

In other instances, value has been attributed to the benefit payable.¹¹⁰

Value based upon either the benefit or the contribution may be appropriate, depending upon the particular circumstances of the case. In Aylsworth v Aylsworth,¹¹¹ the pension in question was one in which only the employee contributions had vested. The pension was not locked in and so the employee had the option of withdrawing his contributions if he terminated employment. As his contributions had vested, he also had the right to leave the contributions in the plan and receive a pension at a later date. This pension would reflect employer contributions which would subsequently vest.

In this particular instance, the cash surrender value of the employee contributions plus the accumulated interest as of the valuation date exceeded by more than twice the amount actuarially calculated to be necessary to purchase a similar pension on retirement.

It was determined to be both unrealistic and inequitable to attribute a value based on future benefits when a value so based would be significantly less than the value the employee was

110. Messier v. Messier (1986), 5 R.F.L. (3d) 251 (Ont. Dist. Ct.); see also Marsham v. Marsham, supra, footnote 98 and Humphreys v. Humphreys (1987), 7 R.F.L. (3d) 113 (Ont. H.C.).

111. (1987), 9 R.F.L. (3d) 105 (Ont. H.C.).

entitled to withdraw from the plan as of the valuation date. In this instance, value was determined to be better reflected through the contributions to the plan. The court distinguished Manitoba and Saskatchewan appellate decisions which questioned the attachment of value to the contribution on the basis of the language of the respective statutes as well as on the particular fact situations. The court suggested that a determination of value could be based on either future benefits or present contributions and that the appropriate method would depend upon the facts of each particular case.

2. Valuation Methods

The Act provides no guidelines with respect to valuation of a pension or any other property. Courts have applied diverse methods of valuation and have considered these methods in the context of the particular set of circumstances. As suggested in Aylsworth,¹¹² perhaps no single method would be appropriate in all circumstances.

(i) Defined Contribution Plans

Calculation of the value of a defined contribution pension plan does not present the difficulties associated with the valuation of a defined benefit pension plan. As previously stated, the essential feature of this type of plan is that the employee's pension is the annuity which can be purchased at retirement by the accumulated funds credited to that employee's pension account. The pension value is the accumulated amount, plus any accrued interest, as of the valuation date.

(ii) Defined Benefit Plans

It is more difficult to attribute a value to a defined benefit pension plan because the value of the benefit is based upon

112. Ibid.

a range of future assumptions and contingencies. Although certain methods of valuation have evolved, no single method has been definitively determined as being the most appropriate.

(a) Contribution Method

One method of valuation is the contribution method. This method of determining value is similar to that of a defined contribution pension plan. Value is based upon the cash surrender value of the employee's contributions, as well as the value of the accrued interest, plus the value of the vested rights to any amounts the employer would, in due course, be obliged to contribute. The amounts are determined as if the employment were terminated as of the valuation date.¹¹³

(b) Termination Method

Under the termination method, the calculation is based upon the amount actuarially calculated to purchase a pension on retirement. It assumes that the employee terminates employment as of the valuation date and thereafter makes no further contributions to the plan. Pursuant to this method, facts are relied upon as

113. See Hodgins v. Hodgins, supra, footnote 110 and Aylsworth v. Aylsworth, supra, footnote 112.

they exist as of the valuation date and so it prevents a value being attributed to the benefits earned after that date.¹¹⁴ However, this method is not completely ideal. It provides for a value based upon an assumed retirement age. Value is based upon the expected lifetime of the employee. This method assumes the fiction that the employee terminates employment as of the valuation date. It thus fails to take into account the fact that employer contributions are calculated on the assumption that the employee will continue employment to pensionable age and it structures such contributions to reflect a pension which will reflect the cost of living at the time.¹¹⁵

(c) Retirement Method

The retirement method of valuation assumes that the employee will continue employment until retirement age and includes in value the earnings prior to retirement upon which the pension is based. The difficulty with this approach is that it assumes post-valuation date events. However, it does make up for the failing in the

114. Supra, footnote 112; Marsham v. Marsham, footnote 82, adopted this method.

115. J.B. Patterson. "Determining a Realistically High Value of a Spouse's Interest in the Employee's Pension", (1986-87) 1 C.F.L.Q. 345.

contribution method and, to an extent, in the termination method, where employer contributions may not be accurately reflected in the value of the pension interest, even though they may well be reflected in the future pension if the employee continues in that plan.¹¹⁶

(d) "If and When" Approach

The "if and when" approach is not a method of valuation. It is an approach initially used to avoid attributing monetary value to the pension interest. This approach was formulated in the Rutherford¹¹⁷ case. The pension received upon retirement is shared equally on the basis of the total number of years of marriage during which pension contributions were made to the plan, divided by the total number of years that contributions were made to the plan. This approach is inappropriate in the context of valuation under the Family Law Act because a monetary value must first be attributed in order to determine the equalization amount which, in turn, must be determined prior to effecting distribution of it.

116. See Aylsworth v. Aylsworth, *supra*, footnote 112.

117. Rutherford v. Rutherford (1981), 23 R.F.L. (2d) 337, [1981] 6 W.W.R. 485, 30 B.C.L.R. 145 (B.C.C.A.).

3. Does the Family Law Act, 1986, Presuppose a Contributory System of Valuation?

Section 4(1)(c) of the Act, defines property, in part, as, "...in the case of a spouse's rights under a pension plan that have vested, the spouse's interest in the plan including contributions made by other persons...". Do these words presuppose a contributory method of valuation?

The use of the word "including" in a definition can and, in this instance does, lead to confusion. Yet, authority seems to support the proposition that the addition of the word "including" to a definitive phrase expands the ordinary meaning of the words which precede it.¹¹⁸

When looking to other indicia in the Act itself, or in looking to the lack of provision therein, it could be suggested that the contributory system of valuation is the proper method. A valuation method based upon the calculation of future benefits payable, as of the designated triggering event, does not readily fit within the framework of the Ontario Family Law Act.

In order to capitalize future benefits, the use of actuarial evidence is a practical necessity.¹¹⁹ Actuarial determinations

118. Elmer A. Driedger, Construction of Statutes, 2d Ed., Butterworths; Toronto, 1983, pp. 15-18.

119. Porter v. Porter (1986), 1 R.F.L. (3d) 12 (Ont. Dist. Ct.).

are, to some extent, premised on predictions and speculation and therefore may not accurately reflect the value of a benefit payable at a future date. As actuarial valuation is not an exact science, valuation amounts may vary. Depending upon the range of assumptions and contingencies, the determined amounts will vary. As certain contingencies may or may not result, there is a risk of over-valuing or under-valuing the pension benefits determined to flow from the plan.¹²⁰ In addition, actuarial evidence is like any other evidence and may be accepted or rejected by the trial judge. If a judge cannot accept either party's position with respect to value, he or she may select a compromise figure, although it is not clear how such determination would be reached.¹²¹ Thus, there is no certainty of value when attributing a value to the deferred benefit. Value may be derived in part through the actuary and in part through the discretion of the court and not through any universally consistent means.

A system of valuation based on the capitalization of future benefits does not lend itself to either legislative or judicial

120. "Determining a Realistically High Value of the Spouse's Interest in the Employee's Pension" and "Determining a Realistically Low Value for the Employee's Pension (In Spite of Unrealistically Large Claims Being Made by the Spouse)", both by J.B. Patterson, (1986-87), 1 C.F.L.Q. 345 and 366 respectively.

121. Grainger v. Grainger (1987), 6 R.F.L. (3d) 175 (Sask.C.A.).

guidelines. When asked for guidance with respect to valuation of future benefits, the Saskatchewan Court of Appeal refused, stating that such guidelines were not possible,

"...because of the large number of types of pension plans, and even within the generally accepted categories, small variations in any individual pension plan may change the principles which must be applied in valuation. It remains in each case a matter to be decided on the terms of each plan and circumstances of each case how it is to be valued."¹²²

Cost is a further consideration with respect to the actuarial calculation of the benefit payable. In one instance, the actuary testified at trial that his fees and expenses for the preparation of his report and for attendance at trial would be in the amount of \$2,500.00 to \$3,000.00. This amount, the court conceded, was beyond the reach of most litigants.¹²³

The Ontario Family Law Act contemplates money judgments. Debt liabilities and ownership rights are to be otherwise left intact.¹²⁴ A spouse whose obligations are determined upon the

122. Ibid, at 179.

123. Marsham v. Marsham (1987), 7 R.F.L. (3d) 1 (Ont. H.C.).

124. Skrlj v. Skrlj (1986), 2 R.F.L. (2d) 305 (Ont. H.C.).

value of pension benefits not yet received might not be able to satisfy a judgment for an immediate equalization payment.

In addition, the Family Law Act stipulates a maximum time frame within which equalization payments are to be made. These payments are subject to a ten year rule. The rule provides that, to avoid a hardship situation, equalization payments may be made in instalments during a period not exceeding ten years or payments may be postponed in whole or in part for a period not in excess of ten years.¹²⁵ A spouse may be unable to meet his or her equalization obligation within this time frame if the equalization amount consists largely of monies not yet received. The ten year rule has been circumvented through an order that property be transferred to or held in trust for a spouse for life or for a term of years.¹²⁶ However, it is not clear whether this provision can be relied upon in support of a deferred distribution of pension benefits as they become payable.

Although the framework of the Act may not support a system of valuation based on the benefit payable, value tied into contributions will fail to reflect, in many instances, the true value of the pension interest.

125. Family Law Act, 1986 S.O. 1986, c. 4 as amended, section 9(1)(c).

126. Ibid., section 9(1)(d); The ten year rule was circumvented in Marsham by invoking a trust pursuant to subsection 9(1)(d) of the Family Law Act.

4. Applicability of the Western Approaches in Valuations under the Family Law Act, 1986

The western provinces preceded Ontario in providing for the inclusion of the pension interest in their respective family or matrimonial property regimes. Although it is useful to consider these approaches, they may not be applicable under the Ontario legislation.

(i) Saskatchewan

Under the Saskatchewan Matrimonial Property Act,¹²⁷ matrimonial property does not expressly encompass the rights to a pension but does provide a wide meaning of matrimonial property. It is defined as "...any real or personal property whatsoever, regardless of its source, kind or nature, that, at the time an application is made under the Act, is owned, or in which an interest is held, by one or both spouses or by one or both spouses and a third party."

