

Part 6 – Pension Division

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The British Columbia Law Institute, in its May 2006 Report, *Pension Division on Marriage Breakdown: A Ten Year Review of Part 6 of the Family Relations Act*, concluded that the pension division provisions of the Family Relations Act work well, but there are some important areas where refinements and additional guidance is required.

In some cases the complexity of pension plans means that the current provisions do not cover every eventuality, causing losses to former spouses and the risk of professional negligence claims against lawyers. Similarly, any uncertainty in the law makes pension administration more difficult and costly.

The changes in this Part are designed to clarify the law of pension division and to protect the economic well-being of both married and common-law spouses. In combination, the changes will simplify separating the economic lives of former spouses, while promoting the financial security of both.

Division 1 – General Matters

This division defines terms used in this part and makes it clear that the part applies to effect a division of pension benefits unless an agreement or order provides otherwise. It also sets out the rules for bringing old agreements and orders under this part and for designating a spouse as a limited member.

Section 110 Definitions

- Section 110 carries forward and expands upon section 70 of the Family Relations Act.
- It provides interpretive guidance for terms used in Part 6 – Pension Division.

Section 111 Benefits to be determined in accordance with this Part

- Section 111 carries forward section 71(1) and (3) of the Family Relations Act.
- It provides that if a spouse is entitled to an interest in a member's pension benefits under Part 5, this part governs determining a spouse's share of benefits under a pension, unless an agreement or order provides otherwise.
- If an order or agreement doesn't mention the benefits, they are deemed to belong to the member, although this would be subject to the court's jurisdiction under Part 5.

Section 112 Original agreements and orders

- Section 112 consolidates and modifies sections 76(4), 80(2), 80(2.1) and 80(2.2) of the Family Relations Act by establishing rules for determining how orders and agreements made under that Act for pension division can be incorporated into the rules of Part 6 of the Family Law Act.

- The problem is that many pre-Family Law Act and pre- Family Relations Act agreements and orders provide for dividing a defined contribution account by a deferred division that will take place when the member dies, terminates employment or retires. The spouse’s share is often determined on a pro rata basis (called the “Rutherford formula” or a “Rutherford Order”) that takes into account pensionable service accruing to the date of pension commencement. Such a formula cannot apply, without modification, to a defined contribution account, because a defined contribution account is divided by an immediate transfer of the spouse’s share. This provision, to be supplemented by the regulations, will provide a template for bringing these arrangements under the umbrella of Part 6 of the Family Law Act.
- This change was a recommendation in the BCLI report, Pension Division on Marriage Breakdown: A Ten Year Review of Part 6 of the Family Relations Act (“BCLI Report”).
- A defined contribution account consists solely of contributions made to the plan and net investment returns. When the member retires, the funds in the account can be used in several ways to provide retirement income: by making withdrawals in the same way as under a Life Income Fund, for example, or by using the funds to purchase an annuity for the member.

Section 113 Designation of limited members

- Section 113 carries forward and enlarges upon subsections 72(1), (2) and (5) of the Family Relations Act.
- The section sets out the situations in which a spouse may become a kind of member of a plan (called a “limited member”) and also specifies the rights of a limited member. A spouse is entitled to become a limited member if the spouse will receive a share of benefits at a later date or over time.
- This section recognizes that a spouse must be a limited member in more situations than was recognized under the Family Relations Act, such as for dividing benefits in a supplemental plan, or if the administrator of a defined contribution account consents to the spouse keeping benefits in the plan.
- A spouse ceases to be a limited member, when the spouse’s entire share is transferred from the plan.

Division 2 – Division of Benefits in Local Plans

This division sets out the rules for dividing benefits in local plans both before and after pension commencement. A “local plan” is defined in section 110 and, very broadly, includes plans in which the member has accrued benefits from employment in B.C. There are rules covering local plans where benefits:

- are determined under a defined contribution provision;
- are determined under a benefit formula provision;
- are determined under a combination of a defined contribution and a benefit formula provision; and
- are being paid to a member as a pension.

