ONTARIO TEACHERS'
PENSION PLAN – RÉGIME DE RETRAITE DES ENSEIGNANTES ET DES ENSEIGNANTS

Your Guide to the Assignment of Pension Benefits on Spousal Breakdown

(for pre-2012 signed separation agreements)

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Introduction

Pensions are considered property under the Ontario *Family Law Act* and must be included in the calculation of net family property when a marriage ends. If a pension plan member does not have sufficient assets to satisfy an equalization obligation, the member may assign a portion of the pension to the former spouse in a separation agreement or court order.

This guide is designed to provide family lawyers with the information required to draft pension assignment clauses with which the Ontario Teachers' Pension Plan can comply.

Before we can release a plan member's personal information to a third party, we require the member's written consent. If you are acting for the member or former spouse, please ensure we have a copy of the consent before contacting us for information.

If you are a member or former spouse, please obtain independent legal and actuarial advice before agreeing to the assignment of pension assets.

Legislation limits amount and timing of assignment

In Ontario, the *Pension Benefits Act* (PBA) limits the amount and timing of pension benefits that can be assigned to a former spouse. Subsection 65(1) of the PBA prohibits the assignment of money payable under a pension plan as a general rule. Subsection 65(3) provides an exception to this general rule and permits *"the assignment of an interest in money payable under a pension plan … by an order under the Family Law Act or by a domestic contract as defined in Part IV of that Act."*

An assignment made pursuant to subsection 65(3) is subject to further statutory restrictions. Section 51 of the PBA limits the assignment in two ways:

1. A spouse is not entitled to more than 50 per cent of the pension benefits that accrued during the spousal period.
2. A spouse is not entitled to payment until either the date the benefit payment commences or the normal retirement date provided in the terms of the member's pension plan.

Valuing the pension benefit

Pension valuation is beyond the scope of this guide, but it is an essential step in the division of pension benefits.

The Ontario Teachers' pension plan encourages plan members to hire an actuary to obtain a pension valuation.

Calculating the PBA limit

In determining the limit imposed by the PBA, the pension plan uses the termination method, which assumes the member terminated membership in the plan on the valuation date. This calculation may result in a lower entitlement than that set out in the separation agreement if, for example, the member's average salary is higher at retirement than it was on the valuation date.

Even if the formula in the separation agreement or court order exceeds the 50 per cent limit, plan administrators are required to administer the assignment only up to the limit. The PBA limit and the formula in the separation agreement will be compared each year, and the Ontario Teachers' pension plan will continue to pay the lower amount to the spouse.

PBA exempts retirement compensation arrangements

Subsection 47(3) of Regulation 909 to the PBA exempts a retirement compensation arrangement (RCA), as defined in subsection 248(1) of the *Income Tax Act (Canada)*, from the PBA and its regulations. An RCA is a supplementary arrangement that 'tops up' the maximum benefits that can be paid from the registered pension plan. Maximum benefits come into play when an employee earns more than $132,036.50 in CPP liable credit per year in 2009, or is restricted from receiving full benefit entitlement under the registered pension plan as a result of other *Income Tax Act* restrictions[1]. In most cases, the registered pension plan and RCA are administered seamlessly to the member, who receives a single monthly retirement payment. The member may be unaware the pension is coming from two sources until tax time when two T4s are issued.

When drafting pension division clauses keep in mind that PBA restrictions, including the 50 per cent limit, do not apply to the portion of benefit above the registered pension plan limit. As a result, it may be possible to assign more than 50 per cent of the benefit that accrued during the marital period to the former spouse.

[1] Gordon M. Hall, *Mercer Handbook of Canadian Pension and Benefit Plans* (North York: CCH Canadian Limited) at 208.

Overview

In drafting pension division clauses, lawyers must comply with legislative requirements and protect clients' interests in all possible pension scenarios, namely upon the member's:

1. retirement;
2. termination of plan membership; and
3. death.

Consider the following situations, and drafting options, when writing provisions that assign a portion of a teacher's pension to a former spouse to satisfy either an equalization obligation or a support obligation.

There are two possible methods of equalizing pension benefits between former spouses on marriage breakdown: transfer of pension credits and assignment of pension benefits payable. Only the second method – a benefit split in the form of an "if and when" order – is currently available for defined benefit pension plans such as the Ontario Teachers' pension plan. This method of equalizing pension benefits is defined as follows: If one of the triggering events occurs (the member retires, terminates plan membership or dies), that is *when* the non-member spouse may be entitled to a share of the member's pension benefits.