127. Matrimonial Property Act, 1979 (Sask.) c. M-6, 1, section 2(h).

Early decisions were not determinative of whether matrimonial property consists of the pension contributions paid or the pension benefit payable.¹²⁸ It was not until the 1984 decision of Tataryn v. Tataryn¹²⁹ that the Saskatchewan Court of Appeal put the issue to rest. The extent of the matrimonial property was determined to be "...the contractual right to receive a periodic payment in accordance with the terms of the contract...".

Under the Saskatchewan Act, a spouse applies for distribution of the matrimonial property itself.¹³⁰

(ii) British Columbia

Under the Family Relations Act¹³¹ of British Columbia, pensions are expressly provided for within the definition of "family asset". Section 45(3) of the Act includes in the definition of family asset, the right of a spouse under an annuity

128. Ronning v. Ronning (1982), 27 R.F.L. (2d) 1, determining contributions to the pension to be matrimonial property; both Fisher v. Fisher (1983), 31 R.F.L. (2d) 274 (Sask. Q.B.) and Topliss v. Topliss (1983), 33 R.F.L. (2d) 436 determined matrimonial property to be the benefit payable.

129. Tataryn v. Tataryn (1984), 38 R.F.L. (2d) 272 (Sask. C.A.).

130. Supra, footnote 127, 2.21(1).

131. Family Relations Act, R.S.B.C., 1979, c. 121.

or a pension, home ownership or retirement savings plan. This provision has been broadly interpreted and has held to include, "...any right, even one that can be said to be inchoate, contingent, immature, or not vested".¹³²

In British Columbia, upon marriage breakdown, a spouse becomes presumptively entitled to an undivided one-half interest in each family asset.¹³³

(iii) Alberta

The Alberta Matrimonial Property Act¹³⁴ includes pensions within the context of divisible matrimonial property. Section 7(1) provides that, "The court may, in accordance with this section, make a distribution between the spouses of all the property owned by both spouses and by each of them". The Alberta position is that any accumulation of pension credits ought not to be distinguished from the accumulation of capital for retirement or other future needs. To disregard such accumulations, it has been determined, is to disregard the object of the Matrimonial Property Act in ensuring that the spouses share in any accumulations.¹³⁵

132. Rutherford v. Rutherford (1981), 23 R.F.L. (2d) 337; [1981] 6 W.W.R. 485, 30 B.C.L.R. 145 (B.C.C.A.).

133. Supra, footnote 131, section 43(1) and (2).

134. R.S.A. 1980, c. M-9.

135. Herchuk v. Herchuk (1983), 35 R.F.L. (2d) 327.

The Alberta legislation speaks of distribution of the matrimonial property itself. It does not require that property be valued.¹³⁶ In fact, capitalized valuation of the pension interest as a means of effecting distribution was expressly rejected by the Alberta Court of Appeal in Moravcik v. Moravcik.¹³⁷ The reason for this was two fold:

1. Courts were reluctant to force a spouse to make a payment when he or she would often lack the funds to do so and would be forced into destruction of the plan to realize the funds, and
2. the contingencies were such that the interest was almost impossible to value.

The Alberta and Saskatchewan statutes speak of distribution of the matrimonial property itself and the British Columbia Act addresses the division of the assets. Each of the Saskatchewan and Alberta statutes provides that the court may order a spouse to pay money in a lump sum or over a period of time to satisfy a distribution order.¹³⁸ There is no stipulated time frame in which

136. Supra, footnote 134, sections 1(d) and 7(1).

137. (1983), 37 R.F.L. (2d) 102 (Alta. C.A.).

138. Matrimonial Property Act, 1979 (Sask) c.M-6.1, section 26(1) (b) (i) and Matrimonial Property Act, R.S.A. 1980, c. M-9, section 9(3) (a) respectively.

the payment or payments must be made. Under the British Columbia legislation, an order may be made for compensation to the other spouse to complement the division of assets if certain property has already been disposed of.¹³⁹

(iv) Manitoba

The Manitoba Marital Property Act¹⁴⁰ expressly includes a spouse's rights under a pension or superannuation plan or scheme as a family asset, even if it is not ascertainable whether the rights will ever be realized. However, if there is no reasonable possibility of the rights ever being realized, the interest is not included.¹⁴¹

The Manitoba Act differs from the other western Acts in that it speaks of the right of a spouse, upon application, to an accounting of and to an equalization of the value of the marital assets and would seem to accord with the process envisaged by the Family Law Act, 1986.¹⁴²

139. Family Relations Act, R.S.B.C., 1979, c. 121, section 52(2)(c).

140. Marital Property Act, S.M. 178, c. 24, as amended section 1(2)(d).

141. Ibid., section 8.1(1).

142. Ibid., section 12.

The "if and when" type of distribution of the pension interest has been endorsed by the Manitoba Court of Appeal in the case of George v. George.¹⁴³ The Court interpreted the Manitoba Marital Property Act as permitting the establishment of a nominal value to assets such as the pension interest for the purposes of an accounting under that Act. Satisfaction of the interest could then be effected by transferring the determined portion of the owner's benefits under the pension plan, when payable, in favour of the other spouse, thereby transferring an asset in lieu of the amount owed. Although this decision was rendered prior to a 1982 amendment to the Act providing for the valuation of non-marketable assets, it was subsequently determined that even where a realistic value of the pension interest can be obtained, this approach to resolution of the division and satisfaction of the interest of the non-entitled spouse could still be utilized.¹⁴⁴

143. (1983), 35 R.F.L. (2d) 225.

144. Downey v. Downey (1983), 36 R.F.L. (2d) 169; 24 Man. R. (2d) 269 (Man. Q.B.).

This approach may no longer be available given a subsequent amendment to the Manitoba Pensions Benefits Act.¹⁴⁵ This amendment provides that the pension benefit, or any payments due thereunder, shall be divided between the spouses in the manner prescribed in the regulations notwithstanding any order or agreement, as the case may be, and may require the division to be made in a different manner. This Act thus expressly overrides orders otherwise permissible under the Marital Property Act.

While the Saskatchewan Court of Appeal in Tataryn¹⁴⁶ determined that the right to receive the benefit was the thing to be valued and distributed, whether it was worth more or less than the contributions and the Manitoba Court of Appeal in George v. George¹⁴⁷ determined the pension's cash surrender value not to be an appropriate valuation under the Manitoba Marital Property Act, it has been held otherwise in Ontario. Both cases have been distinguished on the basis of the language of the respective statutes, as well as on the facts of each case. In the case of Aylsworth v. Aylsworth¹⁴⁸ it was determined that no single method of valuation is appropriate in all circumstances under the Ontario

145. Pension Benefits Act, S.M. 1975, c. 38, as amended by 1982-83-84, c. 79, (p32) section. 27(2).

146. Tataryn v. Tataryn (1984), 38 R.F.L. (2d) 272 (Sask. C.A.).

147. Supra, footnote 143.

148. (1987), 9 R.F.L. (3d) 105 (Ont. H.C.).

Family Law Act. Given the facts of this particular case, the contribution method was preferred because it permitted a precise means of valuing the pension as of the valuation date. In addition, value based on the contributions exceeded more than twice the amount actuarially calculated according to the retirement method. Unlike the position taken in Tataryn, the court found it to be both unrealistic and inequitable and not in keeping with the Family Law Act to fix a value which was substantially less than the plan member had available to him.

Under the Ontario Family Law Act, the spouses have a right to an equalization of values, not to a share in any particular asset of the other spouse. Ascertaining value is crucial to the process of the Act. Under the western Acts, valuation may be circumvented by a division of the pension itself. This western approach does not assist however, in attributing a value to the pension interest. In Ontario, attachment of the pension benefit is only relevant at the distribution phase, not at the point of valuation, and it may or may not be in keeping with the distribution process under the Family Law Act.

5. Factors Influencing Value

If equalization of net family properties is to be effected, a proper value must be assigned to all assets. Due to the unique nature of a pension, diverse factors may have an impact upon a determination of its value. Each merits consideration. The factors include the following:

- (i) Inflation and Interest
- (ii) Early Use of the Funds
- (iii) Cost of the Pension Annuity
- (iv) Tax Liability
- (v) Pension Plan Election: Retirement Date
- (vi) Contributions Prior to Marriage
- (vii) Subsequent Contingencies
 - (a) Death of the Employee Spouse
 - (b) Disability of the Employee Spouse
 - (c) Termination of Employment Prior to Retirement
 - (d) Failure of the Pension Fund

The Family Law Act, 1986 does not provide for specific discounts from value but makes an allowance for them by providing for the deduction from a spouse's gross family property calculation,

- (a) "the spouse's debts and other liabilities, and
- (b) the value of property, other than a matrimonial home, that a spouse owned on the date of the marriage, after

deducting the spouse's debts and other liabilities, calculated as of the date of marriage;"¹⁴⁹

To qualify as a discount within the framework of the Family Law Act, 1986, the following factors must be present:

1. The purported discount must be a debt or a liability.
2. The debt or liability must be that of the titled spouse.
3. The discount for the debt or liability must be applied to value.

If a discount from value is not available and should equalization otherwise cause an imbalance in true value, the only available means to redress such an imbalance is through an adjustment to a spouse's proportionate share. The court may award a spouse an amount more or less than half the difference between their respective net family properties if, in the opinion of the court, equalization would otherwise be unconscionable, having regard to certain enumerated factors.¹⁵⁰

Unconscionability, in the context of share variation, has been held to create a threshold whereby equal division would otherwise

149. Family Law Act, 1986, S.O. 1986, c. 4, as amended, section 4(1).

150. Ibid., section. 5(6).

be"...patently unfair or inordinately inequitable..."¹⁵¹. Yet in considering variation of the equalization share, one should be aware of the opinion of Galligan, J. with respect to balancing equalization entitlements in the face of inequity or unfairness.