Section 114 Local plan – benefits determined under defined contribution provision

- Section 114 carries forward section 73 of the Family Relations Act which provides that if a defined contribution account in a local plan is to be divided before the member retires, the division is by immediate transfer of the spouse’s interest to a pension vehicle (e.g., an RRSP) for the spouse, unless the administrator agrees to continue to administer the spouse’s share.
- The Family Relations Act did not expressly deal with the rights a former spouse had when a member receives benefits from a defined contribution plan by making withdrawals.
- Under the Family Law Act, immediate transfer options are used, so long as the benefits remain in the defined contribution account, unless the administrator consents to continue administering the spouse’s share in the plan. If the funds in the defined contribution account have already been used to purchase an annuity for the member, division is under section 117.
- The section adopts the BCLI Report recommendation.
- **The value of a defined contribution account** consists solely of contributions made to the plan and net investment returns, so that its value is determined by the account balance. Because of this, it can be divided immediately by a transfer from the plan. This is in contrast to where benefits are determined, in whole or in part, by a benefit formula provision, where the true value of the benefits is often not reached until the member is eligible to have the pension commence, and so the division is deferred until that time.

Section 115 Local plan – benefits determined under benefit formula provision

- Section 115 is a modified version of section 74 of the Family Relations Act and provides rules dividing benefits in a local plan that are determined under a benefit formula provision where the pension division arrangements take place before pension commencement. If the pension has commenced, the division is under section 117.
- Under section 74 of the Family Relations Act, a spouse received a share by becoming a limited member of the plan. As a limited member, the spouse could choose between taking

the share by a lump sum transfer (to a locked-in RRSP, for example), or as a separate pension. The lump sum transfer option was available at any time after the member became eligible to have the pension commence. In contrast, the separate pension option was available only if the spouse waited until the member chose to have the pension commence.

- Under the Family Law Act, the spouse no longer has to wait until the pension commences to choose the separate pension option, and like the lump sum transfer, it is available once the member is eligible to have the pension commence.
- The value of benefits determined by a **benefit formula provision** is often quite different from the contributions made to a plan (and net investment returns on those contributions). For these plans, the future pension that will be paid is determined by the benefit formula. Part 6 specifies that the division take place no earlier than when the member becomes eligible to have the pension commence because, in most cases, this places a more accurate value on the former spouse's share (division before that date would often produce a substantially discounted value).

Section 116 Local hybrid plans

- A **hybrid plan** is a plan where benefits are determined by a combination of a defined contribution provision and a benefit formula provision, or, where there is an option to choose between these provisions at pension commencement (either by the member's election or the plan rules).
- Section 116 carries forward and amplifies section 75 of the Family Relations Act which provides the options available to a spouse for dividing benefits in a hybrid plan where the pension division arrangements take place before pension commencement.
- This section recognizes more situations that can arise where benefits are determined by some combination of a defined contribution provision and a benefit formula provision.
- Section 75 of the Family Relations Act was structured on the assumption that the main benefit is determined by a benefit formula provision and the additional portion is determined by a defined contribution provision. However, there are some hybrid plans that have the opposite structure, with the main benefit determined by defined contribution principles and the additional portion based on defined benefit principles. In some cases, the plan provides rules that direct when all of the benefits are determined by one provision or the other, and, in other cases members are permitted to make this choice at pension commencement. Section 116 of the Family Law Act provides rules for all of these situations.
- The section adopts the BCLI Report recommendation.

Section 117 Local plans after pension commencement

- Section 117 carries forward section 76(1), (1.1) and (2) of the Family Relations Act.
- It provides rules for dividing benefits in a local plan where the pension consisting of lifetime periodic payments has commenced (different rules apply if the pension consists of withdrawals from a defined contribution account).
- In this case, the monthly income stream is divided between the parties. If the spouse dies first, the member resumes receiving all the benefits. If the member dies first, the spouse receives the survivor benefits payable under the form of pension elected by the member.
- More direction concerning the spouse's entitlement to the survivor benefits is set out in section 124(5). Under that section, if the member's pension is a joint pension with a spouse, the spouse owns the survivor benefits. A limited member who is a beneficiary of survivor benefits under a pension is entitled to all of the survivor benefits (subject to the entitlement, if any, of another limited member).

