

FTR Now

When is a Pension Assignment not an Assignment?

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Pension plan administrators are often required to interpret the wording of court orders and separation agreements to determine whether there is a valid and effective assignment of an interest to a member's former spouse. Until now, the courts have not provided clear guidance on what language is needed in order to create an assignment.

On July 27, 2012, the Ontario Superior Court of Justice held that if a pension plan member wishes to assign an interest in his or her pension entitlement to a former spouse in relation to a marriage breakdown, the language of the separation agreement or divorce order must be **clear and unambiguous**. The case, [Vladescu v. CTVglobemedia Inc.](#), is the first clear judicial pronouncement in Canada on this issue and was successfully argued by Frank Cesario on behalf of the Plan Administrator. This *FTR Now* analyses the Court's decision and its implications for plan administrators.

LEGISLATIVE BACKGROUND

One of the main objectives of pension legislation across Canada is the protection of pension benefits. To prevent pension benefits from being subject to demands from creditors, assignments are generally prohibited, and the circumstances in which a plan member can assign all or part of his pension benefits to another individual are extremely limited. One of the only exceptions arises in the context of a marriage breakdown, when a member may be permitted to assign a portion of his or her pension benefit to a former spouse. An assignment of benefits to a former spouse can divert a portion of the member's own pension to the former spouse, and in certain circumstances, it may also trump a subsequent spouse's statutory priority to death benefits. No legislation speaks to the form of an assignment.

FACTUAL BACKGROUND

Mr. Filotti was employed by CTV, the Plan Administrator and was a member of one of its pension plans, which was registered under the federal *Pension Benefits Standards Act* ("PBSA").

In 2002, Mr. Filotti and Ms. Vladescu executed a separation agreement (the "Separation Agreement"). The Separation Agreement contained specific provisions addressing Mr. Filotti's pension benefits. Attached to the Separation Agreement was Schedule "C", which purported to authorize and direct the Plan Administrator to pay all survivor benefits to Ms. Vladescu. In addition, the Separation Agreement required Mr. Filotti to make "all possible efforts to enter into a Cohabitation Agreement or Marriage Contract wherein...his future wife or common-law wife releases all rights or claims of any kind or nature whatsoever to his pension." These provisions were also incorporated into the divorce order that was ultimately completed in 2003 (the "Divorce Order").

CTV treated the Separation Agreement as containing an irrevocable beneficiary designation in favour of Ms. Vladescu.

By the time Mr. Filotti died in 2009, he had re-married. CTV was of the view that Mr. Filotti had a spouse who was entitled under the PBSA to the pre-retirement death benefit and that the Separation Agreement and Divorce Order were not sufficient to create an assignment that would affect that spousal priority. Ms. Vladescu sought payment of the full value of the death benefit on the basis that the death benefit was assigned to her under the Separation Agreement and Divorce Order.

COURT DETERMINES THERE IS NO ASSIGNMENT

The Ontario Superior Court of Justice rejected Ms. Vladescu's position that the Separation Agreement and the Divorce Order assigned the death benefits to her. The Court considered the nature of pension assignments and stated that "an assignment is inherently irrevocable because the interest is gone, that is, once the interest is transferred from the assignor to the assignee, the assignor generally cannot take it back." The Court acknowledged that the PBSA death benefit regime creates a presumptive entitlement in favour of a surviving spouse for a pension plan member's death benefit. The Court also confirmed that assignments of pension benefits in the marriage breakdown context must be clear and unambiguous, particularly when the assignment would oust the statutory rights of another person.

In this case, the Court noted that the Separation Agreement specifically contemplated that Mr. Filotti might cohabit with or marry another person who would be presumptively entitled to the death benefits in priority to Ms. Vladescu. If the Separation Agreement and supporting documents constituted an assignment in favour of Ms. Vladescu, it would not make sense to acknowledge that a subsequent spouse would have a right to the death benefit that would override Ms. Vladescu's rights, because an "assignment" would transfer the rights to the death benefit to her irrevocably.

Further, the Court found that Schedule C merely "authorizes" the plan's administrator to pay "survivor benefits to the Plaintiff", and Schedule C uses the language of "direction", which the Court found is not an assignment of an interest. The Court dismissed the action and ordered that the death benefits be paid to Mr. Filotti's surviving spouse.

GUIDANCE FOR PLAN ADMINISTRATORS

The treatment of pensions following the death of a divorced or separated member often become litigious and has been considered in other cases, including *Stairs v. Ontario Teachers Pension Plan Board* and *Robinson v. University of Guelph*, both of which were also argued by our firm.

It is not uncommon for plan administrators to advise a member and his or her former spouse that the separation agreement or divorce order is not clear enough to be administered. In Ontario, due to the new pension division regime that took effect January 1, 2012, assignment language may be less of an issue as time goes on. However, administrators will continue to be presented with agreements and court orders under the pre-2012 Ontario regime and from other jurisdictions. The Court's decision recognizes that, particularly where an assignment purports to reduce or eliminate the rights of a third party (such as a subsequent spouse), plan administrators should not be required to guess what the parties intended. Assignment language must be clear and unambiguous.

Ms. Vladescu is appealing the decision to the Ontario Court of Appeal. If upheld on appeal, this case will be of assistance to administrators in Ontario and other jurisdictions faced with the difficult decision of paying one person but not the other.

If you have any questions about this case and its implications, [Natasha D. Monkman](#) at 416.864.7302 or any other member of our [Pension & Benefits Practice Group](#) would be pleased to speak with you.

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