

FTR Now

Ontario Court of Appeal Decision Rewrites the Pension Pre-Retirement Death Benefit Regime

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On October 31, 2012, a majority of the Ontario Court of Appeal awarded the pre-retirement death benefit payable under an Ontario registered pension plan to a member's designated beneficiaries rather than to his common law spouse. The majority's decision in [*Carrigan v. Carrigan Estate*](#) ("*Carrigan*") is a departure from the pension industry's widely held interpretation of section 48 of the *Pension Benefits Act* ("PBA"). In this *FTR Now*, we discuss this decision, which is of critical importance to all administrators of pension plans with Ontario members.

BACKGROUND

The facts of the case are not atypical. Mr. Carrigan married Mrs. Carrigan in 1973. They had two daughters together. Mr. Carrigan participated in a workplace registered pension plan and in 2002 he designated Mrs. Carrigan and their daughters as his beneficiaries under the pension plan. Mr. and Mrs. Carrigan separated in or around 1996, but they never divorced or formalized their separation by a separation agreement or court order. Mr. Carrigan began living openly with Ms. Quinn in 2000 and they continued to do so until Mr. Carrigan's death in 2008. The Ontario Court of Appeal found as fact that Ms. Quinn and Mr. Carrigan were common law spouses at the date of Mr. Carrigan's death. Mr. Carrigan died prior to retirement such that a pre-retirement death benefit was payable from the pension plan.

Both Ms. Quinn and Mrs. Carrigan claimed entitlement to the pre-retirement death benefit payable from the pension plan. Mrs. Carrigan argued that the term "spouse" could only apply to one person under the applicable PBA provisions, and that the claim of a married spouse takes priority over the claim of a common law spouse. Ms. Quinn argued that multiple persons could qualify as a "spouse" under the PBA and that the claim of the married spouse who is living separate and apart from themember does not take precedence over a common law spouse's claim. At trial, Ms. Quinn was successful. Mrs. Carrigan appealed this decision.

THE DECISION

THE ISSUE

The issue before the Ontario Court of Appeal was the statutory interpretation of section 48 of the PBA. The PBA definition of "spouse" was also central to the Court's reasoning. The key statutory

provisions read as follows:

1. In this Act [...]

“spouse” means, except where otherwise indicated in this Act, either of two persons who,

(a) are married to each other, or

(b) are not married to each other and are living together in a conjugal relationship,

(i) continuously for a period of not less than three years, or

(ii) in a relationship of some permanence, if they are the natural or adoptive parents of a child, both as defined in the *Family Law Act*; [...]

48. (1) If a member who is entitled under the pension plan to a deferred pension described in section 37 dies before payment of the first instalment is due, or if a former member or retired member dies before payment of the first instalment of his or her deferred pension or pension is due, the person who is his or her spouse on the date of death is entitled,

(a) to receive a lump sum payment equal to the commuted value of the deferred pension;

(b) to require the administrator to pay an amount equal to the commuted value of the deferred pension into a registered retirement savings arrangement; or

(c) to receive an immediate or deferred pension, the commuted value of which is at least equal to the commuted value of the deferred pension. [...]

(3) Subsections (1) and (2) do not apply where the member, former member or retired member and his or her spouse are living separate and apart on the date of death. [...]

(6) A member, former member or retired member described in subsection (1) may designate a beneficiary and the beneficiary is entitled to be paid an amount equal to the commuted value of the deferred pension mentioned in subsection (1) or (2),

(a) if the member, former member or retired member does not have a spouse on the date of death; or

(b) if the member, former member or retired member is living separate and apart from his or her spouse on the date of death.

THE MAJORITY JUDGMENT

The majority of the Court assumed that both Mrs. Carrigan and Ms. Quinn met the definition of “spouse” set out in section 1 of the PBA and confirmed that section 48(1) of the PBA gives a member’s spouse priority to pre-retirement death benefits. The majority then held that because Mrs. Carrigan (the married spouse) was living separate and apart from Mr. Carrigan at the date of his death, section 48(3) of the PBA was invoked. Once invoked, section 48(3) had the effect of causing section 48(1) *in its entirety* to become inapplicable. Based on this analysis, neither Ms. Quinn nor Mrs. Carrigan was entitled to pre-retirement death benefits under section 48(1) of the PBA. The majority awarded the pre-retirement death benefit to Mrs. Carrigan and her daughters as the designated beneficiaries under section 48(6) of the PBA. In the majority’s view, this interpretation of the PBA allowed members greater freedom to arrange their affairs in a way that suits their particular circumstances.

THE DISSENT

The Court of Appeal’s decision was not unanimous. The dissent judgment held that a member could have both a married spouse and a common law spouse under the PBA definition of “spouse” at the same time. The dissent then held that section 48(1) of the PBA gives priority to the member’s spouse at the date of death, provided that the spouse has not waived his or her entitlement and provided that the spouse is not disentitled to the benefit by virtue of section 48(3) of the PBA. Mrs. Carrigan was held to be a spouse under section 1 of the PBA. However, pursuant to section 48(3) of the PBA, she was disentitled to pre-retirement death benefits under section 48(1) because she was living separate and apart from Mr. Carrigan at the date of death. On the other hand, Ms. Quinn was also Mr. Carrigan’s spouse under section 1 of the PBA and she was entitled to pre-retirement death benefits under section 48(1) – section 48(3) of the PBA did not apply to her. In the dissent judgment, Ms. Quinn’s spousal entitlement under section 48(1) of the PBA took priority over the entitlements of any designated beneficiaries. The dissent judgment is consistent with the widely held view of the pension industry.

IMPLICATIONS

We understand that leave to appeal may be sought to the Supreme Court of Canada. However, as it currently stands, this case has significant implications for employers in their capacity as pension administrators. To start, plan administrators will need to review (1) pre-retirement death benefits situations where benefits have not yet been paid, and (2) future pre-retirement death benefits situations, to assess whether there are any “dual spouse” fact scenarios similar to *Carrigan* and determine how to proceed with benefit payouts. Plan documentation and communications should also be reviewed and revised, if necessary.

If you have any questions regarding this decision, please contact any member of our [Pension & Benefits Group](#).

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