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Pension and Benefit Splitting upon the Breakdown of the Spousal Relationship: The Legal Issues

by Cheryl Goldhart/Kristen Normandin

Part A – A Primer on the Legal Framework

For family law lawyers, the thought and discussion of pensions is not particularly appealing. Generally, we ask if one party has a pension, and then we promptly send the pension documents to a pension valuator. Often, the only thing we are interested in is the value of a party's pension on valuation day. However, there are certain basic concepts that must be understood before the family lawyer takes that step.

Framework Under the Family Law Act[1]

The *Family Law Act* essentially deals with the breakdown of an economic partnership upon the breakdown of a marriage. In doing so, it provides that, upon separation, legally married spouses have the right to equalize their net family property. The equalization is not a division of an actual asset or of property (in kind) but is a division of the increase in the *value* of the parties net family properties from the date of marriage to the date of separation. For the purpose of this calculation as it relates to pensions, this means that a party with a pension has to value this asset for equalization purposes.

The *Family Law Act* only permits an equalization of net family property for married spouses. Therefore, the value of a pension is only divisible for married parties. The result of this is that common law partners, regardless of the duration or nature of their relationship are not entitled to an

[1] *Family Law Act*, R.S.O. 1990 Chapter F.3

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equalization of net family property and therefore not entitled to a sharing of the value of a party's pension, as it has accrued during the relationship.

What is considered property?

Pursuant to section 4 the *Family Law Act*, property is defined as:

> ""property" means any interest, present or future, vested or contingent, in real or personal property and includes,
>
> (a) property over which a spouse has, alone or in conjunction with another person, a power of appointment exercisable in favour of himself or herself,
>
> (b) property disposed of by a spouse but over which the spouse has, alone or in conjunction with another person, a power to revoke the disposition or a power to consume or dispose of the property, and
>
> (c) in the case of a spouse's rights under a pension plan that have vested, the spouse's interest in the plan including contributions made by other persons;"

Who is considered to be a spouse?

For the purposes of property division, pursuant to the *Family Law Act*, the definition of spouse is set out at section 1 as follows:

> ""spouse" means either of two persons who,
>
> (a) are married to each other, or
>
> (b) have together entered into a marriage that is voidable or void, in good faith on the part of a person relying on this clause to assert any right."

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As set out above, this narrow definition of spouse only allows for the equalization of property for married spouses (including same sexed spouses). However, the definition of spouse is not always defined in these terms, as is evident when dealing with Canada Pension Plan Splitting.

Canada Pension Plan

There is a provision which is incorporated into almost every separation agreement, which deals with Canada Pension Plan credits. According to the "bible" of separation agreement precedents[2], the provision reads "Either party may apply for a division of Canada Pension Plan credits". Often, if you make inquiries as to what this provision means, people (even lawyers) are not sure what the purpose of the provision is, nor what it does.

From the time a party becomes employed, Canada Pension Plan records pensionable earnings and the contributions a party makes throughout the course of their employment. The contributions that are made are deemed to be that party's Canada Pension Plan credits.

For parties that separate after January 1, 1987, a spouse (or common law partner) is entitled to apply for a splitting of those Canada Pension Plan credits (only the credits earned from the commencement of cohabitation and not from the time that party began accruing credits).

For the purpose of credit splitting, the Canada Plan Plan legislative regime[3] departs from the *Family Law Act* in that common law partners (same sex or opposite sex) are entitled to credit splitting.

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[2] Separation Agreement Annotated, Epstein, P., Grant, S., Sadvari, G., 2002 Law Society of Upper Canada
[3] Canada Pension Plan Act(R.S., 1985, c. C-8)

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The term "common law partner"[4] is defined as:

> "common-law partner" , in relation to a contributor, means a person who is cohabiting with the contributor in a conjugal relationship at the relevant time, having so cohabited with the contributor for a continuous period of at least one year. For greater certainty, in the case of a contributor's death, the "relevant time" means the time of the contributor's death."

Essentially, married spouses and common law partners are both entitled to equalize the Canada Pension Plan credits.

Therefore, the Canada Pension Plan provision in separation agreements must be made clear to clients, as it imparts benefits to a party that they may not be aware of. By way of example, if your client has been in a long term traditional marriage, and was not employed throughout that marriage, he or she will be entitled to the credit splitting of their spouse's (or common law partner's) Canada Pension Plan credits even though they have no Canada Pension Plan credits of their own.