"As I read the Family Law Act, 1986, it leaves the court with no discretion to decide spouses' affairs in accordance with a particular court's sense of fairness. Subject to a discretion if it finds unconscionability, under s. 5(6), the courts must decide the rights of separating spouses in strict compliance with the terms of the Act, even if, in an individual case, a judge may feel that the result does not appear fair according to the particular judge's sense of fairness. I think that the legislature has clearly expressed its intent to remove judicial discretion from property disputes between separating spouses."¹⁵²

(i) Inflation and Interest

If the equalization entitlement, in whole or in part, is the product of an amount which is only payable at a future date and

151. Sullivan v. Sullivan (1986), 5 R.F.L. (3d) 28 (Ont. U.F.C.) 38; Klein v. Klein (1987), 59 O.R. (2d) 781 (Ont. Dist. Ct.) 786-7.

152. Skrlj v. Skrlj (1986), 2 R.F.L. (2d) 305 (Ont. H.C.).

over an extended period of time, then inflation and interest have a direct bearing upon the actual value of that interest. The payor of the entitlement, in such an instance, receives a detriment to the extent that the value the benefit is based upon is diminished in proportion to the decline in the real value of the money as caused by inflation. In addition, the recipient of an immediate lump sum amount receives a tangible benefit insofar as any capital, when invested, possesses the quality of being able to earn income without any expenditure of the capital itself. There is no corresponding benefit to the payor of the entitlement.¹⁵³

Although the effects of inflation and interest cannot properly be termed a "debt" or a "liability", their effects have been recognized and adjustment had been provided for.¹⁵⁴

The Ontario Rules of Civil Procedure¹⁵⁵ provide for a discount figure to offset the effects of interest and inflation in the case of future pecuniary damages.

"The discount rate to be used in determining the amount of an award in respect of future pecuniary damages, to the extent that it reflects the difference between estimated investment and price inflation rates, is 2 1/2 per cent per year."

153. Fisher v. Fisher (1983), 31 R.F.L. (2d) 273 (Sask. Q.B.).

154. Ibid., see also Marsham v. Marsham (1987), 7 R.F.L. (3d) 1 (Ont. H.C.).

155. Ontario Rules of Civil Procedure, Rule 53.09.

This discount figure has been accepted and employed by one court as reasonably reflecting the interest rate, net of inflation, on values attaching to the pension interest.¹⁵⁶

This discount rate, as provided in the Ontario Rules of Civil Procedure, anticipates increases in accordance with the Consumer Price Index. While it may be appropriate in the instance of a pension plan indexed to the cost of inflation, a higher discount rate may be more appropriate in respect of a plan in which there is no inflationary adjustment.¹⁵⁷

(ii) Early Use of the Funds

Money possesses a "time value" in that it has the potential, when invested, of generating income over a fixed period of time. "Time value" becomes relevant in the context of the pension interest when a substantial portion of the equalization payment reflects that value. Inequity may result from the fact that the non-titled spouse enjoys an immediate benefit in respect of the pension interest that the titled spouse does not have. The non-titled spouse is given accessibility to an amount representing the value of the pension interest while the titled spouse is

156. Marsham v. Marsham, supra, footnote 154.

157. J.B. Patterson. "Determining a Realistically Low Value for Employee;s Pension (in Spite of Unrealistically Large Claims being Made by the Spouse)", (1986-87)1 C.F.L.Q. 365.

precluded from making use of any part of the actual funds until retirement or termination of employment, as the case may be.¹⁵⁸

Associated with the potential gain to the non-titled spouse is a corresponding deprivation of that same potential to the titled spouse. In addition to this, the inequity may be further aggravated when the titled spouse does not have the means to fund the equalization payment and is obliged to borrow money at current rates of interest in order to do so.¹⁵⁹

The issue of accessibility was recognized in the New Brunswick decision of Dimock-Cummings v. Cummings.¹⁶⁰ Here, the court determined that the value of the pension moneys was clouded by the inability of the titled spouse to gain access to the pension funds, except upon retirement or termination of employment. Because of this, a gross calculation of value was determined not to be the true value. The value of the pension interest was, therefore, discounted. The court applied a one third discount figure but did not provide any explanation as to how that figure was arrived at.

A discount from a value to represent early use of a sum representing the value of the pension interest was expressly rejected in the Ontario decision of Kukolj v. Kukolj.¹⁶¹ The court

158. Fisher v. Fisher, supra, footnote 153.

159. Ibid.

160. Dimock-Cummings v. Cummings (1986), 3 R.F.L. (3d) 302 (N.B.Q.B.).

161. (1986), 3 R.F.L. (3d) 359 (Ont. U.F.C.).

refused to allow the discount, in part, as on the particular facts of the case there was no evidence upon which to make such a determination. The court further suggested that such a discount might not be available in any event, given the fact that there is no such provision under the Family Law Act, 1986 regulating the equalization of a spouse's net family property where the property includes rights under a pension plan.

The Saskatchewan Court of Appeal in the decision of Tataryn v. Tataryn¹⁶² suggested that even where there is no evidence of the extent to which an adjustment may be appropriate, it nevertheless should be born in the mind in arriving at an equitable sharing. However, this sort of determination may not be available within the confines of the Ontario Family Law Act. As provided, the only available deductions from the value of a spouse's family property are the debts and liabilities of that spouse as at the valuation date. A discount for early use does not fit within either category. It is neither a debt nor a liability. If any imbalance is to be redressed, it may only be available, if at all, through a share variation of the equalization entitlement. Given the anti-discretionary attitude of the courts in Skrlj¹⁶³ and Kukolj¹⁶⁴ it seems unlikely, at this point in time, that such a discount will be available.

162. (1984), 38 R.F.L. (2d) 272 (Sask. C.A.).

163. Skrlj v. Skrlj (1986), 2 R.F.L. (2d) 305 (Ont. H.C.).

164. Supra, footnote 161.

(iii) Cost of the Pension Annuity

The capitalized value of the pension interest is expressed in terms of the amount of money required to purchase a pension annuity. This value does not take into consideration the cost of the actual annuity, the associated administrative costs to the annuitant or the profit component to be realized by the company. If not discounted, the value of the pension interest included in the titled spouse's net family property may exceed the actual value of the interest later realized by that spouse.¹⁶⁵ This issue may only be moot insofar as the determination of an appropriate discount figure may not be possible to ascertain. Not only might insurance companies refuse to quote for these purposes, the information might also be too speculative given that any determination is dependent upon the interest rates in effect at the time the calculation is made.¹⁶⁶

(iv) Tax Liability

It has been generally accepted that because pension payments upon receipt are subject to income tax, the tax liability ought to

165. Fisher v. Fisher (1983), 31 R.F.L. (2d) 274 (Sask. Q.B.).

166. H. Wayne Woods, Wm. Mercer Limited. "Division of Pension Rights Upon Marriage Breakdown, November 25, 1986 (unpublished).

be taken into consideration when attributing a value to the pension. To exclude such a discount would otherwise unjustly benefit the non-titled spouse. However, there is no consistent approach in ascertaining a proper discount figure.

The difficulty primarily rests in the fact that, in many instances, the pension interest being valued is generally not payable until a future date and is then only payable over an extended period of time. As a proper gross down depends upon the probable tax bracket of the pension recipient at the time the pension payments are made, this determination is highly speculative. Tax payable is influenced by other income earned by the individual as well as the extent to which he or she utilizes any exemptions, deferrals, deductions, allowances or tax credits available at the time, all of which are subject to the tax legislation of the day.

It has been acknowledged that determinations are somewhat arbitrarily made when addressing a matter that rests entirely in the future.¹⁶⁷ In one instance it was determined reasonable to use the pension holder's average tax rate.¹⁶⁸ In another instance, a determination was reached through a discount figure as "deemed proper" by the court, without reason as to how that figure was

167. Fisher v. Fisher *supra*, footnote 165.

168. Marsham v. Marsham (1987), 7 R.F.L. (3d) 1 (Ont. H.C.).

reached.¹⁶⁹ A discount figure based upon the amount of tax which would have been applied had the pension been collapsed to pay the entitlement has been applied¹⁷⁰. A discount based upon an amount equal to the average income tax rate of the pension holder in the year of separation has also been used.¹⁷¹ Even if a consistent approach had evolved, it would not necessarily reflect the ultimate tax liability of the pension holder.

When the value of the pension interest is satisfied within the equalization process, that amount, upon investment, generates income. This income is subsequently taxable in the hands of the non-pension holder spouse. To offset this, the actuary in the Marsham¹⁷² case, in calculating the pension value, did not provide a deduction for income tax payable. The reason for this was that there was no corresponding income tax gross up made to reflect the fact that taxable investment income would be generated on earnings of any lump sum to the non-pension holder spouse. Without addressing the issue, the court did not allow a gross up to reflect the tax liability which would accrue to the non-pension holder spouse on investment income. It did, however, determine that a deduction ought to be made for income tax when calculating a present day value as the pension benefits are taxable upon receipt.

169. Messier v. Messier (1986), 5 R.F.L. (3d) 251 (Ont. Dist. Ct.).

170. C.R.S. v. C.M.S. (1986), 3 R.F.L. (3d) 347 (Sask. Q.B.).

171. Aylsworth v. Aylsworth (1987), 9 R.F.L. (3d) 105 (Ont. H.C.).

172. Supra, footnote 168.

Although a subsequent tax liability may be generated, it may not be proper deduction under the Family Law Act, 1986. The Act does not expressly prescribe an allowance for income tax liability. Any discount for it flows from the concept of "liability", a permitted deduction from the value of a spouse's family property. It may be said that this deduction attaches at valuation and is accorded to the titled spouse. Any subsequent liability attaches as a result of distribution, not valuation. In addition, as it is not a liability of the titled spouse, it may not be an available deduction in any event.

(v) Pension Plan Elections: Retirement Date

Pension plan elections may affect the value of the pension interest. Upon marriage breakdown, competing interests arise with respect to these elections.

Various elections to the employee may be possible under the terms of a particular pension plan. An employee may be able to transfer his or her accumulated funds to another pension plan. He or she may be able to elect to receive an annuity for life, with a guaranteed number of years, or may be able to elect to receive an annuity for the joint lives of the employee and his or her spouse, or for the life of the survivor of the two.

A particular plan may provide an election with respect to the retirement date. The employee may elect early retirement, either

with or without a reduced annuity, or, may elect to continue his or her employment and postpone the pension payment to a later point in time.

