THE CANADIAN BAR ASSOCIATION

Implementing intentions: Recent pension division jurisprudence

July 13, 2017 | Natasha Monkman

Despite legislative provisions that are intended to ease pension divisions upon marriage breakdown and expedite the finality of such divisions, there continue to be interesting disputes that arise. Recent cases, *McKearney-Morgan v Morgan*, 2016 NSSC 79 and *Stephens v Stephens*, 2016 ONSC 367, are two such examples, in which the court was called upon to enforce existing court orders with a view to implementing the original intention of the parties.

MCKEARNEY-MORGAN V. MORGAN

Following a brief marriage, the spouses divorced and obtained a divorce order and corollary relief order. The respondent's workplace pension was subject to equal division in the order, consistent with treatment as a matrimonial asset, pursuant to section 4(1) of the Nova Scotia *Matrimonial Property Act*. In the order, the Nova Scotia Supreme Court granted the applicant a 35 per cent interest in the entire pension earned up to the date of separation, including premarital contributions. That interest was valued at $44,818.90.

The order did not address how the applicant was to secure her interest in the pension benefits. The plan administrator refused to enforce the order, based on provisions of the Nova Scotia *Pension Benefits Act*, which limits pension divisions at source to 50 per cent of the pension benefits earned during the marriage. The plan administrator consulted the Nova Scotia pension regulator and ultimately transferred $2,822 – the maximum permitted under the *Pension Benefits Act* – to the applicant. The respondent was not appointed as trustee in the order and did not agree to act as trustee for the applicant's full interest without a further court order. The applicant brought a motion seeking enforcement of the order.

The court found that the *Matrimonial Property Act* and the *Pension Benefits Act* were not in conflict because the *Pension Benefits Act* does not govern entitlement, but rather provides a mechanism to divide pension benefits. The court concluded that the plan administrator's refusal to enforce the order arose from the confusion between "entitlement" and the "administrative functions" set out in the *Pension Benefits Act*. The court clarified that it was the court's jurisdiction to determine entitlement pursuant to the *Matrimonial Property Act* and the plan administrator's responsibility to administer the entitlement once determined.

Nevertheless, the *Pension Benefits Act* governed the plan administrator's actions, and permitting a division at source based on 35 per cent of the entire accrued pension benefit contravened the *Pension Benefits Act* because of a limit on divisions to 50 per cent of the pension benefit accrued during the relationship. The court accepted that the plan administrator was constrained by the 50 per cent limit in the *Pension Benefits Act* and the court had no authority to order a trust over the balance of the applicant's entitlement when held by the plan administrator.

The court expressed its frustration with the interaction between the laws and commented that the pension regulator ought to make recommendations to the Nova Scotia government to amend the applicable legislation to "ensure a harmonious interpretation is possible" and to "permit fund members to respect and comply with court orders under the *Matrimonial Property Act*."

In the absence of legislative intervention to remedy this problem, the court established a trust over the portion of the order that remained unsatisfied and ordered that the respondent serve as trustee. The court characterized this remedy as unsatisfactory, because the applicant's realization of her entitlement is contingent on the respondent's cooperation.

STEPHENS V STEPHENS

In this case, the plan administrator provided a valuation of the respondent's pension of $445,681.68. The valuation was based on the plan's transfer ratio of 73.1 per cent. The spouses subsequently entered into a settlement agreement based on that valuation.

Approximately two years later, the plan administrator advised the parties that it had mistakenly applied the transfer ratio to the valuation of the respondent's pension – the pension benefits should have been fully valued at $609,687.67. The applicant, having already received a transfer in respect of her share of the pension based on the incorrect valuation, brought a motion to amend the pension provision in the settlement and to be paid an additional sum based on the increased value of the respondent's pension.

The respondent argued that the original court order indicated that there was no further claim for equalization once the transfer was made to the applicant. The Ontario Superior Court of Justice noted that section 67.3(10) of the Ontario *Pension Benefits Act* provides that once a transfer is made from a pension plan, a non-member-spouse has no further claim against the pension plan in respect of the plan member.

Having found that a discounted value was mistakenly used, the court held however, that in this instance, the applicant was not advancing a "further claim." Rather, she was correcting a mistake made as a result of inaccurate information provided by the plan administrator. The court found that the applicant was not barred from seeking her full entitlement to the respondent's pension and transferring the balance to which she was entitled based on the correct valuation of the pension benefits, which was consistent with the original intentions of the parties. Section 67.3(10) would not bar the correction of an understated valuation, even when a transfer of the non-member-spouse's interest had already been completed.

SUMMARY

In both cases, the courts sought to ensure the intentions of the parties are implemented. In *McKearney-Morgan v Morgan*, the court concluded that the pension legislation does not support the parties' intended division of the pension benefit at source and the result was to impose a trust on the member-spouse until the non-member-spouse's entitlement is satisfied. In *Stephens v Stephens*, the court found that provisions providing for final distributions should not bar correction of mistakes in the original court order that would otherwise frustrate the intentions of the parties.

Natasha Monkman is an associate with Hicks Morley Hamilton Stewart Storie LLP in Toronto