

**Pension Splitting upon the Breakdown of
the Spousal Relationship: The Legal
Issues**
Part A - A Primer on the Legal Framework

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January 15, 2008

Framework under Pension Legislation

- Provincial pension legislation establishes minimum standards
 - e.g. vesting, locking-in, survivor benefits
- 9 provinces plus federal
- Each jurisdiction has a pension regulator
- Does not apply to RRSPs

Framework under Pension Legislation

- ITA provisions administered by the Registered Plans Division of the Canada Revenue Agency
- ITA sets “caps” on the benefits paid from a pension plan

Framework under Pension Legislation

- Minimum standards legislation defines who is and isn't a "spouse"
- Spouses are given automatic priority to pre-retirement death benefits and post-retirement survivor pensions
- Can in certain circumstances be waived on the form prescribed by the pension regulator
- Beneficiary designation for non-spouse benefits

Framework under Pension Legislation

- Legislation applies to both DB and DC pension plans

Framework under Pension Legislation

- **Defined Benefit (DB) plans**
 - Uses a formula to define income at retirement (e.g. $2\% \times \$50,000 \times 30$ years of service)
 - May or may not require a member contribution

Framework under Pension Legislation

- **Defined Contribution (DC)**
 - Contributions are defined (e.g. employee contributes 3% of earnings and employer contributes 3% of member's earnings)
 - Income at future retirement date unknown
 - Contributions accumulate in member account, with investment earnings/losses
 - Account balance used to create income

Framework under Pension Legislation

- All jurisdictions address treatment of pension benefits following relationship breakdown
- Some apply only to married spouses, some include common law spouses
- Some are prescriptive, others less detailed

Framework under Pension Legislation

- All jurisdictions limit member's ability to deal with the pension as an asset
- Ontario *Pension Benefits Act* prohibits assigning, charging, giving as security, execution, seizure or attachment of money payable under a pension plan

Framework under Pension Legislation

- PBA provides limited exemptions
- Section 65(3) permits assignment of an interest by an order under the FLA or a domestic contract as defined in Part IV of the FLA
- Section 66(4) permits execution, seizure or attachment in satisfaction of an order for support

Framework under Pension Legislation

- Limited to:
 - In relation to equalization, 50% of benefits accrued during marriage, calculated in the prescribed manner (section 51(2))
 - In relation to support, 50% of the money payable

Equitable Receiver

- Use of equitable receiver concept by former spouses to seek an interest in member's pension

Equitable Receivers

- *Hooper v. Hooper*, 2002 (OCA)
- Order required husband to pay support and equalization
- Husband failed to make payments
- Pension was sole source of income
- Wife sought order appointing her as equitable receiver of pension

Equitable Receivers

- Court of Appeal held not necessary to grant for support
- Plan was already diverting payments to the FRO
- ER order could not result in payment of more than 50% of pension

Equitable Receivers

- Equalization order did not refer to pension
- Could not order ER with respect to equalization
- Direct contravention of PBA

Equitable Receivers

- Not just any order can be enforced against a pension
- Only equalization and support orders fit within the PBA exemptions
- Statutory 50% limits must be honoured

Beneficiary Designations

- Insurance policies
- Pension/retirement plans
- Existing designation in favour of former spouse remains on file
- Does separation agreement revoke existing designation?

Beneficiary Designations

- *Conway v. Conway*, 2006 (SCJ)
- Husband dies
- Former wife was designated beneficiary of life insurance, pension death benefit
- Estate challenged

Beneficiary Designations

- Separation agreement contained only general releases
- Court held wife remained beneficiary
- Separation agreement did not comply with statutory requirements for revocation

Beneficiary Designations

- But Court did impress death benefit with a constructive trust in favour of estate
- Court concluded husband did not intend for spouse to receive pension benefits

Beneficiary Designations

- For a valid revocation, specific reference to plan is the minimum necessary
- Be aware of *Insurance Act* formalities