The anticipated date of retirement must be established in order to attribute a value to the pension interest. In the instance where the employee is able to elect his or her date of retirement, this election could allow that spouse to control the extent of the value of the pension interest, to the exclusion of the other spouse. While the employee spouse ought to be free to continue working as long as he or she chooses, it is not appropriate to allow that spouse to diminish the value of the pension interest for the purpose of his or her calculation of net family property. The right to elect must be balanced against the interest of the other spouse in the value of the future benefit.

There are no legislative guidelines in respect of this. The task of balancing these competing interests is left to the courts. "As unscientific as the approach may be, the court must nevertheless decide on the probable age of retirement".¹⁷³ If the intention of the employee spouse to retire at a certain age can be

173. Messier v. Messier, supra, footnote 169.

shown, this may prove sufficient in the determination of a probable age of retirement.¹⁷⁴ The date when the employee would first qualify for an unreduced pension may also prove determinative.¹⁷⁵

Where distribution of the equalization entitlement is, in whole or in part, effected through the imposition of a trust upon the pension holder, that spouse could attempt to postpone pension payments to the other spouse by electing to retire at a later date. In this event, it has been held that the non-titled spouse ought to receive compensation equal to the benefits he or she otherwise would have received had the titled spouse retired as of the determined date.¹⁷⁶

(vi) Contributions Prior to Marriage

The Family Law Act requires that a gross value of all property first be determined. Once that amount is ascertained, the value of property owned, calculated as at the date of marriage, is then deducted from it.¹⁷⁷

Where there has been pension plan participation prior to marriage, an alternative method of adjusting for contributions made

174. Porter v. Porter (1986), 1 R.F.L. (3d) (Ont. Dist. Ct.).

175. Marsham v. Marsham (1987), 7 R.F.L. (3d) 1 (Ont. H.C.).

176. Messier v. Messier, supra, footnote 169; Porter v. Porter, supra, footnote 174.

177. Family Law Act, 1986, S.O. 1986, c. 4 as amended, section 4(1).

prior to marriage could affect the ultimate value of the pension interest.

Under the following examples, the value of the pension entitlement, at the date of marriage, is \$4,000.00 per annum. At separation, the value of the interest is \$10,000.00 per annum.¹⁷⁸

Event	P	M	S
Age of Employee	30	40	50
Spouse			

P = Plan Participation

M = Marriage

S = Separation

Using a "termination pro-rated method"¹⁷⁹ of valuation, value is pro-rated for a period between marriage and separation to the period between joining the plan and separation. The value of the pension interest is as follows:

10 (years of marriage)

20 ((years of plan participation) X \$10,000.00 (value of pension at separation))

This provides a value to the pension of \$5,000.00.

178. The examples are based upon those used in H. Wayne Woods, Wm. Mercer Limited. "Division of Pension Rights Upon Marriage Breakdown" , November 25, 1986 (unpublished).

179. Ibid.

Using a "termination added value method",¹⁸⁰ the value reflects the pension accumulated during the marriage as well as the "added value" of the pension benefit accumulated prior to marriage, for the period between the date of marriage and the date of separation. In this instance, the value of the pension interest is as follows:

	\$10,000.00	(value of the pension at separation)
-	<u>4,000.00</u>	(value of the pension at the date of marriage)
	\$ 6,000.00	

This gives a value to the pension interest of \$6,000.00.

It is the latter method that appears to be in keeping with the requirements of the Act. The property a spouse owns is calculated as of the valuation date and the value of the property that a spouse owned on the date of marriage is then deducted from that amount.¹⁸¹

180. Ibid.

181. Supra, footnote 177, section. 4.

(vii) Subsequent Contingencies

(a) Death of the Employee Spouse

The pension interest, when valued, assumes the probability of survival of the employee spouse and the eventual receipt of the pension interest. The value of the interest is calculated on the basis of the total benefits payable, after maturity, under the particular pension plan. Death of the employee spouse, whether before pensionable age or prior to reaching his or her estimated life expectancy, will render the earlier determined value inaccurate. A mortality discount reflects the possibility of the employee spouse dying before pension maturity or before his or her estimated life expectancy.

In Fisher v. Fisher,¹⁸² the court held that a reduction ought to be made to reflect this contingency. It reasoned that, should the employee die prior to receiving the projected value of the benefits, he or she would have received only a fraction of the calculated value. Any lump sum payments to the other spouse would, therefore, exceed the actual value of the pension interest.

If a discount is not made and death of the employee spouse subsequently occurs in advance of when it was anticipated, the

182. (1983), 31 R.F.L. (2d) 274 (Sask. Q.B.)

deferred annuity would have been overvalued. An appropriate discount figure would reflect this possibility and redress, to an extent, the potential economic imbalance. Yet, how is an appropriate determination to be made where there is no evidence to support the possible occurrence? In considering this, one must also consider the fact that the employee spouse may also exceed any projected life expectancy.

If this discount is to be applied, it can be argued that the value of pension interest ought to be offset by the concurrent possibility of the other spouse receiving death benefits or pension payments under the particular plan. This, in turn, adds to the complexity of an already complicated and highly speculative determination.

The Alberta Institute of Law Research and Reform¹⁸³ has suggested that, as a general rule, a discount for the contingency of death ought not to be applied. It stated that such a discount does not justify the extra cost and complication which would be introduced into the valuation process and that any appearance of greater justice in allowing it would merely be illusory.

183. "Matrimonial Property: Division of Pension Benefits Upon Marriage Breakdown", prepared for the Institute of Law Research and Reform, Edmonton, Alberta, Report for Discussion, No. 2, May, 1985.

Unless there is clear evidence which would affect the probability of survival of the employee spouse, a discount for the mere possibility of death prior to attaining the projected life expectancy may not be a worthwhile exercise in terms of cost or in the interests of justice.

(b) Disability of the Employee Spouse

In considering whether a discount ought to be applied to the pension value to reflect the possibility of a subsequent disability of the employee spouse, treatment of the disability benefit itself needs first to be considered.

This determination turns upon the character of the benefit itself and each particular plan needs to be considered in order to ascertain the basis of any such benefits which would be available to the employee. Generally, if a benefit can be shown to be compensation for the injury itself, as opposed to being payment for an inability to work, the value of it may be subject to exclusion from a spouse's calculation of net family property as representing "...damages or a right to damages for personal injuries... or the part of a settlement that represents those damages".¹⁸⁴

184. Supra, footnote 177, section 4(2)3.

As in the instance of a mortality discount, the costs and illusion of greater justice do not justify the exercise of determining a discount amount to reflect the possibility of this.

(c) Termination of Employment Prior to Retirement

Consideration of this contingency rests upon several factors, including the terms of the particular pension plan, the employee's stage of service in that plan and the actuarial method used in valuing the pension interest.

It is suggested that in the instance of a contributory method of valuation, a discount for any future termination of employment is not appropriate. An employee is entitled to a refund of any contributions made to the pension plan prior to the vesting of his or her pension interest. Upon vesting, the employee is entitled to a deferred annuity upon maturity of the pension interest. A plan which provides for a relatively short qualification or vesting period may, nonetheless, provide a refund of contributions upon termination of employment. The value of a deferred pension is equal to at least the value of the contributions plus the interest yield.¹⁸⁵ Accordingly, the plan will always reflect the value of the contributions, plus interest, whether in the form of a refund or a deferred pension.

185. See "Vesting and Locking In" supra, pages 18 and 19.

It is suggested that a discount for termination of employment may not be appropriate in any event, given the portability of the pension interest. Section 43(1) of the Ontario Pension Benefits Act, 1987 provides as follows:

"A former member of a pension plan who, on or after the date on which this Act comes into force, terminates employment or ceases to be a member of the pension plan and who is entitled to a deferred pension is entitled to require the administrator to pay an amount equal to the commuted value of the deferred pension,

- (a) to the pension fund related to another pension plan if the administrator of the other plan agrees to accept the payment;
- (b) into a prescribed retirement savings arrangement; or
- (c) for the purchase for a former member of a life annuity that will not commence before the earliest date on which the former member would have been entitled to receive payment of pension benefits under the pension plan".¹⁸⁶

Accordingly, the value of the pension interest may be unaffected by termination of employment. Any application of a

186. Pension Benefits Act, 1987, S.O. 1987, c. 35, Section 43(1).

discount figure to reflect the contingency of a future termination of employment ought, therefore, to turn upon the particular facts of each situation and upon the provisions of the governing pension plan or legislation.

(d) Failure of the Pension Fund

The actual receipt of the pension annuity depends upon the ability of the pension fund to pay it. Should the value of the pension therefore reflect the possibility that the pension fund may not be able to pay the annuity when it falls due?

A defined contribution plan is always fully funded.¹⁸⁷ The deferred annuity to which an employee is entitled is that annuity which the amount on hand will purchase. Therefore, a discount from value is not appropriate for this type of plan.

A defined benefit plan, however, is not fully funded. It cannot be predicted with absolute certainty what the ultimate cost of the annuity will be or what money will be required at the time to fund it. Furthermore, it cannot be predicted accurately what the future investment climate will be as it pertains to investment of the pension fund assets.

187. See "Defined Contribution Plans" Section II 3 supra, page 15.

To minimize the risk of failure in the case of plans administered pursuant to the Ontario Pension Benefits Act, 1987,¹⁸⁸ the Pension Benefits Guaranteed Fund stands behind the plans administered in accordance with this Act. This fund is ultimately guaranteed by the Consolidated Revenue Fund for the Province of Ontario to a percentage of benefits which would have been payable under the failed fund.¹⁸⁹

As a general rule it is suggested that an allowance to reflect this contingency ought not to be considered. Due to the current administrative safeguards in place, the risk of such an eventuality is minimal.¹⁹⁰

188. Supra, footnote 186, sections 6-25 inclusive.

189. Ibid, section 83(4).

190. Reference was generally made to "Matrimonial Property: Division of Pension Benefits Upon Marriage Breakdown" supra footnote 183.

VI. DISTRIBUTION

Once the net family property of each spouse has been determined, the equalization entitlement can then be ascertained. The last step in the process requires that the determined entitlement be distributed to the spouse whose net family property is the lesser of the two.