1. Assignment of retirement pension

a) The separation agreement or court order should make express reference to an assignment of pension benefits from the member to the spouse and should also specify the spouse's interest in the member's pension benefits as either a percentage or specified dollar amount. Here are two examples of draft wording:

Drafting option: specify the interest (%) in member's pension benefits to be assigned to the non-member spouse

"The Wife agrees to assign to the Husband 50 per cent of the pension benefits that accrued during the period from October 22, 1966, to October 6, 1998, to be paid to the Husband on her retirement pursuant to the provisions of the Pension Benefits Act. This assignment is to cease upon the death of the first of the Husband or the Wife."

Drafting option: specify the share ($) in member's pension benefits to be assigned to the non-member spouse

"The Husband hereby agrees that the Wife is entitled to the sum of $65,277.00 as an equalization payment under the Family Law Act of Ontario and he agrees that said sum shall be paid by way of monthly payments from his Ontario Teachers' Pension Plan until said sum has been paid in full. The Husband hereby directs the Ontario Teachers' Pension Plan Board to:

a) Each Year until he reaches the age of 65 years (which will occur on the 9th day of October, 2007) pay to the Wife the maximum amount under the Pension Benefits Act (Ontario) (estimated in 2001 to be approximately $11,396.48 per annum) by way of monthly payments.

b) Each year after the Husband reaches the age of 65 years, to pay to the Wife the maximum amount under the Pension Benefits Act (Ontario) (estimated in 2001 to be approximately $9,160.38 per annum) by way of monthly payments."

Although the spouse's share is specified as a dollar amount in the second drafting example, that amount cannot be paid out as a lump sum. The payments must be assigned each month as the member's retirement pension is paid.

The second example also addresses the assignment of the member's pension at age 65 when Ontario Teachers' pensions are reduced to reflect the plan's integration with the Canada Pension Plan (CPP). Depending upon the wording of the spouse's interest in the agreement or court order, the spouse's share of the pension may be automatically reduced when the member reaches age 65. For example, if the assignment to the spouse is expressed as a percentage of the member's retirement pension, the assignment amount will decrease when the member turns age 65. If the assignment to the spouse is expressed as a monthly dollar amount, the assignment will not automatically decrease. However, it may violate the 50 per cent limit.

b) Indexing - Indexing refers to a contractual provision in the pension plan that periodically adjusts a benefit amount according to a formula based on a recognized index of price or wage level. For example, the Ontario Teachers' pension plan provides indexing for inflation based on the Consumer Price Index (CPI) every January. As counsel for the spouse, you need to ensure that the value of your client's interest in the assignment is preserved over time. Before drafting the pension division clause, consider whether the assignment will be adjusted for inflation and, if so, whether the amount will be adjusted from the valuation date or from the payment date forward.

Drafting option: specify inflation adjustment from valuation date

“Pat and Alan agree that: Pat is entitled to fifty per cent (50%) of the portion of the Pension that is attributable to the period that Alan and Pat were married and cohabiting (the “spousal period”), being the period from August 16, 1958 (the date of their marriage) to July 1st, 2000 (the date of their separation). Pat’s share of the pension will be adjusted for inflation annually at the same rate that Alan’s pension is adjusted from July 1st, 2000 forward.”

Drafting option: specify inflation adjustment from payment date on outstanding balance

“Both the Husband and the Wife agree that the amount remaining to be paid from the equalization amount ($65,277.00) shall be adjusted for inflation each year commencing in 2003, said adjustment to be made at the same time and by the same method as for pension payments under the Ontario Teachers’ Pension Plan.”

c) **When will the assignment of pension benefits stop?**

The separation agreement or court order should also specify when the assignment of the benefit will cease.

- Unless the agreement or court order expressly states that pension payments to the spouse revert to the member upon the death of the spouse, the pension plan must continue to make payments as assigned to the spouse's estate until the pension ends with the member's death.
- If the assignment is to cease when a certain total is paid and the member has the option of making additional payments over and above the pension assignment, specify that the assignment ceases upon both parties’ confirmation to the plan administrator.
- If the member’s pension is suspended in retirement, the pension assigned to the spouse will also be suspended. Under the Ontario Teachers’ pension plan, there are limits on the days pensioners can work in education before their pension is suspended.

In all cases, regardless of the wording in the agreement, the assignment of the member's retirement pension to the spouse stops when the member dies. On death, the retirement pension ceases and the assignment of that retirement pension also ceases. In the worst case scenario, the member dies one or two months after retirement and the spouse is not entitled to survivor benefits because they separated before the first instalment of the pension was due. Counsel for the spouse should ensure that the agreement addresses this scenario, either in the form of life insurance, estate planning or the assignment of pension death benefits. See the *Assignment on death* section, beginning on page 7, for examples of provisions that assign pre-retirement death benefits and post-retirement death benefits to the former spouse.