Remarriage or entering into a new common law relationship will not affect a party's entitlement to split the Canada Pension Plan credits.

In Ontario, a provision in a separation agreement purporting to contract out of the division of the Canada Pension Plan credits is not enforceable. Therefore, if the parties agree that neither party will apply for a splitting of the other's Canada Pension Plan credits and they attempt to contract out of it

[4] Canada Pension Plan – Credit Splitting Upon Divorce or Separation *(supra)*.

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the division, the provision will NOT be enforceable if one party ultimately requests a credit splitting.

This is not the case in all provinces. In British Columbia, Alberta, Saskatchewan and Quebec, parties can contract out of Canada Plan credit splitting. In recent discussions with a colleague, I learned that they met with a client who attempted to contract out of the Canada Pension Plan credits. In doing so, the parties agreed to a "penalty clause" which provided that, in the event one party resiled from the agreement to not split their credits, that party would have to pay the other as compensation for loss of the credits. After the parties settled and executed their Separation Agreement, the wife made a request to split the Canada Pension Plan credits contrary to their agreement. The Canada Pension Plan ignored the agreement (Canada Pension Plan will split the credits), as the provision of the separation agreement was unenforceable. While the outcome of this situation is not known, this type of a provision could be used to prohibit a spouse or common law partner from requesting a split. However, one has to wonder why a party would agree to pay a penalty to receive something they are entitled to under the current legislative regime.

Double Dipping

As set out above, a pension is a capital asset for the purposes of calculating the equalization of the spousal net family property and is therefore subject to equalization upon marriage breakdown. There is, however, the ongoing debate around the issue of double dipping. Why should a recipient spouse be entitled to receive support based on income receive from a pension once that pension has already been accounted for (or divided) by equalizing net family properties.

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On its face, it seems completely inequitable for a party to first share in the value of a pension and then, once that payor is in receipt of the pension income, have to pay the recipient spouse support from that pension income.

The Supreme Court of Canada confirms that double dipping (double recovery) should be avoided. In *Boston* v. *Boston*,[5] the Honourable Justice Major, writing for the majority, explained double recovery as follows:

> "..upon marriage dissolution the payee spouse (here the wife) receives assets and an equalization payment that take into account the capital value of the husband's future pension income. If she later shares in the pension income as spousal support when the pension is in pay after the husband has retired, the wife can be said to be recovering twice from the pension: first at the time of the equalization of assets and again as support from the pension income."

In *Boston*, the Supreme Court of Canada cited, with approval, the decision of the Honourable Justice Czutrin in *Shadbolt v. Shadbolt* and stated that the starting point with respect to double recovery (or double dipping) is:

> "The challenge for the court is to determine how to fairly avoid 'double recovery'."

While *Boston* and *Shadbolt* enunciate the principle with respect to double dipping, there is always an exception to the rule and *Boston* left the door open for those exceptions.

In the recent decision of *MacPherson* v. *Auld*[6], the Honourable Justice Wright of the Ontario Superior Court considered the issue of double dipping. In this case, the parties entered into a separation agreement which provided the husband would pay spousal support to his former spouse until he retired or became unemployed. The husband put the wife on notice that he intended to

[5] Boston v. Boston [2001] 2 S.C.R. 413 ("Boston")
[6] 2007 CarswellOnt 6555

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retire (approximately ten (10) years after they entered into the separation agreement) and pursuant to the separation agreement, ceased paying spousal support upon his retirement. The wife initiated proceedings. The husband argued that a significant amount of his income was derived from income from investments which had already been equalized. The wife had already received a division of the husband's Canada Pension Plan credits. The husband had a nominal pension but had RRPS's. Justice Wright considered the basic principle set out in *Boston*, but sets out the exception identified by Justice Major, which provides:

> "Despite these general rules, double recovery cannot always be avoided. In certain circumstances, a pension which has previously been equalized can also be viewed as a maintenance asset. Double recovery may be permitted where the payor spouse has the ability to pay.....[and] an economic hardship from the marriage on its breakdown persists."

In finding that the wife was entitled to ongoing support, notwithstanding the terminating provision in the separation agreement and the double dipping principle set out in *Boston*, the Court only considered the means and needs of the parties.