Division 3 – Division of Other Benefits

This division sets out the rules for dividing benefits in the following cases (which are not covered in Division 2):

- annuities;
- benefits under a supplemental pension plan;
- benefits for specified individuals;
- disability benefits; and
- benefits in an extraprovincial plan.

Section 118

- Section 118 clarifies that an annuity privately purchased by a member and an annuity purchased by an administrator on behalf of a member are both to be treated in the same way, by the rules under section 117 that apply when a pension consisting of lifetime periodic payments has commenced (different rules apply if the pension consists of withdrawals from a defined contribution account).
- The Family Relations Act pension division rules have been interpreted as applying to an annuity purchased by a plan administrator on behalf of a member, but there is some doubt as to whether it applies to a privately purchased annuity. In principle, there is no reason why the pension division rules should not apply equally in both cases.
- The section adopts the BCLI Report recommendation.

Section 119 Supplemental pension plans

- Section 119 provides detailed rules governing the division of benefits that are supplemental to benefits in a local plan.
- Under the Family Relations Act, benefits in a supplemental plan are divided by the same rules that apply to extraprovincial plans – the former spouse is entitled to a share of the income stream when it becomes payable.
- The problem with this approach is that it is usually not possible to provide the former spouse with any security for that share and payment typically ends when the member dies.
- Under the Family Law Act, in contrast, if the pension has not yet commenced, the former spouse is entitled to take the share as a separate pension. If the pension has already commenced, then the same rules under section 117 that apply to pensions being paid under a local plan apply. It is also open to the administrator to consent to using any of the rules that would apply had the benefits been under a local plan.
- The spouse's share of the supplemental benefits is subject to the same terms and conditions as the member's share. If the member's share is adjusted, suspended or terminated, the spouse's share is adjusted, suspended or terminated as well. In these cases, recourse is provided in section 120.

- The section adopts the BCLI Report recommendation.

Section 120 Compensation for lost supplemental benefits

- Section 120 establishes rules for protecting a spouse from loss of benefits in a supplemental pension plan caused an act or omission by a member. If a spouse's benefits are adjusted, suspended or ended, and the member is to blame, the spouse has a claim for compensation.
- The section adopts the BCLI Report recommendation.

Section 121 Benefits for specified individuals

- Section 121 provides rules for dividing pensions for specified individuals.
- Under the Family Relations Act, just as with benefits in a supplemental plan, these were dealt with by the rules that apply to benefits in extraprovincial plans and subject to some important limitations. (See the notes to section 119).
- Under the Family Law Act, if the member has benefits in a plan for specified individuals, the spouse becomes a limited member of the plan and receives the share by a separate lifetime pension when the member elects to have the pension commence. Other options are also available, with the consent of the administrator.

Section 122 Disability benefits

- Section 122 provides rules that apply when an agreement or court order provides for dividing disability benefits payable under a pension plan.
- The Family Relations Act also addresses dividing disability benefits, by stipulating that after the spouse reaches age 60, these are subject to the rules that apply after pension commencement, leaving in doubt what arrangements are possible before the former spouse reaches that age.
- Under the Family Law Act, there is no age limit for when a former spouse is entitled to receive a share of disability benefits payable under a plan.
- Under British Columbia law, disability benefits, with a few exceptions such as WCB benefits, are considered to be divisible between spouses on marriage breakdown. The court generally reapportions 100% of disability benefits to the disabled person, but in those cases where it is appropriate for the former spouse to receive a share, the Family Law Act provisions will allow that.
- The section adopts the BCLI Report recommendation.

Section 123 Extraprovincial Plans

- Section 123 carries forward section 77 of the Family Relations Act which sets out the rules for dividing benefits in an extraprovincial plan. Very broadly, these are plans where the benefits accrued from employment outside B.C.

- In these cases, section 123 provides for the application of the pension division rules set out in the legislation governing the plan. In appropriate cases, however, a B.C. court may order that the monthly income stream be divided between the parties.
- This section also addresses the former spouse's entitlement if survivor benefits are payable. The member must, if possible, designate the spouse as beneficiary under the plan to the extent of the spouse's interest.