To effect distribution of the equalization entitlement, the court may order the following:

- "(a) that one spouse pay to the other spouse the amount to which the court finds that spouse to be entitled under this Part;
- (b) that security , including a charge on property, be given for the performance of an obligation imposed by the order;
- (c) that, if necessary to avoid hardship, an amount referred to in clause (a) be paid in instalments during a period not exceeding ten years or that payments of all or part of the amount be delayed for a period not exceeding ten years; and
- (d) that, if appropriate to satisfy an obligation imposed by the order,
 - (i) property be transferred to in trust for or vested in a spouse, whether absolutely for life or for a term of years, or

(ii) any property be partitioned or sold".¹⁹¹

Walsh, J., in the Marsham¹⁹² decision, suggested what is almost an hierarchy to the enumerated powers. In effecting distribution, the court first looks to section 9(1)(a), a lump sum payment. If this method is impossible or inappropriate in the given circumstances, the court ought then to look to section 9(1)(b), and so on down through the enumerated powers. The eliminating feature, he suggested, was whether that power was "impossible or inappropriate" to implement.

In certain circumstances, however, it may be appropriate to allow the pension holder spouse the choice of distribution to use in giving effect to the equalization obligation. Scheibel, J., in the decision of Fisher v. Fisher,¹⁹³ had this to say:

"Another approach may be to give the employee spouse the right to elect how a distribution of the pension is to effected: whether by periodic payments or by way of lump sum payment. This approach removes to some extent some of the undesirable features presented by either

191. Family Law Act, 1986, S.O. 1986, c. 4 as amended, section 9(1).

192. Marsham v. Marsham (1987), 7 R.F.L. (3d) 1 (Ont. H.C.).

193. Supra, footnote 182.

periodic payments or a lump sum payment as methods of distribution. A right of an election would enable the employee spouse to assess the relative merits of an immediate distribution, with the concomitant benefit of not being encumbered in his economic affairs by ties that continue long after the marital relationship has come to an end, and periodic payments with its advantage that the parties are placed in the same position with respect to the timing and extent of enjoyment of the pension."

Scheibel, J. when on to say that:

"If the employee spouse elects a lump sum payment and subsequent contingencies intervene to reduce the actual value of the pension, he cannot thereafter complain. He was free to elect to make periodic payments. If he elects to make periodic payments, he cannot complain that the distribution of matrimonial property has created economic ties which hinder him in his economic affairs".

The difficulty, he suggested, with giving to the employee spouse a right of election is that the non-employee spouse does not enjoy a concurrent right. Such an election could effect support obligations and, ultimately, the future security of the other spouse. Because of this, a right of election should not become a

method of distribution which the employee can demand as of right. As conceded in Marsham,¹⁹⁴ an election is contingent upon the non-employee spouse not being able to establish the necessity of resorting to a particular method of distribution as being more appropriate.

194. Marsham v. Marsham, supra, footnote 192.

1. Lump Sum Payment

In speaking of the general goals of distribution, Scheibel, J., in the decision of Fisher v. Fisher,¹⁹⁵ had this to say about lump sum payments:

"A distribution of matrimonial property upon dissolution of the marital relationship involves an attempt to reduce the economic interdependence of the spouses by severing the economic ties which, during the continuance of the marital relationship, served in part to bind the parties together. For this reason, the court should give due consideration to the objective of leaving the parties as free as possible to manage their economic affairs after the break-up of the marriage, without the hindrance of economic ties that arise out of a marriage relationship which no longer exists. A lump sum payment is ideally suited to achieving this objective.

By contrast, the creation of economic ties between the parties in the form of periodic payments by one party to the other over an extended period of time, as a method of distributing matrimonial property, represents a risk that

195. Supra, footnote 192.

the objective will be defeated. Instead of final distribution of matrimonial property which recognizes the fact that this marital relationship is at an end, new economic ties between the parties are created which may last for the rest of their lives and beyond".

This rationale is in keeping with the objective of the Family Law Act, 1986 in providing for the orderly equitable settlement of the affairs of the spouses upon the breakdown of the partnership. The economic ties are severed and the parties can manage their respective affairs free from any ties to the other person.

In ordering a lump sum payment, it is suggested that the court needs to go the extra step in order to secure the amount. If there is no available cash to satisfy the entitlement, the court ought to provide in the order which property the spouse is required to transfer to the other spouse to satisfy the equalization payment. Otherwise, the entitled spouse would be left with a money judgment which he or she could only execute upon by way of a writ of seizure and sale or other means available to that spouse as an ordinary creditor. This, in turn, could generate very unsatisfactory results.

In one instance, such a judgment would have caused the debtor husband to liquidate a viable farming operation in order to satisfy the equalization entitlement. Aside from the disastrous economic consequences, this would have been in conflict with section 11(1)

of the Family Law Act which expressly seeks to maintain the viability of operating businesses and farms unless there is no other reasonable alternative to satisfy the award. In this case, the court was able to effect a compromise and order for sale only one of the farming lots.¹⁹⁶ In another instance, the court ordered the execution of the judgment be stayed pending the ordered sale of a property out of which the obligation was to be subsequently satisfied.¹⁹⁷

In the context of a pension interest, a simple money judgment is inadequate if there are no other or insufficient other assets to execute against. The judgment would be empty as the pension interest, unlike other assets, is generally exempt from execution, seizure or attachment.¹⁹⁸

Where a substantial portion of the equalization entitlement is comprised of value attributed to the pension interest, a lump sum payment is neither a realistic nor an equitable method of distribution. A spouse might not be able to realize upon such an order as he or she might not have the financial means to do so.

196. Leslie v. Leslie (1987), 9 R.F.L. (3d) 82 (Ont. H.C.).

197. Humphreys v. Humphreys (1987), 7 R.F.L. (3d) 113 (Ont. H.C.).

198. Pension Benefits Act, 1987, S.O. 1987, c. 35, Section 66(1).

The interest supporting the entitlement may not be payable until a future date and then, be only payable in amounts over an extended period of time. Inequity would result if that spouse was thus required to borrow money, at current rates of interest, in order to give effect to the obligation. A lump sum payment in these circumstances could mean economic collapse for the payor spouse.

2. The Hardship Provision

If the equalization entitlement cannot be realized as a lump sum payment, the court may order,

"that, if necessary to avoid hardship, an amount referred to in clause (a) be paid in installments during the period not exceeding ten years or that payment of all or part of the amount be delayed for a period not exceeding ten years".¹⁹⁹

If an order has been made for instalment or delayed payments, the court may subsequently vary the order, but cannot subsequently vary the amount it has found a spouse entitled to.²⁰⁰

199. Supra, footnote 191, section 9(1) (c).

200. Ibid., section 9(3).

A spouse who is required to fund an entitlement which substantially reflects his or her interest in future pension payments may not be able to do so within the ten year time frame. An extension is not permitted beyond this ten year period.²⁰¹

201. Ibid., section 9(4).

3. Charge on Property

A charge on the pension interest pending performance of the equalization obligation is not an available option given the provisions of most pension legislation. The Ontario Pension Benefits Act, 1987 provides as follows:

"Every transaction that purports to assign, charge, anticipate or give as security money payable under a pension plan is void".²⁰²

Although this general prohibition has been relaxed to permit the "...assignment of an interest in monies payable...by an order under the Family Law Act, 1986...",²⁰³ it is still retained insofar as any transaction which serves to charge or give as security the pension moneys.

The federal Pension Benefits Standards Act, 1985²⁰⁴ provides for a similar restriction and relaxation. In addition, as this Act is within federal legislative competence, provincial interference pursuant to such a court order under the Family Law Act, 1986 may be beyond the power of the provincial courts.²⁰⁵

202. Supra, footnote 198, s. 66(1).

203. Ibid., section 66(3).

204. Pension Benefits Standards Act, 1985, S.C.. 1985, c. 40, section 38(2) and (3).

205. Supra, pages 5-6.

4. Transfer of Property in Trust

In many instances, a spouse may not be able to effect a lump sum equalization payment, even if allowed a ten year period over which to satisfy it. When the payment is substantially composed of the value of the pension interest, section 9(1)(d) of the Family Law Act, 1986 has been relied upon. It provides,

"that, if appropriate to satisfy an obligation imposed by the order,

(i) property be transferred to or in trust for or vested in a spouse, whether absolutely, for life or for a term of years,..."²⁰⁶

Walsh, J., in Marsham v. Marsham²⁰⁷ determined that this section was available to satisfy that portion of the equalization entitlement represented by the pension benefits as to do so would result in a most "orderly and equitable settlement" of the spouse's affairs. In so stating he concluded that,

"It is difficult to believe that the Legislature of Ontario, given the extraordinary pressure and publicity exerted for the inclusion of a sharing of pension

206. Supra, footnote 191.

207. Supra, footnote 192.

benefits between spouses when it was reviewing the old Family Law Reform Act, did not intend this section to yield such a result when it enacted the new Family Law Act".²⁰⁸

He ordered that the wife be entitled to receive a share of all benefits payable to the husband "as and when" those benefits are paid. Her share was calculated as follows:

$$\frac{\text{number of months of contribution to the pension plan during the period the parties cohabited within marriage}}{\text{total number of months of contributions to the pension plan}} \times \frac{\text{benefits payable}}{2}$$

Even though a transfer of property in trust may appear to be the only realistic means of achieving distribution of an entitlement which reflects the value of the pension interest, the following ought to be considered:

- (i) Is the transfer of property in trust available, in the instance of the pension interest, given the general framework of the Family Law Act, 1986?
- (ii) Does a transfer of pension property, in trust, secure the value of the equalization entitlement?

208. Ibid., page 22.

(i) In the Instance of the Pension Interest, is the Transfer of Property, in Trust, Available Given the General Framework of the Family Law Act, 1986?

(a) The "If and When" Order

The "If and When" order has its roots in the 1981 British Columbia decision of Rutherford v. Rutherford.²⁰⁹ In that decision, the pension was ordered to be distributed, upon receipt of it, on the following basis:

	total years of marriage during		
<u>1</u>	<u>x</u>	<u>which contributions were made</u>	<u>benefit</u>
2		total years contributions were	X
		made to the plan	received

The "if and when" order, as the name suggests, provides that the pension payments are to be shared in accordance with the determined proportion, if and when they come into receipt.

This type of order provides the advantage that the spouses share equally in the risks of all contingencies associated with the pension and its benefits. It seems fair and equitable that should

209. (1981), 23 R.F.L. (2d) 337, [1981] 6 W.W.R. 485, 30 B.C.L.R. 145 (B.C.C.A.).

one spouse not receive any or only part of what was initially determined as the value of his or her pension interest, then the other spouse ought not to receive any value for that which was not actually realized.