Upon a review of all of the facts in this case, this seems to be an unfair result for the husband. As a finding of fact, Justice Wright noted that: the wife did not "live within her means", that she was incapable of handling money, depleted significant assets post separation, and that, despite being educated, she did not seek out any employment opportunities. On the other hand, the husband had invested his money carefully, had a new wife and anticipated that, upon his retirement, his support obligations would terminate. Based on the facts with respect to the wife's improvident depletion of her asset base

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and her failure to even attempt to become gainfully employed, this is a disappointing decision.

Pensions – What About Trust Claims?

Trust claims are a mechanism by which a party (common law partner), who has no entitlement to an equalization of net family property, may acquire an entitlement to an interest in a pension which is not provided for in the legislation.

This was the strategy in the case of *Maloney* v. *Maloney*[7], which decision seems to be more the exception than the rule. In *Maloney*, the parties cohabited from 1966 to 1990. They had one child together. The applicant (woman) claimed a one half interest by way of constructive trust in, among other things, the respondent's (man) pension. The respondent resisted her claim. Throughout the relationship, the applicant assumed the child rearing duties along with performing the majority of the household work. The respondent, on the other hand, was able to further his education, ultimately obtaining his M.B.A. In doing so, the respondent increased his earning potential and career advancement. In making the decision to award the applicant a one half interest in the respondent's pension, the Honourable Justice Bell stated that the applicant's "contribution to the defendant's education is particularly relevant with respect to this asset, as, without the education, the defendant would not have been in the same employment and would not have built up this pension."

By contrast, in *Reaney* v. *Reaney*[8], the parties cohabited from 1964 to 1988. They had two children together. Throughout their relationship, Ms. Reaney

[7] 109 D.L.R. (4th) 161. See also *Thibert* v. *Thibert* [1992] B.C.J. No. 697
[8] [1990] O.J. No 1337

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contributed to a Bell Canada pension. Mr. Reaney claimed an interest in Ms. Reaney's pension. Justice Granger found that Mr. Reaney was not entitled to an interest (by way of resulting trust) in the pension based on the fact that there was no evidence that he contributed to the pension or that there was an agreement or common intention that he would share in the pension. In addition, there was no unjust enrichment of Ms. Reaney and as such, Mr. Reaney's claim by way of constructive trust failed.

In *Trotter* v. *Trotter*[8], the parties were married (in 1967) and subsequently divorced (1974) however they resumed cohabitation from 1975 to 1984. They had two children while they were married. Throughout the (second) period of cohabitation, Mr. Trotter's assets, including his pension, increased in value. Ms. Trotter sought, by way of constructive trust, an interest in, among other things, Mr. Totter's assets including his RRSP's, funds in a bank account, stock acquired through employment and his pension. The Honourable Justice McGarry found that Ms. Trotter was equitably entitled to one half of the savings and the RRSP's. However, Justice McGarry declined to award Ms. Trotter a one half interest in Mr. Trotter's pension and stocks. Ms. Trotter was not able to establish a clear "nexus between the contribution of the applicant and the resulting benefit of the respondent and to divide the assets any further would virtually equate to the applicant and respondent being in a married state."

In *DeZorzi* v. *Sonley*, the parties cohabited from 1987 to 2000. They had two children together. Both of the parties were employed throughout their relationship. At issue in the litigation was the sharing of the parties' incomes and Mr. DeZorzi's claims that the parties agreed he would share in Ms. Sonley's RRSP's and pension. Ms. Sonley disputed Mr. DeZorzi's constructive trust claims against same. While Justice Mullally found that Mr. DeZorzi

[9] [1996] O.J. No 2323, [1998] O.J. No 4459 (Court of Appeal)

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had a 25% interest in Ms. Sonley's RRSP's, the Court declined to find that Mr. DeZorzi had any interest in her pension partly based on the principles set out in *Trotter* (supra) and *Reaney* (supra).

Conclusion

In the absence of a legal marriage and pursuant to the current statutory regime, a common law claim for an interest in a pension is a difficult claim. Given the ongoing changes to the legislation however, we may soon see changes to the *Family Law Act* insofar as it relates to property division.

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Spousal Entitlements to Employee Related Benefits

Introduction

In 2007, an associate from Goldhart & Associates, Haley Gaber Katz prepared the paper that follows and references an excellent paper prepared by Georgina Carson and her associate Kim Stock of MacDonald & Partners LLP which provides a complete summary of the legal issues relating to disability insurance, life insurance and extended health benefits. Their paper touched on all of the pertinent issues and provided up to date cases which reflected the status of the law.