2. Assignment on termination of membership

The assignment of benefits can also be triggered on an ‘if and when’ basis if a plan member’s employment or plan membership is terminated before retirement. A plan member who terminates employment or membership in a multi-employer pension plan before entitlement to an immediate pension has certain options, including the transfer of a lump-sum payment out of the pension fund. Subsection 51(5) of the PBA provides a spouse of the member with the same options:

> *A spouse on whose behalf a certified copy of a domestic contract or order mentioned in subsection (1) is given to the administrator of a pension plan has the same entitlement, on termination of employment by the member or former member, to any option available in respect of the spouse's interest in the pension benefits as the member or former member named in the domestic contract has in respect of his or her pension benefits.*

In these circumstances, regulation 46 of the PBA requires a plan administrator to notify the spouse of the member’s termination of employment, provide the spouse with a copy of the member’s termination option statement and advise the spouse of the options available under section 42 of the PBA, namely:

- transfer the commuted value (CV) to a prescribed retirement savings arrangement;
- transfer the CV to another pension plan, if the administrator of the other plan agrees to accept the payment; or
- purchase an annuity with the CV.

(The commuted value is the lump sum required today to replace the future pension. It fluctuates with changes in interest rates and other factors.)

As with assignments on retirement, assignments on termination should identify the spouse’s entitlement as either a percentage or a dollar amount. It should also specify whether the entitlement is to be adjusted for inflation from the valuation date or some other date.

Drafting option: transfer on termination

“In the event that the Husband terminates employment with the Toronto District School Board before retirement and is entitled to a commuted value payment from the Ontario Teachers’ Pension Plan, the Wife will have the same entitlement to any options that are available to the Husband, for the Wife’s share of the Husband’s pension, as calculated in paragraph 9.6 above. The Wife’s share shall be adjusted for inflation from the valuation date to the date of payment.”

Assignment on shortened life expectancy
Subsection 49(2) of the PBA permits variation in the payment of a pension in cases of "shortened life expectancy", where the plan member has an illness or physical disability that is likely to shorten his or her life expectancy to less than two years. The member will be able to withdraw the entire CV of the pension if the prescribed circumstances in regulation 51.1 are met. To apply, active plan members must terminate membership in the pension plan. Presumably, this will trigger subsection 51(5) of the PBA which gives the spouse the same options that are available to the member.

3. Assignment on death

Before retirement
The death of the plan member before retirement is the third trigger for an 'if and when' assignment of pension benefits. Subsection 48(13) of the PBA states that:

> *An entitlement to a [pre-retirement death] benefit under this section is subject to any right to or interest in the benefit set out in a domestic contract or an order referred to in section 51 (payment on marriage breakdown).*

The former spouse only acquires an interest in the benefits that are actually paid out. In practice, this means that an assignment of pre-retirement death benefits made by a member will be administered by the Ontario Teachers' pension plan as follows:

i. If the member has another eligible spouse on the date of death, the benefit will be split between the former spouse and the new spouse. The spouse on the date of death is entitled to receive a lump-sum payment equal to the commuted value of the deferred pension or to an immediate or deferred pension. With the pension option, the stream of income would be converted to a lump-sum present value, a percentage of which would be apportioned to the former spouse. The percentage would be determined by the separation agreement or court order, and would be subject to the limit imposed by subsection 51(2) of the PBA. If the lump-sum amount is to be paid out as a pension, it will be converted to a stream of income based on the lifetime of the former spouse and would be payable for the lifetime of the former spouse. There may be a residual payment to the former spouse's estate, depending on the wording of the assignment in the agreement[2].

ii. If the member has dependent children but no eligible new spouse on the date of pre-retirement death, the benefit will be split between the former spouse and the children. After the dependent children have exhausted their entitlement, any remaining pre-retirement death benefits will be split between the former spouse and the designated beneficiary.

[2] The residual death benefit is normally paid to the deceased member's estate, after the spousal survivor pension ends with the spouse's death.

iii. In the absence of an eligible spouse, dependent children or a designated beneficiary, any remaining death benefits would be apportioned between the former spouse and the member's estate. Each would receive a lump-sum payment. The amount of the payment to the former spouse would be determined by the formula in the separation agreement or court order, subject to the 50 per cent limit imposed by subsection 51(2) of the PBA.