Division 4 – Death of Member or Limited Member

This division provides rules for dealing with issues respecting the division of benefits when a member or limited member dies.

Section 124 Death of member or limited member

- Section 124 carries forward and clarifies section 78 of the Family Relations Act.
- If the member dies before pension commencement and before the limited member receives the proportionate share, the deferral of the division ends, and the limited member's share of the benefits must be determined as of the day before the death of the member.
- This is an important change from the Family Relations Act, which instead gives the former spouse a share of the survivor benefits payable on the death of a member. Survivor benefits can vary significantly, and using that approach means that the former spouse could conceivably receive far less and, in some cases, far more, than if the benefits were divided during the member's lifetime.
- Deferring receipt of a share of the benefits should not result in overcompensating or under-compensating the limited member if the member dies before pension commencement and before the limited member receives the proportionate share of the benefits. The Family Law Act provision means that the same result applies whether the benefits are divided before or after the member's death.
- The section adopts the BCLI Report recommendation.
- As under the current Family Relations Act, if the limited member dies before receiving the proportionate share, it is paid to the limited member's estate.

Section 125 Entitlement to preretirement survivor benefits

- Section 125 revises the policy of section 72 (3) and (4) of the Family Relations Act that impacts a member's authority to designate beneficiaries. Under the Family Relations Act there was a question concerning the extent to which a member may change a beneficiary designation after a spouse was designated a limited member.
- Section 125 provides that entitlement to the member's share of any survivor benefits is determined by the usual principles that apply (which are, first to the member's spouse; if there is not spouse, to the beneficiary designated by the member; and, if there is no beneficiary, to the member's estate).
- The former spouse entitled to a proportionate share of benefits under Part 6 is fully secured for the proportionate share. There is no need to provide additional security through a beneficiary designation. This change will prevent the former spouse from receiving an unintended windfall. The portion of the benefits over and above the former spouse's share will go to another beneficiary named by the member (for example, a child or other dependent) or to the member's estate.
- The section adopts the BCLI Report recommendation.

Section 126 Waiving pension or postretirement survivor benefits

- Section 126 clarifies rules for waiving a share of benefits, including survivor benefits.
- Their counterpart is found in section 80(1)(b) of the Family Relations Act, which permits a spouse to waive any claim to benefits. By implication, this would also permit a personal representative of a deceased limited member to waive payment to the limited member's estate. (In most cases where this would be considered, it will be the member's children who want to make sure the surviving parent has adequate retirement income.) Section 126 expressly provides that a personal representative can make this waiver.
- This section also permits a spouse entitled to survivor benefits under a pension that has commenced to waive those benefits, provided it is done expressly. (Payments would still be made to the spouse, who would have to pay them to the person entitled, unless the administrator consents to do this instead.)

Division 5 – Other Matters Respecting Pension Division

This division provides rules for dealing with other issues respecting the division of benefits in pension plans:

- agreements respecting division;
- determining compensation;
- reapportioning benefits;
- clarifying division of benefits;
- changing division of benefits in unusual circumstances; and
- dividing benefits retroactively.

Section 127 Agreements respecting division

- Section 127 carries forward, with changes, sections 62, 75.1(b) and section 80(1) of the Family Relations Act. This section allows parties to agree that the spouse receive more than half the benefits and to waive CPP credit splitting.
- This is in contrast to the Family Relations Act, which provides that an arrangement giving a spouse more than a half share can only be done by court order. In practice, court orders to this effect were made by consent, so that the requirement, quite apart from protecting either party, merely added an unnecessary layer of costs and wasted registry time.

Section 128 Determining compensation

- Section 128 carries forward sections 80(3) and (4) of the Family Relations Act and applies where the parties agree, or the court orders, that the spouse's share of benefits be satisfied by a compensation payment. The payment must be calculated as prescribed under the regulations, although it is possible for the parties to agree, or the court to order, that the regulations do not apply.
- This section also provides that spouse can agree with the administrator to receive the share by lump sum transfer in circumstances not provided for under the legislation. In that case, however, the lump sum transfer must be calculated as prescribed under the regulations, unless the court orders otherwise.