The following is a reproduction of Ms. Gaber Katz's paper.

Disability Insurance

In January, 2006, the Ontario Court of Appeal released its decision in *Lowe v. Lowe.*[10] This was an appeal by the husband from a determination that his disability benefits were property to be included in his net family property calculation. The Court of Appeal granted his appeal and made a determination that disability benefits were not to form part of an individual's net family property statement. The Court of Appeal found that "disability benefits represent income replacement and, from the perspective of family property and spousal support, are more appropriately treated on the same basis as income for employment."[11]

[10] *Lowe v. Lowe* [2006] O.J. No. 132 (O.C.A.)
[11] Ibid. at para. 24.

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Extended Health Benefits

Impact on Spousal Support

Given the rising costs of medical drugs, dental treatment and other paramedical services, a comprehensive health plan is necessary for most people to cover these expenses. Unfortunately, when parties divorce, a spouse who used to be covered under their spouse's health plan may no longer receive this necessary medical/dental coverage. This can result in a significant financial burden for the non-insured spouse.

Many courts have taken this financial burden into account when determining the quantum of spousal support. In *Fisher v. Fisher,* Justice Campbell required an upward adjustment of spousal support on a going forward basis once Ms. Fisher lost her entitlement to Mr. Fisher's health benefits. This upward adjustment was meant to compensate for her loss of the extended health benefits.[12]

This impact of the loss of extended health benefits on spousal support is particularly the case where the non-insured spouse has a serious illness or disability.

In *Eng v. Eng,* the parties were only married for three short years. Prior to the parties' marriage, Ms. Eng advised Mr. Eng of her health issues and that she was unable to work due to chronic pain.[13] Given the parties' short marriage, the court held that allowing Ms. Eng to maintain the standard of living that prevailed during the marriage was inappropriate. However, in addition to the spousal support award of $3,000.00 per month, the court ordered that Mr. Eng pay the cost of the private health care insurance that Ms. Eng will require as a result of the parties' divorce.

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[12] *Fisher v. Fisher* [2006] O.J. No. 676 (Ont. Sup. Crt.)
[13] *Eng v. Eng* [2006] B.C.J. No. 2044 (B.C.S.C.).

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Even though it was a short marriage, given Ms. Eng's health and Mr. Eng's means, Justice Russell held that the support should be ordered for an indefinite period of time. Justice Russell also ordered a review of the support once Ms. Eng reached the maximum lifetime limit of coverage for her health expenses (the maximum was $100,000.00). Once Ms. Eng reached this maximum, she could review the spousal support order to determine what her needs were at the time. It is conceivable that at this review Mr. Eng could be required to pay an increased support award as Ms. Eng would no longer be covered under a private health care plan and would have to pay her medical expenses out of her own pocket.

Reimbursement of Health Expenses

Clients frequently complain that their ex spouse will not reimburse them for the out of pocket expenses they have paid for their own or the children's medical/dental expenses. For example, the non-insured spouse pays for the medical or dental expenses up front and then submits the receipts to the health plan. As it is the insured spouse's name that is on the health plan, the reimbursement cheque is sent to the insured spouse's name. On many occasions the insured spouse will just keep the funds, not forwarding the cheque to the non-insured spouse. This results in a significant financial loss to the uninsured spouse and financial gain to the insured spouse.

Unfortunately health plans are not the most cooperative in attempting to resolve this problem. A customer service agent at Manulife Financial advised that if a member requests that the claim be paid to the separated spouse then Manulife can direct the cheque to the non-insured spouse. However, once the parties divorce, Manulife can no longer forward the cheque to the non-insured person – even at the request of the insured spouse. The only way that Manulife will forward the reimbursement cheque to the non-insured spouse is by court order.

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Given the difficulty of ensuring that the non-insured spouse is reimbursed for the medical expenses they pay out of pocket, it may be helpful to obtain a court order which either directs the health insurance provider to reimburse the non-insured spouse directly or which states that the insured spouse will facilitate payment of any claim under the plan and immediately pay any funds received in connection with a claim by the non-insured spouse.[14]

Dual Coverage

As health insurers continue to reduce the coverage available to their plan members, individuals continually are required to pay more out of their own pocket for their prescriptions and dental care. It is for this reason that being covered under two plans is beneficial as the portion that is not covered under an individual's primary plan can be submitted for coverage under their secondary plan.