The "if and when" order can effectively circumvent the difficulties associated with placing a value on an interest which is payable at a future date. As the interest is to be shared as and when received, it is not necessary to place a value on it.

However, the Family Law Act, 1986 expressly provides that each asset be valued. The equalization entitlement cannot be ascertained until this valuation process has been completed. It seems a waste to pay the cost of having the pension interest valued only to have the interest divided in specie along the lines of the Rutherford decision.

The equalization entitlement reflects the value of all assets, including the pension. As this interest is part and parcel of the determined entitlement, distribution of the pension benefit ought to reflect the satisfaction of the entitlement rather than the pension interest alone. An equalization entitlement may be more or less than the amount prescribed in the Rutherford formula.

The "if and when" type of distribution provides the non-employee spouse with a benefit earned post-separation. However, as was stated by the New Zealand Court of Appeal in

Haldane v. Haldane,²¹⁰ the pre-separation years of employment service have a continuing effect in augmenting the amount of the pension. If this was not taken into consideration, the member spouse would reap the benefit of this contribution, long after separation.

(b) Can a Spouse's Right to an Equalization Entitlement be Defeated?

In considering the "if and when" order, it must be considered whether the "if" part of it has any application under the Ontario Act. If a spouse has an indefeasible right to a determined amount that right cannot subsequently be defeated by the distribution process.

The Family Law Act suggests that the entitlement, once determined, is fixed. Even in the face of a material change or circumstance, it cannot subsequently be varied, at least in the instance of instalment or delayed payments.

210. [1981] 1 N.Z.L.R., 554 (N.Z.C.A.).

"If the court is satisfied that there has been a material change in circumstances of the spouse who has the obligation to make instalment or delayed payment, the court may, on motion, vary the order, but shall not vary the amount to which the court found the spouse to be entitled under this part".²¹¹

If the equalization entitlement or any portion thereof is contingent upon the chosen form of distribution, then inconsistent results may follow. If the value of the pension interest as initially determined does not materialize, that value is lost as distribution only ensues "if and when" the payments are received. The spouse upon whom a trust was imposed would clearly be in a different and much more favourable position than the spouse who earlier satisfied the entitlement by lump sum payment when, in both instances, the determined value did not materialize.

If the equalization entitlement is an amount not to be varied, the "if and when" type of distribution order has no place under the Ontario Family Law Act. The entitlement amount is certain and is not subject to the happening of any future event.

211. Family Law Act, 1986, S.O. 1986, c. 4 as amended, section 9(3).

(ii) Does a Transfer of Pension Property, In Trust, Secure the Value of the Equalization Entitlement?

(a) Is the transfer of property, in trust, a voidable transaction?

Historically, the pension interest and any payments thereunder were rendered inalienable and exempt from seizure, execution or attachment under most pension regimes. The Ontario Pension Benefits Act, 1987,²¹² repealed as of January 1, 1988, provided that,

"Moneys payable under a pension plan shall not be assigned, charged, anticipated, or given as security and are exempt from execution, seizure or attachment, and any transaction purporting to assign, charge, anticipate or give as security such moneys is void".

New legislation is now in effect, at both the federal and provincial levels, in order to accommodate the fact that the value of the pension interest is now to be included in a spouse's calculation of net family property. The federal Pension Benefits Standards Act, 1985²¹³ came into effect on January 1, 1987 and the

212. R.S.O. 1980, c. 373, section 27(1).

213. Pension Benefits Standards Act, 1985, S.O. 1985, c. 40.

Ontario Pension Benefits Act, 1987²¹⁴ came into force on January 1, 1988.

The Ontario Pension Benefits Act, 1987 now provides that, upon marriage breakdown, a court order under the Family Law Act, 1986 is effective to cause a party to become entitled to a maximum of fifty per cent of the pension benefits accrued by a member or former member during the period when the party and the member or former member were spouses.²¹⁵ The federal Pension Benefits Standards Act, 1985 provides that the pension plan administrator is to distribute the pension benefit in accordance with the court order, without any prescribed maximum amount.²¹⁶ In effect, both the Ontario and federal statutes now permit, under prescribed circumstances, assignment of a portion of the pension interest to the spouse of a plan member or former member.

(b) The Fifty Percent Rule

As mentioned, the Ontario Pension Benefits Act, 1987 allows a non-member spouse to become entitled to a maximum of fifty per cent of the pension benefits accrued by a member or former member during the period when the non-member and member or former member were spouses.²¹⁷ If the pension benefit is the only asset available for

214. Pension Benefits Act, 1987, S.O. 1987, c. 35.

215. Ibid., section 52(1) and (2).

216. Supra, footnote 213, s. 25(5a).

217. Supra, footnote 215.

distribution and if satisfaction of the equalization entitlement to the non-member spouse requires more than fifty per cent of the pension benefit, that part of the entitlement which exceeds fifty per cent of the benefit payable cannot be secured by the non-member spouse. In this situation, the non-member spouse would have no higher right than any other creditor in recovering the amount owing.

(c) Subsequent Events

If the equalization entitlement is a sum certain, whether it is distributed by way of a lump sum payment or by way of instalment payments or by way of a transfer of property, in trust, subsequent events should have no bearing on that amount. Should the employee spouse in any way reduce or increase the value of the interest from which the entitlement is to be satisfied, it does not alter the entitlement amount owing.

Under the "if and when" order, the non-employee spouse receives a proportionate share. The value of the share is therefore related to the timing and extent of the pension payments. Early retirement will reduce that share value if it involves a reduced annuity. Postponed retirement will affect the value insofar as it delays any share payment until a later date.

(d) Retirement Date

If a member spouse elects early retirement and accepts a reduced pension, the share distribution to the non-member spouse under an "if and when" order would reduce accordingly. In order to offset this it has been ordered that the member spouse pay to the other spouse a lump sum equal to the capitalized value of the difference in the benefits the non-member spouse would have otherwise received had the member spouse not taken an early retirement at a reduced pension.²¹⁸

If a member spouse postpones retirement the share entitlement to the non-member spouse under an "if and when" order is also postponed. To offset this, it has been ordered that the member spouse commence payment of the share of the benefit to the non-member spouse as of the originally determined day of retirement.²¹⁹

This does not interfere with any contractual rights of the member spouse accrued under the terms of the pension plan. It simply entitles the non-member spouse to a money judgment

218. Marsham v. Marsham (1987), 7 R.F.L. (3d) 1 (Ont. H.C.);
Rutherford v. Rutherford (1981) 23 R.F.L. (2d) 337 [1981] 6
W.W.R. 485, 30 B.C.L.R. 145 (B.C.C.A.).

219. Ibid.

should these events prevail. In the event of non-compliance with the order, it could be enforced as any other money judgment, by way of writ of seizure and sale, garnishment or other means available to a judgment creditor.

(e) Death of the Pensioned Spouse

In the instance of both pre-retirement and post-retirement death benefits, the "pension division" sections of the Ontario Pension Benefits Act, 1987 and the federal Pension Benefits Standards Act, 1985 provide protection only to "spouses".²²⁰ As a divorced person is not considered to be a spouse, these benefits are lost to the non-member "spouse" if and when the parties divorce. The non-member is again left with the same rights as any other creditor in attempting to realize upon the unpaid balance of the equalization entitlement.

In the event that the non-member spouse is still considered a spouse for the purposes of any death benefit payable under the terms of the pension plan, any such rights may be subject to competing rights of a subsequent spouse or spouses.

220. Pension Benefits Act, 1987, S.O. 1987, c. 35, section 52; Pension Benefits Standards Act, 1985, S.C. 1985, c. 40, sections 24 and 25.

Walsh, J., in Marsham v. Marsham²²¹ purported to secure the equalization entitlement by ordering that the member spouse irrevocably designate his wife as beneficiary of any death benefits available under any of his pension plans. He further ordered that should the wife be considered a surviving spouse under those plans, she would be considered the sole surviving spouse and receive all benefits payable, to the exclusion of any other person who would also qualify as a spouse. Orders such as this may not have the desired effect in respect of pensions administered under the federal Pension Benefits Standards Act, 1985 or the Ontario Pension Benefits Act, 1987. This type of order purports to transfer all of the benefit, whenever accrued, to one spouse without regard to entitlement under the pension legislation.

221. Supra, footnote 219.

VII. RECONCILIATION OF THE FAMILY LAW ACT, 1986 AND THE PENSION BENEFITS ACT, 1987

On March 1, 1986, the Family Law Act, 1986 came into force and expressly provided that value of a spouse's interest in a pension was to be included in that spouse's calculation of net family property.

In an attempt to accommodate this inclusion, the Ontario Pension Benefits Act, 1987 and the federal Pension Benefits Standards Act, 1985 have made provision for payment of the pension benefit to the non-pensioned spouse upon marriage breakdown. Each of these statutes prescribes an in specie division of pension benefits. In contrast, the Family Law Act, 1986 prescribes an equalization of value. These fundamental differences in each scheme raise concerns as to the effectiveness of the Family Law Act, 1986 in dealing with the pension interest. For the purposes of this discussion, references to pension legislation will be confined to the Ontario Pension Benefits Act, 1987 as reference to other federal or provincial statutes, would prove cumbersome and would not serve to clarify or raise additional issues.