Section 129 Reapportioning benefits

- Section 129 carries forward section 75.1(a) of the Family Relations Act.
- This section provides the Supreme Court with the discretion to reapportion entitlement to benefits under a plan in cases where it is necessary, appropriate or convenient and the circumstances would otherwise require the member to pay support, or a share of the benefits as they are received.

Section 130 Clarifying division of benefits

- Because pensions are complex financial vehicles, there may be circumstances where questions arise about the parties' arrangements, or the requirements of the Family Law Act.
- If those questions arise, section 130 authorizes the Supreme Court, on an application by the member or the spouse, to give directions or make additional orders at any time to facilitate or enforce the division of the benefits between them.

Section 131 Changing division of benefits in unusual circumstances

- Section 131 carries forward section 75.1(1)(b) of the Family Relations Act. It empowers the Supreme Court to revise pension division arrangements to depart from the usual Part 6 rules if those rules are inappropriate because of the terms of the plan, or changes in those terms since the agreement or order to divide the benefits was made.
- The section clarifies that an order directing the method of division is binding on the administrator. The administrator must be served with notice of an application and permitted to make submissions when the application is heard.

Section 132 Retroactive division of benefits

- There are significant differences between the rules that apply to benefits before pension commencement and after lifetime periodic payments have commenced (although there is no difference if the pension consists of withdrawals from a defined contribution account).
- Before pension commencement, the former spouse will receive a secure share of the benefits (by a lump sum transfer, or in the form of a separate pension). After pension commencement, typically the former spouse is entitled to only a share of the income stream, which will end when the member dies.
- If the parties have not sorted out the pension division arrangements before pension commencement, the former spouse will usually apply for a restraining order. Delaying commencement of the pension can prejudice both parties (because it means foregoing monthly payments), unless arrangements can be made so that the division is retroactive to a reserved pension commencement date.
- Section 132 establishes rules for dealing with these situations. It provides for retroactive division if the conditions set out in the provision are met.
- The section adopts the BCLI Report recommendation.

Division 6 – Administrative Matters

This division governs administrative matters respecting the division of benefits in pension plans.

Section 133 Information from plan

- Section 133, carries forward section 82 of the Family Relations Act which sets out the rules relating to information that an administrator may provide to a spouse who claims an interest in benefits. But the section (and the regulations) provide more direction concerning the treatment of private information.
- The section adopts the BCLI Report recommendation.

Section 134 Agreement or order required for division of benefits

- Section 134 clarifies that Part 6 does not apply unless there is an agreement or court order dividing the benefits between the spouses. (In contrast, under the Family Relations Act, at one time arguments were often made that Part 6 applied even in the absence of an order or agreement.)
- The section adopts the BCLI Report recommendation.

Section 135 Information required by plan

- Section 135 ensures that an administrator can insist on being provided with the information necessary to administer the division of benefits. This can include a requirement to provide satisfactory evidence about entitlement.
- The parties or their lawyers do not always have the full name of the pension plan in question. For example, the member may know the plan only by some short form designation, or the name of the plan may have changed. As a practical matter, identifying the member's employment in the agreement or order will be sufficient to identify the pension plan in most cases.
- The section adopts the BCLI Report recommendation.

Section 136 Notice or waiver

- Section 137 provides that where a notice or waiver is required under Part 6, it must be given in the form and in the manner set out in the regulations.

Section 137 Implementing division of benefits

- Section 137 sets out the rules administrators must follow with respect to dividing benefits. It provides that, except where retroactive division rules apply, the administrator is required to divide only those benefits that become payable within a prescribed period after the administrator receives the relevant information set out in this provision.
- This provision also sets out circumstances in which the administrator may delay division because to do so would be advantageous to a spouse.
- The section adopts the BCLI Report recommendation.

Section 138 Adjustment of member's pension

- Section 138 carries forward section 84 of the Family Relations Act, with minor wording changes. It provides that after benefits are divided, the administrator must adjust the member's benefits as required under the regulations.