Note that payment restrictions set out in section 51 apply in the same way to the assignment of pre-retirement death benefits and retirement benefits. Specifically, the payment cannot be made on marriage breakdown, but on "the date on which payment of the pension benefit commences"[3]. In the case of pre-retirement death benefits, the payment will not start until the death of the member. The assignment is subject to the limit imposed by subsection 51(2) of the PBA, which is 50 per cent of the pension benefits accrued by the member during the spousal period.

If the plan member has not retired at the date the separation agreement is executed, and the parties have not made arrangements for life insurance, lawyers should draft a paragraph that assigns a portion of the plan member's pre-retirement death benefits:

Drafting option: specify assignment of pre-retirement death benefits

"The Teacher agrees to assign to the Spouse 50 per cent of the pre-retirement death benefits that accrued during the period from October 22, 1966, to October 6, 1998, to be paid to the Spouse in the event that the Teacher predeceases him."

Death after retirement

The key issue in the assignment of post-retirement death benefits is vesting, which occurs on the date the first instalment of the retirement pension is paid to the teacher. Pre-retirement death benefits remain the property of the member and do not vest in anyone else until the date of death.

In contrast, an eligible spouse's entitlement to a post-retirement survivor pension vests not on the date of death, but on the date the first instalment of the pension is due, pursuant to section 44 of the PBA.[4] After that crucial date, the death benefit is no longer the property of the member but of the new spouse. As such, the member no longer has the right to assign a portion of the vested death benefit to a former spouse in satisfaction of an equalization obligation. The member is still free to assign a portion of any retirement benefits payable, because that is still the member's property. However, upon the member's death that assignment would cease along with the retirement pension.

[3] Subsection 51(1) of the PBA

[4] Smiley v. Ontario (Pension Board) (1994), 116 D.L.R. (4th) 337

The bottom line is that a member can validly assign a portion of the post-retirement death benefits in a separation agreement any time before retirement, but at retirement the benefits may vest in another eligible spouse.

A survivor benefit can be assigned to a former spouse after retirement, if there was no eligible new spouse on the date the first instalment of the pension was paid and the retirement pension was not paid as a "joint and survivor" pension.

In that case, the pension plan may provide another form of death benefit that may be payable to the member's estate, which can be assigned to the former spouse. In practice, this means that an assignment of post-retirement death benefits made by a member will be administered as follows:

i. If the member separates from his first spouse before retirement and completes a separation agreement *before* retirement in which he assigns a portion of his post-retirement death benefits, and has another eligible spouse on the date his retirement pension commences, the survivor pension will be split between the former spouse and the new spouse. The amount of the payment to the former spouse would be determined by the formula in the separation agreement or court order, subject to the 50 per cent limit imposed by subsection 51(2) of the PBA.

ii. If the member separates from his first spouse before retirement, but does not sign the separation agreement in which he assigns a portion of his post-retirement death benefits until *after* retirement, and has a new eligible[5] spouse on the date his retirement pension commences, the survivor pension will be paid entirely to the new spouse. The assignment of the post-retirement death benefits is invalid because it was completed after the date the benefit had already vested in the new spouse.

iii. If the member separates from his first spouse before retirement and completes a separation agreement in which he assigns a portion of his post-retirement death benefits before retirement, but does not have another eligible spouse on the date his retirement pension commences, no survivor pension will be payable upon the member's death.

    However, any residual death benefit that may be payable to the member's estate may be split between the former spouse and the member's estate. Lawyers should carefully examine the terms of the plan to determine the form of death benefit that is payable to a 'single' plan member in order to determine what is available to be assigned in a separation agreement. The amount of the payment to the former spouse would be determined by the formula in the separation agreement or court order, subject to the 50 per cent limit imposed by subsection 51(2) of the PBA.

[5] See the definition of 'spouse' in section 1 of the PBA for the criteria that must be met in order to be considered an eligible spouse.

If the plan member has not retired at the date the separation agreement is executed, and the parties have not made arrangements for life insurance, lawyers should draft a paragraph that assigns a portion of the plan member’s post-retirement death benefits:

Drafting option: specify assignment of post-retirement death benefits

“The Teacher agrees to assign to the Spouse 50 per cent of the post-retirement death benefits that accrued during the period from October 22, 1966, to October 6, 1998, to be paid to the Spouse in the event that the Teacher predeceases him.”

Assignment of retirement benefits

The guidelines and suggestions for retirement pension splitting arrangements, which begin on page 3, also apply to members who are already collecting a pension when their marriage ends.