1. Retrospective Effect of the Ontario Pension Benefits Act,
1987

The Family Law Act, 1986 provides that the equalization provisions of the Act apply unless,

- "(a) an application under section 4 of the Family Law Reform Act was adjudicated or settled before the 4th day of June, 1985; or
- (b) the first spouse's death occurs before the day this Act comes into force".²²²

The retrospective effect of the Act is limited in that an application for equalization shall not be brought after the earliest of the following:

- "(a) two years after the day the marriage is terminated by divorce or judgment of nullity;
- (b) six years after the day the spouse's separate and there is no reasonable prospect that they will resume cohabitation;
- (c) six months after the first spouse's death".²²³

222. Family Law Act, 1986, S.O. 1986, c. 4 as amended, section 70(1).

223. Ibid., section 7(3).

The Ontario Pension Benefits Act, 1987 came into force on January 1, 1988. The predecessor of this Act, the Pension Benefits Act 1967, strictly prohibited any alienation of pension benefits, under any circumstances. It provided as follows:

"Moneys payable under a pension plan shall not be assigned, charged, anticipated, or given as security and are exempt from execution, seizure or attachment, and any transaction purporting to assign, charge, anticipate or give as security such moneys is void".²²⁴

The Ontario Pension Benefits Act, 1987 when it came into force, retained the general prohibition that provides that,

"Every transaction that purports to assign, charge, anticipate or give as security moneys payable under a pension plan is void".²²⁵

This provision does not apply "...to prevent the assignment of an interest in moneys payable under a pension plan...by an order under the Family Law Act, 1986 or by a domestic contract as defined in Part IV of the Act".²²⁶

224. R.S.O. 1980, c. 373, section 27(1).

225. The Pension Benefits Act, 1987, S.O. 1987, c. 35, section 66(1).

226. Ibid, section 66(3).

At the time the Family Law Act, 1986 came into force, until January 1, 1988, when the Ontario Pension Benefits Act, 1987 was proclaimed, any alienation of the pension benefit was strictly forbidden. The issue thus becomes one of whether the Ontario Pension Benefits Act, 1987 has retrospective effect and can accommodate any order made under the Family Law Act, 1986 to include the value of the pension benefits accrued prior to January 1, 1988.

There is a general presumption against the retrospective operation of statutes.

"Retrospective laws are, no doubt, prima facie of questionable policy, and contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law...Accordingly, the court will not ascribe retrospective force to new laws affecting rights, unless by express words or necessary implication it appears that such was the intention of the legislature".²²⁷

227. Phillips v. Eyre (1870), L.R. 6 Q.B. 1; 1- B. & S. 1004; 40 L.J.Q.B. 28; 22 L.T. 869; affg. (1869), L.R. 4 Q.B. 225 (Exchequer Chamber).

It is suggested that the Ontario Pensions Benefits Act, 1987 does not have retrospective effect insofar as there are not words to suggest that any alienation is to apply to a period when alienation was strictly forbidden.

Certain classes of people who separated prior to January 1, 1988 may be caught by the words of the legislation. Even though the permissible date for alienation of the pension benefits may be limited to January 1, 1988, the exemption from the general prohibition is an order or a domestic contract under the Family Law Act, 1986. The following type of scenario could ensue. The spouses separated on April 1, 1980, brought an application for equalization of net family properties under this Act on March 31, 1986 and obtained judgment on or after January 1, 1988. As the court order under the Family Law Act, 1986 was not obtained until after the Ontario Pension Benefits Act, 1987 came into force, the assignment of the pension interest presumably would be valid. However, this order purports to attach the interest or the value of the interest for a time when any attachment or alienation was strictly forbidden.

2. Limits on the Scope and Applications of the Family Law Act, 1986

The essential problem lies in the fact that the Family Law Act, 1986 and the Ontario Pension Benefits Act, 1987 each provide for a competing and perhaps irreconcilable scheme as it pertains to the pension interest.

It is suggested that the Ontario Pension Benefits Act, 1987 limits the means by which a court might use a spouse's pension interest to satisfy an equalization obligation or any portion thereof. The Act provides as follows:

"A domestic contract or an order...is not effective to cause a party to the domestic contract or order to become entitled to more than 50 per cent of the pension benefits, calculated in the prescribed manner, accrued by a member or former member during the period when the party and the member or former member spouse".²²⁸

The Family Law Act, 1986 permits a man and woman who are married to each other or who intend to marry each other to enter into an agreement in which they agree on their respective rights and obligations in respect of ownership or in division of

228. Supra, footnote 226, section 52(2).

property.²²⁹ This agreement, as it pertains to the pension interest, is thus not effective to the extent that it causes the non-member spouse to become entitled to more than fifty per cent of the pension benefit.

The Pension Benefits Act, 1987 speaks in terms of a party becoming "...entitled...to the pension benefits..."²³⁰ This suggests a pension split, for the benefit of the non-titled spouse. It may exclude all other forms of distribution of the pension interest or the value thereof, including the "if and when" order, if such was not considered to cause a party to become entitled to the interest.

The Ontario Pension Benefits Act, 1987 details the time, manner and extent to which the pension interest is to be distributed.²³¹ Under this Act an order or domestic contract is not effective to cause a party to become entitled to more than fifty per cent of the pension interest. Yet under the Family Law Act, 1986, satisfaction of the equalization obligation is not limited by a proportionate share of the interest. It is only limited by the value of the interest itself. This becomes relevant if a spouse is obligated to satisfy an entitlement in excess of the

229. Supra, footnote 223, section 52.

230. Supra, footnote 226, section 52(2).

231. Ibid., section 52(1).

value of fifty per cent of the pension interest. The pension interest is unavailable to satisfy any portion of the entitlement in excess of fifty percent of that interest.

The Ontario Pension Benefits Act, 1987 limits the determinable value of the pension interest insofar as value is calculated in accordance with a manner as prescribed under the Act.²³² This value may differ from that actuarially calculated under the Family Law Act, 1986.

In addition, the two Acts conflict with respect to the date on which that value is determined. Under the Family Law Act, 1986 value is determined, in the instance of separation, as of the date that the parties separate and there is no reasonable prospect that they will resume cohabitation together.²³³ Under the Ontario Pension Benefits Act, 1987 value is calculated for the period when the non-member and member or former member were spouses.²³⁴ There may be a wide gap between the date the parties separate and the date when the parties are no longer spouses,²³⁵ being the date of divorce. In such an instance, the value of the benefit payable may exceed the amount of the equalization entitlement.

232. Ibid., section 52.

233. Supra, footnote 223, section 4(1) 1.

234. Supra, footnote 226, section 52(2).

235. Ibid.

The most irreconcilable feature of all is the fact that the Family Law Act, 1986 speaks of value and the Ontario Pension Benefits Act, 1987 speaks of an in specie transfer of part of the interest. While the Family Law Act, 1986 aims to equalize all net family property values, it may not be able to give effect to that aim given the limitations imposed by competing pension legislation.

3. Summary of the Irreconcilable Features of the Family Law Act, 1986 and the Ontario Pension Benefits Act, 1987

For convenience of reference, the following is a brief summary of the irreconcilable features of the Family Law Act, 1986 and the Ontario Pension Benefits Act, 1987.

Family Law Act, 1986

Pension Benefits Act, 1987

1. Retrospective Effect

-proclaimed in force March 1, 1986 - limitation - no application for equalization after earliest of,
(a) 2 years after divorce or nullity;
(b) 6 years after separation;
(c) 6 month's after first spouse's death.

- time may be extended if:
(a) prima facie grounds for relief;

- proclaimed into force January 1, 1988.

- prior to January 1, 1988, absolute prohibition of pension monies from "execution, seizure or attachment".

(Pension Benefits Act, R.S.O. 1980, c. 373, s. 27(1))

- (b) relief is unavailable
because of delay incurred
in good faith, and;
- (c) no substantial prejudice
because of delay.

2. Sharing

- equalization of net family
property values;
 - the court may award an amount
that is more or less than
half the difference of the
net family properties;
 - domestic contract - may
contract on respective
rights and obligations with
respect to ownership in or
division of property.
- a domestic contract or court
order is not effective to
cause a party to become
entitled to more than 50%
of the pension benefits.

3. Valuation

- no mention of valuation method
Actuarial valuation accepted.
- value to be calculated in a
prescribed manner.

4. Entitlement

- equalization of net family
property value.

- in specie transfer of a
portion of the pension
interest.

5. Eligibility

- value accrued from the date
of marriage to the date of
the triggering event: divorce,
declaration of nullity,
separation, death of a spouse,
application for improvident
depletion.

- benefits earned during the
time when the party and
member or former member were
spouses.

CONCLUSION

The pension interest differs from all other property interests. A true value cannot be placed on this interest as the value cannot be known until a future time when all benefits due under the particular pension plan have been paid. Attempts to place a value on this interest are speculative. Contingencies which may never occur, are assumed. Discounts are applied on the assumption of future facts and events which may not in fact occur.

Aside from the matrimonial home, the pension interest will often be the most valuable interest a spouse owns. If an equalization entitlement substantially reflects this interest a spouse will generally not have sufficient other assets to satisfy the entitlement.

To date, the Ontario Pension Benefits Act, 1987 and the federal Pension Benefits Standards Act, 1985 have attempted to reconcile with the Family Law Act, 1986 by assigning part of the interest in the pension benefit credit. But each Act has retained control with respect to the timing, extent and manner of any such split. The Family Law Act, 1986 expresses no paramount authority over that of the pension legislation. Accordingly, any distribution can only be effected to the extent permitted by the particular pension statute in question. A distribution order under the Family Law Act, 1986 must accord with the manner of distribution provided under the particular pension legislation.

It is suggested that the Family Law Act, 1986 should be amended to provide for the separate and specific treatment that the value and nature of a pension interest warrant. This could be achieved by removing the pension interest from the equalization process.

It is submitted that pension legislation be amended to provide for an in specie transfer of a portion of the pension interest upon marriage breakdown. If a benefit becomes available to one party, a proportionate share then becomes available to the other party. (This assumes amendment to the various pension statutes to expand the definition of spouse to protect the non-titled party upon divorce).

This would allow the equalization process to function as it was designed to function. An equalization entitlement could be realized, for the most part, by lump sum payment, within the prescribed time limits. This would afford the parties a clear break from each other. In addition, the parties would avoid the cost of actuarial valuation and could eliminate protracted litigation concerning the sharing of the pension interest. It further avoids the situation whereby one spouse acquires the matrimonial home in satisfaction of the equalization entitlement while the other is left with nothing but a prospective pension benefit.

It is suggested that the pension interest cannot be dealt with equitably under the process envisioned by the Family Law Act, 1986. Consideration of this interest within the process is both costly and uncertain to both the titled and non-titled party. An in specie transfer is the most fair and cost effective manner of dealing with this interest.