Section 139 Transfer of commuted value of separate pension or share

- Section 139 carries forward section 79 of the Family Relations Act, which authorizes an administrator to require a limited member to accept a transfer of commuted value in any case where the administrator could require a member to do so under the Pension Benefits Standards Act. This will usually be a case where the limited member's share is less than a prescribed amount.
- Section 139 goes one step further than this, by also allowing a limited member to apply for a transfer of the commuted value of the limited member's share in any circumstances that a member may do so under the Pensions Benefits Standards Act.
- This section is intended to ensure that the transfer options and requirements are the same for both limited members and members.

Section 140 Administrative costs

- Section 140 carries forward, with revisions, section 81 of the Family Relations Act. Like the Family Relations Act, section 140 permits administrators to charge an administrative fee. Unlike the Family Relations Act, section 140 also permits the administrative fee to be deducted from the payment of benefits.
- The Family Law Act also updates the fees that may be charged, which have not changed since Part 6 of the Family Relations Act came into effect in 1996. The administrative fees were never intended to fully cover the costs of administering pension division arrangements. The purpose of increasing the fees is to bring them to a level that constitutes a realistic contribution towards the costs of administering the pension division but not a complete indemnity. The fees will be set by regulation.

Section 141 Income tax

- Section 141 carries forward and expands on section 76(3) of the Family Relations Act which says that where a plan makes separate payments to a member and spouse, the plan must make separate source deductions from the spouse's share and the member's share.
- This section clarifies that the member and spouse are each responsible for paying income tax on their respective shares of the benefits. It also provides that a person required to pay income tax on the other's share can claim reimbursement from other.
- The requirement to reimburse for income tax paid on the other person's behalf is common in agreements and orders and setting it out as a legislative requirement will simplify the drafting of agreements and orders.
- The section adopts the BCLI Report recommendation.

Section 142 Claim does not relieve duty to administer benefits

- Section 142 provides that a spouse's unperfected claim to an interest in a member's benefits does not relieve the administrator of the duty to act on directions given by the member. The obligation is on the spouse to perfect the claim to an interest. Merely stating that a claim is being made is not a ground for putting everything on hold until that claim is established.
- If, in these circumstances, a spouse wants to preserve options, it will be necessary get the member to agree or to apply for a restraining order. Otherwise, the administrator's obligation is to administer the pension benefits as required under the plan text and governing legislation.
- This does not necessarily mean that an administrator owes no duties to the spouse. Section 143 provides for circumstances where an unperfected claim places a notice obligation on the administrator.
- The section adopts the BCLI Report recommendation.

Section 143 Administrator's duties

- Section 143 carries forward the policy of section 85 of the Family Relations Act and clarifies that an administrator who, in good faith, takes specified steps will not be liable to a spouse, member or other person.
- The need to limit the administrator's exposure to liability is important because of:
 - the dollar amount involved in dividing benefits (often this is the most valuable family asset);
 - the complexity of family law; and
 - the complexity of pension plans.
- This change addresses BCLI recommendations to provide administrators with greater protection from liability to a spouse. It is also intended to provide more direction on how an administrator can discharge obligations owed to a spouse claiming an interest.

Section 144 Trust of survivor and pension benefits

- Section 144 expands upon section 83 of the Family Relations Act , which provides that a person who receives survivor benefits in which a spouse has an interest, holds those benefits in trust for the spouse.
- Experience has highlighted the need for a trust in any case where a third party receives pension benefits belonging to the spouse, and also cases where the spouse receives a greater share than intended.
- The section adopts the BCLI Report recommendation.

Section 145 No further entitlement after division of benefits

- Section 145 clarifies the general policy that, after having received the share of the member's benefits, a spouse or limited member has no further entitlement to any share of those benefits.
- The Pension Benefits Standards Act confers various rights on a person who qualifies as a spouse, such as survivor benefits, but provides that entitlement ends two years after separation, or after the benefits are divided under the Family Relations Act. This section consolidates this principle, and also confirms that it applies in circumstances where a share of the benefits is waived.
- The section adopts the BCLI Report recommendation.