Following separation, parties may still want to be covered under both health plans. If both parties agree, and the health plan will allow, this type of arrangement can be included in a separation agreement or court order.

In *MacDonald v. MacDonald,* Mr. MacDonald requested a court order the compel Ms. MacDonald to continue to provide for him and the children on her health plan (even though he had a plan of his own).[15] Ms. MacDonald indicated that she had appropriate health coverage for her and the children at no cost to her under her new partner's plan and, accordingly, wanted to discontinue her health plan for herself, the children, and Mr. MacDonald. The court found that under the circumstances it was appropriate to relieve Ms. MacDonald of her responsibility to provide health coverage for Mr. MacDonald given that he was in a position to provide his own coverage.

[14] *Gabriel v. Robinson* [2005] O.J. No. 5566 (O.C.J.)
[15] *MacDonald v. MacDonald* [2006] N.S.J. No. 264 (N.S.S.C.).

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Life Insurance

Changing Beneficiary Designations

Many payor spouses obtain life insurance policies to secure their child and/or spousal support obligations. This is an effective mechanism to protect a support recipient's support.

It is important to advise clients that once their support obligation has terminated they need to change the beneficiary designation on their life insurance policies or else the recipient spouse may obtain the life insurance benefit, even if there is no longer a support obligation.

It is equally important to advise spouses with no support obligations that they should change the beneficiary designations on their RRSPs, life insurance policies and update their wills upon separation. In *Gaudio Estate v. Gaudio*, the deceased had designated his wife on various life insurance and RRSP policies.[16] The estate of the deceased attempted to argue that as the wife, pursuant to the separation agreement, contracted out of her entitled to the deceased's assets, she should not be entitled to the RRSP and life insurance policy. The court found that since the deceased died intestate and that the boilerplate clauses in the separation agreement did not constitute a declaration of revocation of the wife as beneficiary to the RRSPs and life insurance, she was entitled to receive the proceeds of these assets.

Reducing Security for Support

Many clients have asked whether it is possible to reduce the quantum of life insurance that is used as security for support as the obligation to provide support diminishes.

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[16] *Gaudio Estate v. Gaudio* [2005] O.J. No. 1773 (Ont. Sup. Crt.). See also *Conway v. Conway Estate* [2006] O.J. No. 234 (Ont. Sup. Crt.)

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While it is possible for parties to come to this type of agreement themselves, they should be clear on the amount that the life insurance obligation will be reduced. In *Rondeau v. Kirby*, parties added a clause in the Minutes of Settlement that allowed for an adjustment to the life insurance so that it will be roughly commensurate with the obligation to pay support.[17] However the parties did not specify the amount that the life insurance would be reduced. Justice Campbell found that as there was no benefit of expert evidence to capitalize the support payments, and as the after tax value of the current award appeared similar to the original award, a reduction in life insurance was not appropriate.

In *Ravka v. Ravka* Justice Magda also refused to reduce the life insurance obligation.[18] Here the payor agreed to have life insurance in the amount of $720,000.00. Justice Magda was not comfortable with simply applying a percentage reduction of a sum parallel to the reduction in spousal support as there was no evidence that such a sum would adequately secure spousal support. Furthermore, the life insurance requirement in the separation agreement did not provide for any proportional reduction in life insurance. Justice Magda finally holds that as the payor agreed to carry $720,000.00 in life insurance for as long as he was required to support the wife pursuant to the agreement, a reduction was not appropriate.

Justice Yard in *Cadigan* took a different approach and ordered a reduction in the payor's life insurance policy in the same ratio as spousal support was reduced.[19] Here the payor brought a motion to vary spousal support from the final order. The final order also provided that the payor maintain $300,000.00 in life insurance as security for support. As the judge awarded a reduction in spousal support, a reduction in the life insurance policy was also

[17] *Rondeau v. Kirby* [2003] N.S.J. No. 436 (N.S.S.C.)
[18] *Ravka v. Ravka* [2003] O.J. No. 3198 (Ont. Sup. Crt.)
[19] *Cadigan v. Cadigan* [2004] M. J. No. 460 (Man. Q.B.)

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warranted. Accordingly, the life insurance amount was reduced at the same ratio that the spousal support was reduced.