APPENDIX "A"

Family Law Act, 1986, S.O. 1986, c. 4 as amended

FAMILY PROPERTY

4(1) In this part "net family property" means the value of all property, except property described in subsection (2), that a spouse owns on the valuation date, after deducting,

(a) the spouse's debts and other liabilities, and

(b) the value of property, other than a matrimonial home, that the spouse owned on the date of the marriage after deducting the spouse's debts and other liabilities, calculated as of the date of the marriage;

"property" means any interest, present or future, vested or contingent, in real or personal property and includes,

(a) property over which a spouse has, alone or in conjunction with another person, a power of appointment exercisable in favour of himself or herself,

(b) property disposed of by another spouse but over

which the spouse has, alone or in conjunction with another person, a power to revoke the disposition or a power to consume or dispose of the property, and

- (c) in the case of a spouse's rights under a pension plan that have vested, the spouse's interest in the plan including contributions made by other persons;

"valuation date" means the earliest of the following dates:

1. The date the spouses separate and there is no reasonable prospect that they will resume cohabitation.
 2. The date a divorce is granted.
 3. The date the marriage is declared a nullity.
 4. The date one of the spouses commences an application based on subsection 5(3) (improvident depletion) that is subsequently granted.
 5. The date before the date on which one of the spouses dies leaving the other spouse surviving, 1986, c. 4, s. 4(1); 1986, c. 35, s. 1(1)
- (2) The valuation of the following property that a spouse

owns on the valuation date does not form part of the spouse's net family property:

1. Property, other than a matrimonial home, that was acquired by gift or inheritance from a third person after the date of marriage.
2. Income from property referred to in paragraph 1, if the donor or testator has expressly stated that it is to be excluded from the spouse's net family property.
3. Damages or a right to damages for personal injuries, nervous shock, mental distress or loss of guidance, care and companionship, or the part of a settlement that represents those damages.
4. Proceeds or a right to proceeds of a policy of life insurance, as defined in the Insurance Act, that are payable on the death of the life insured.
5. Property, other than a matrimonial home, into which property referred to in paragraphs 1 to 4 can be traced.
6. Property that the spouses have agreed by a domestic contract is not to be included in the spouse's net

family property. 1986, c. 4, s. 4(2); 1986, c. 35,
s. 1(2)

- (3) The onus of proving a deduction under the definition of "net family property" or an exclusion under subsection (2) is on the person claiming it.
- (4) When this section requires that a value be calculated as of a given date it shall be calculated as of close of business on that date.
- (5) If a spouse's net family property as calculated under subsections (1), (2) and (4) is less than zero it shall be deemed to equal zero. 1986, c. 3, s. 4(3-5)
- 5(1) When a divorce is granted or a marriage is declared a nullity, or when the spouses are separated and there is no reasonable prospect that they will resume cohabitation, the spouse whose net family property is the lesser of the two net family properties is entitled to one-half the difference between them.
- (2) When a spouse dies, if the net family property of the deceased spouse exceeds the net family property of the surviving spouse, the surviving spouse is entitled to one-half the difference between them.

- (3) When spouses are cohabiting, if there is a serious danger that one spouse may improvidently deplete his or her net family property, the other spouse may on an application under section 7 have the difference between the net family properties divided as if the spouses were separated and there were no reasonable prospect that they would resume cohabitation.
- (4) After the court has made an order for division based on subsection (3), neither spouse may make a further application under section 7 in respect of their marriage.
- (5) Subsection (4) applies even though the spouses continue to cohabit, unless a domestic contract between the spouses provides otherwise.
- (6) The court may award a spouse an amount that is more or less than half 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,
- (a) a spouse's failure to disclose to the other spouse debts or other liabilities existing at the date of the marriage;

- (b) the fact that debts or other liabilities claimed in reduction of a spouse's net family property were incurred recklessly or in bad faith;
- (c) the part of a spouse's net family property that consists of gifts made by the other spouse;
- (d) a spouse's intentional or reckless depletion of his or her net family property;
- (e) the fact that the amount a spouse would otherwise receive under subsection (1), (2) or (3) is disproportionately large in relation to a period of cohabitation that is less than five years;
- (f) the fact that one spouse has incurred a disproportionately larger amount of debts or other liabilities than the other spouse for the support of the family;
- (g) a written agreement between the spouses that is not a domestic contract; or
- (h) any other circumstance relating to the acquisition, disposition, preservation, maintenance or improvement of property.

(7) The purpose of this section is to recognize that child care, household management and financial provision are the joint responsibilities of the spouses and that inherent in the marital relationship there is equal contribution, whether financial or otherwise, by the spouses to the assumption of these responsibilities, entitling each spouse to the equalization of the net family properties, subject only to the equitable considerations set out in subsection (6). 1986, c. 4, s. 5.

9(1) In an application under section 7, the court may order,

(a) that one spouse pay the other spouse the amount to which the court finds that spouse to be entitled under this Part;

(b) that security, including a charge on property, be given for the performance of an obligation imposed by the order;

(c) that, if necessary to avoid hardship, an amount referred to in clause (a) be paid in instalments during a period not exceeding ten years or that payment of all or part of the amount be delayed for a period not exceeding ten years; and

(d) that if appropriate to satisfy an obligation imposed by the order,

(i) property be transferred to or in trust for or invested in a spouse, whether absolutely, for life or for the term of years, or

(ii) any property be partitioned or sold.

(2) The court may, at the time of making an order for instalment or delayed payments or on motion at a later time, order that the spouse who has the obligation to make payments shall,

(a) furnish the other spouse with specified financial information, which may include periodic financial statements; and

(b) permit inspections of specified property of the spouse by or on behalf of the other spouse, as the court directs.

(3) If the court is satisfied that there has been a material change in the circumstances of the spouse who has the obligation to make instalment or delayed payments, the court may on motion, vary the order, but shall not vary the amount to which the court found the spouse to be entitled under this Part.

- (4) Subsections (3) and 2(8) (extension of times) do not permit the postponement of payment beyond the ten year period mentioned in Clause 1(c). 1986, c. 4, s. 9.

APPENDIX "B"

Pension Benefits Act, 1987, S.O. 1987, c. 35

- 52(1) A domestic contract as defined in Part IV of the Family Law Act, 1986, or an order under Part I of that Act is not effective to require payment of a pension benefit before the earlier of,
- (a) the date on which payment of the pension benefit commences; or
 - (b) the normal retirement date of the relevant member or former member.
- (2) A domestic contract or an order mentioned in subsection (1) is not effective to cause a party to the domestic contract or order to become entitled to more than 50 per cent of the pension benefits, calculated in the prescribed manner, accrued by a member or former member during the period when the party and the member or former member were spouses.
- (3) If payment of a pension or a deferred pension is divided between spouses by a domestic contract or an order mentioned in subsection (1), the administrator is discharged on making payment in accordance with the domestic contract or order.

(4) If a domestic contract or an order mentioned in subsection (1) affects a pension, the administrator of the pension plan shall revalue the pension in the prescribed manner.

(5) A spouse on whose behalf a certified copy of a domestic contract or order mentioned in subsection (1) is given to the administrator of a pension plan has the same entitlement, on termination of employment by the member or former member, to any option available in respect of the spouse's interest in the pension benefits as the member or former member named in the domestic contract or order has in respect of his or her pension benefits.

APPENDIX "C"

Pension Benefits Standards Act, 1985, S.C. 1985, c. 40

Remarriage of Former Spouse or Surviving Spouse

24. A pension benefit payable to the former spouse of a member or former member or to the surviving spouse of a deceased member or former member shall not terminate by reason only of the remarriage of the former spouse or surviving spouse.

Distribution of Pension Benefits and Pension Benefit Credits on Divorce, Annulment or Separation

25. (1) In this Section,

"provincial property law" means the law of a province relating to the distribution, pursuant to court order or agreement between the spouses, of the property of the spouses on divorce, annulment or separation;

- (a) in the definition "provincial property law" in this subsection, the same meaning that it has in the applicable provincial property law, regardless of whether provincial property law uses the word "spouse" or uses another expression, and

(b) in subsection (2) to (8),

(i) in relation to a court order, the same meaning that it has in the applicable provincial property law, regardless of whether the provincial property law uses the word "spouse" or uses another expression, or

(ii) in relation to an assignment or agreement referred to in this section, the same meaning as in the definition "spouse" in subsection 2(1).

(2) Subject to this section, pension benefits, pension benefit credits and any other benefits under a pension plan shall, on divorce, annulment or separation, be subject to the applicable provincial property law.

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

(4) Notwithstanding anything in this section or in provincial property law, a member or former member of a pension plan may

assign all or part of that person's pension benefit, pension benefit credit or other benefit under the plan to that person's spouse, effective as of divorce, annulment or separation, and in the event of such assignment the spouse shall, in respect of the assigned portion of the pension benefit, pension credit or other benefit, be deemed for the purposes of this Act, except subsection 21(2) to (6),

(a) to have been a member of that pension plan, and

(b) to have ceased to be a member of that pension plan as of the effective date of the assignment,

but a subsequent spouse of that spouse is not entitled to any pension benefit, pension benefit credit or other benefit under the pension plan in respect of that assigned portion.

(5) Where, pursuant to this section, all or part of a pension benefit, pension benefit credit or other benefit under a pension plan of a member or former member is required to be distributed to that person's spouse under a court order or an agreement between the spouses, the administrator, on receipt of

(a) a written request from either the member or former member or that person's spouse that all or part of the pension benefit, pension credit or other benefit, as the case may

be, be distributed in accordance with the court order or the agreement, and

(b) a copy of the court order or agreement,

shall determine and henceforth administer the pension benefit, pension benefit credit or other benefit, as the case may be, in the prescribed manner, in accordance with the court order or the agreement; however, in the case of a court order, the administrator shall not administer the pension benefit, pension benefit credit or other benefit in accordance with the court order until all appeals therefrom have been finally determined or the time for appealing has expired.

(6) On receipt of a request referred to in subsection (5), the administrator shall notify the non-requesting spouse of the request and shall provide that spouse with a copy of the order or agreement submitted in support of the request, but this requirement does not apply in respect of a request or an agreement received by the administrator in a form or manner that indicates that it was jointly submitted by the two spouses.

(7) 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 under a court order or an agreement between the

spouses, 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, 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 benefits.

- (8) Notwithstanding subsection (2), the aggregate of
- (a) the actuarial present value of the pension benefit or other benefit paid to the member or former member, and
 - (b) the actuarial present value of the pension benefit or other benefit paid to the spouse of the member or former member

pursuant to this section shall not be greater than the actuarial present value of the pension benefit or other benefit, as the case may be, that would have been payable to the member or former member had the divorce annulment or separation not occurred.

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