Assignment of death after retirement benefits

Section 44 of the PBA provides that every pension paid under a pension plan to a member who has a spouse on the date that the payment of the first instalment of the pension is due shall be a joint and survivor pension. Survivor benefits are a minimum statutory right that cannot be waived or revoked once the qualifications have been met and the pension has commenced. Lawyers acting for plan members who separate after retirement should advise their clients that a release may only be effective to prevent an assignment of the member's pension while the member is alive. It does not disentitle the former spouse from receiving spousal survivor benefits upon the member's death, if those benefits had already vested in the spouse on first instalment due.

Drafting problem: Waiver of equalization of retirement pension does not equal waiver of survivor benefits if entitlement vested on first instalment due

"Neither party will make a claim against the other's private pension plan or plans. This Agreement may be cited and used as evidence in order to disentitle a claimant from seeking a division of such pension credits."

While section 46 of the PBA provides for the waiver of a joint and survivor post-retirement death benefit, it must be delivered before the pension commences.

Assignment of pension for child and spousal support

Subsection 66(4) of the PBA provides that money payable under a pension plan is *"subject to execution, seizure or attachment in satisfaction of an order for support enforceable in Ontario to a maximum of one-half the money payable."* Note that the assignment of pension for support is not subject to 50 per cent of the pension that accrued during the spousal period. Instead, the limit will be 50 per cent of the total amount payable.

Unlike the entitlement to an equalization payment, an entitlement to spousal support payments does not continue to the former spouse's estate. Therefore, if the pension is assigned to satisfy support obligations, the payments will cease if the spouse pre-deceases the member.

Note that the PBA does not prohibit the stacking of equalization orders and support orders with the effect of assigning 100 per cent of the member's pension benefits. In *Nicholas v. Nicholas*[6], the Ontario Court (General Division) confirmed that 50 per cent of the member's pension was payable to his spouse as an equalization payment under section 51 of the Act and the remaining 50 per cent of the member's pension was payable to the spouse as a monthly pension benefit under section 65 of the Act to satisfy support obligations.

Cannot create an entitlement to a survivor pension*n*

Since entitlement to spousal survivor benefits is set out in the PBA, neither the parties nor a judge can create an entitlement where it doesn't exist. As a result, the following provision cannot be administered.

Drafting problem: invalid entitlement to survivor benefits

Should the Husband die before the Wife at a time when he is still employed by the Toronto District School Board or has retired from the Ontario Teachers' Pension Plan, and should survivorship benefits be payable under the Plan …. then even if there is any other person who would qualify as a spouse under the terms of these plans, the Wife shall be considered the sole surviving spouse and shall receive all benefits payable to a surviving spouse under the plans."

[6] (1998), 17 C.C.P.B. 130

Pensions as security

Although the *Family Law Act* may grant a court the authority to order that security be given for an equalization payment[7], an order that purports to put a charge on a pension cannot be administered by a plan administrator because it violates the PBA.[8]

Subsection 65(1) of the *Pension Benefits Act* states that *"every transaction that purports to assign, charge, anticipate or give as security money payable under a pension plan is void."*

Subsection 65(3) of the PBA provides a limited exception:

> *Subsections (1) and (2) do not apply to prevent the assignment of an interest in money payable under a pension plan or money payable as a result of a purchase or transfer under section 42, 43, clause 48(1)(b) or subsection 73(2) (transfer rights on wind up) by an order under the Family Law Act or by a domestic contract as defined in Part IV of that Act.*

There is a distinction between *assigning* a pension benefit and giving it as *security*. Subsection 65(3) of the *Pension Benefits Act* permits an assignment of pension benefits in satisfaction of an equalization obligation by an order under the *Family Law Act* or by domestic contract. It is important to note that the exception listed in subsection 65(3) only applies to the assignment of pension benefits. It does not apply to the other prohibitions listed in subsection 65(1), namely the prohibition against using pension money as security. Therefore, any order under the *Family Law Act* that provides for a charge against the assets of a pension plan in settlement of a division of property would violate Section 65 of the PBA.

[7] Subsection (9)(1)(b) of the *Family Law Act (FLA)* states that a court may order that security, including a charge on property, be given for the performance of an obligation imposed by an order in an application under section 7 of the FLA. Applications under section 7 are designed to determine any matter, respecting a spouse's entitlement under section 5 of the FLA, which creates the right to an equalization payment through the division of the spouse's net family property.

[8] Section 114 of the *Pension Benefits Act (PBA)* states that in the event of a conflict between the PBA and any other Act, the PBA prevails unless the other Act states that it is to prevail over the PBA. The FLA does not expressly state that it is to prevail over the PBA on the issue of using pensions as security for equalization payments, therefore the prohibitions in section 65 of the PBA prevail.